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1930

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1930

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COMPARATIVE TABLES

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Table No. I—This Table shows serially the pages of INDIAN LAW REPORTS, for the year 1930 with corresponding references of the ALL INDIA REPORTER.

Table No. II—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1930 with corresponding references of the ALL INDIA REPORTER.

Table No. III—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1930 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of INDIAN LAW REPORTS, ALLAHABAD SERIES for the year 1930 with corresponding references of the ALL INDIA REPORTER.

N, B.—Column No. 1 denotes pages of I. L. R. 52 ALLAHABAD.

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158	1929	"	840	363	"	*A*	69	501	"	"	193	761	1931	"	95	941	1931	"	267
167	1930	"	81	368	"	"	169	532	"	"	363	768	1930	"	861	947	1930	"	873
169	1929	"	980	381	"	"	128	536	"	"	217	775	"	"	401	951	"	"	701
178	"	"	963	385	"	"	471	538	"	"	312	789	"	"	643	954	"	"	631
200	"	"	917	391	"	"	292	539	"	"	416	793	"	"	797	961	"	"	822
203	"	"	935	406	"	"	957												

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1930 with corresponding references of the ALL INDIA REPORTER.

N. B.– Column No. 1 denotes pages of others JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

1930 Allahabad Law Journal=All India Reporter

ALJ)	A. I. R.			ALJ)	A. I. R.			ALJ)	A. I. R.			ALJ)	A. I. R.			ALJ)	A. I. R.		
1	1930	*A*	49	303	1930	*A*	219	561	1930	*A*	363	842	1930	*A*	706	1076	1930	*A*	817
26	1929	"	919	305	"	"	330	564	"	"	299	849	"	"	449	1080	"	"	704
40	"	"	908	316	"	"	471	569	1929	"	869	852	"	"	861	1084	"	*Notes*	18*c*
45	1930	"	1	321	"	"	113	572	1930	"	215	857	"	"	762	1085	"	*A*	795
57	1929	"	943	324	"	"	118	573	"	"	485	866	"	"	408	1087	"	"	509
65	"	"	863	327	"	"	252	579	"	"	389	868	"	*PC*	185	1089	"	*Notes*	16*c*
68	1930	*PC*	41	330	"	"	110	584	1929	"	845	873	"	"	177	1090	"	*A*	832
70	"	"	22	332	"	"	375	585	1930	"	109	875	"	*A*	753	1091	"	"	521
73	"	"	51	336	"	"	97	588	"	"	498	885	"	"	326	1095	"	"	511
76	"	"	56	337	"	"	186	590	"	"	392	890	"	"	531	1097	"	"	832
78	"	*A*	209	340	1929	"	885	591	"	"	177	901	"	"	758	1100	"	*Notes*	18*b*
82	"	"	17	343	1930	"	117	599	"	"	352	908	"	"	479	1102	"	*A*	441
85	"	"	92	345	"	"	372	601	"	*Notes*	22*a*	911	"	"	595	1103	"	"	517
92	1929	"	759	347	"	"	128	603	"	*A*	737	913	1931	"	65	1105	"	"	746
94	"	"	870	350	"	"	104	610	"	"	283	923	1930	"	646	1109	"	"	516
97	"	"	793	352	"	"	251	615	"	"	260	924	"	"	604	1112	"	"	785
99	1930	"	180	354	"	"	265	616	"	"	462	926	"	"	786	1113	"	"	497
109	"	"	169	369	"	"	220	623	"	"	669	938	"	"	644	1115	"	"	446
119	"	*PC*	17	370	"	"	282	632	"	"	217	941	"	"	636	1119	"	"	510
122	"	"	79	373	"	"	503	634	"	"	379	944	1931	"	276	1121	"	"	493
126	"	"	64	375	"	"	255	635	"	"	259	945	1930	"	659	1125	"	"	476
128	"	"	82	377	"	*PC*	103	637	"	"	304	950	"	"	631	1126	"	"	558
131	"	"	59	382	1929	*A*	707	638	"	*Notes*	21*c*	955	"	"	490	1129	"	"	444
134	"	"	60	383	"	"	815	641	"	*A*	291	961	"	"	641	1130	1931	"	267
139	"	*A*	357	384	"	"	813	643	"	"	288	964	"	*Too old*		1135	1930	"	826
148	1929	"	932	386	1930	*Notes*	23*b*	646	"	*PC*	176	972	1930	*Notes*	17*a*	1141	1931	"	95
152	1930	"	66	387	1929	"	11*f*	648	"	*A*	337	974	"	*A*	822	1147	1930	"	584
156	"	"	136	388	"	*A*	751	650	"	*Notes*	22*e*	977	"	"	752	1153	"	"	573
190	"	*PC*	66	389	1930	"	274	653	"	*A*	771	978	"	"	837	1157	1931	"	59
197	1929	*A*	803	394	"	"	112	665	"	"	483	984	"	"	443	1163	1930	"	506
199	"	"	914	397	"	"	162	670	"	*Notes*	20*b*	987	"	"	710	1166	"	"	477
201	"	"	720	399	1929	"	859	671	"	"	21*e*	989	"	"	552	1168	"	"	489
202	"	"	901	402	1930	"	225	673	"	*A*	545	995	"	"	711	1170	"	"	767
203	"	"	899	452	"	"	127	682	"	"	261	997	"	"	873	1177	"	"	556
205	"	"	849	453	1931	"	59	684	"	"	398	999	"	*Notes*	13*a*	1181	"	"	543
206	"	"	848	454	1930	"	122	686	"	"	374	1003	"	*A*	550	1184	"	*PC*	242
209	1930	"	206	457	"	*Notes*	20*e*	688	"	"	687	1008	"	"	440	1188	"	"	270
215	1929	"	845	459	"	*A*	214	711	"	"	445	1010	"	"	407	1193	"	*A*	721
216	"	"	931	461	"	"	365	713	"	"	401	1012	"	"	434	1200	"	"	841
218	"	"	940	465	"	"	280	724	"	"	797	1015	"	"	434	1203	"	"	617
220	"	"	917	467	1929	"	735	750	"	"	416	1017	"	"	437	1206	"	*Notes*	11*b*
223	"	"	761	469	1930	"	427	753	"	*PC*	183	1018	"	"	368	1208	"	*A*	577
224	1930	"	15	474	"	"	188	756	"	*A*	611	1020	"	"	609	1209	"	*Notes*	7*f*
226	1929	"	914	481	1929	"	800	763	1931	"	26	1023	"	"	729	1211	"	*A*	592
229	"	"	937	482	"	"	912	765	1930	"	529	1025	"	"	383	1212	"	"	701
233	1930	"	81	484	1930	"	319	766	"	"	354	1032	"	"	441	1215	"	"	836
235	1929	"	957	486	"	"	28	769	"	"	365	1034	"	"	380	1217	"	"	848
239	"	"	763	489	"	*PC*	158	771	"	"	456	1038	"	"	580	1222	1931	"	76
242	"	"	935	495	1929	*A*	812	775	"	"	536	1039	"	"	531	1233	1930	"	713
244	1930	"	26	497	"	"	881	777	"	"	661	1042	"	"	529	1244	"	"	727
247	"	*Notes*	22*d*	500	"	"	826	792	"	"	312	1043	"	"	702	1247	"	*Notes*	11*f*
249	"	*A*	161	521	1930	"	257	793	"	"	537	1046	"	"	419	1249	"	*A*	655
251	1929	"	936	525	1929	"	788	799	"	"	101	1048	"	"	622	1251	1931	"	39
254	1930	"	23	527	1930	"	31	805	"	"	471	1052	"	"	778	1254	"	"	21
256	"	"	193	529	1929	"	864	807	"	"	602	1055	"	"	656	1256	"	"	28
280	"	"	99	531	"	*PC*	288	811	"	"	350	1057	"	"	815	1257	1930	*PC*	251
281	"	"	409	533	"	"	279	815	"	"	658	1060	"	*Notes*	14*a*	1261	"	"	253
284	1929	"	805	539	1930	"	141	816	1929	"	775	1062	"	*A*	542	1265	"	*A*	627
286	1930	"	313	544	"	"	142	818	1930	"	648								
289	"	"	223	547	"	*A*	263	825	"	"	779	1065	"	"	455	1267	1931	"	62
290	"	"	98	550	"	"	399	834	"	"	415	1066	"	"	824	1271	1930	"	730
292	"	*PC*	91	552	"	"	467	836	"	"	348	1070	"	"	560	1274	"	"	600
297	"	*A*	132	559	1931	"	57	839	"	"	887	1073	"	"	504	1278	"	"	610

Comparative Tables

1930 Allahabad Law Journal=All India Reporter—(*Concld.*)

ALJ)	A. I. R.			ALJ)	A. I. R.			ALJ)	A. I. R.			ALJ)	A. I. R.			ALJ)	A. I. R.		
279	1930	*A*	604	1335	1931	*A*	257	1416	1930	*A*	858	1475	1931	*A*	53	1548	1931	*A*	23
281	1931	"	29	1338	1930	*PC*	188	1420	1931	"	18	1478	"	"	106	1552	"	"	92
284	"	"	25	1347	"	"	302	1422	"	"	10	1481	"	"	1	1555	"	"	104
286	"	"	45	1358	"	"	238	1425	1930	"	624	1485	"	"	55	1558	1930	*Notes*	25*e*
291	1930	"	592	1361	"	"	209	1428	"	"	734	1490	"	"	51	1561	1931	*A*	101
295	"	"	577	1369	"	"	281	1433	1931	"	227	1492	1930	"	834	1564	1930	*Notes*	23*e*
297	"	"	826	1373	"	*A*	675	1435	"	"	196	1494	1931	"	103	1566	1931	*A*	90
298	"	*Notes*	12*d*	1378	"	"	643	1437	"	"	14	1497	"	"	94	1569	1930	*Notes*	24*a*
302	"	*A*	597	1381	"	"	638	1439	1930	"	593	1498	1930	*Notes*	19*a*	1572	1931	*A*	73
307	1931	"	47	1385	"	"	678	1443	"	"	742	1504	1931	*A*	3	1577	"	"	40
309	1930	*Notes*	6*e*	1391	"	"	652	1451	1931	"	258	1509	"	"	108	1584	1930	"	340
312	"	*A*	426	1396	"	"	615	1456	"	"	193	1517	"	"	225	1587	"	"	881
314	1931	"	7	1400	"	"	699	1462	1930	"	740	1520	"	"	141	1592	1931	"	128
316	1930	"	820	1402	"	"	732	1463	"	"	814	1524	"	"	99	1594	"	"	38
320	"	"	835	1405	"	"	532	1465	"	"	739	1528	1930	"	852	1597	1930	*Notes*	24*e*
322	"	*Notes*	5*i*	1409	"	*Notes*	9*d*	1467	1931	"	17	1535	1931	"	12	1599	1931	*A*	112
324	1931	*A*	13	1411	"	*A*	397	1469	"	"	57	1537	1930	"	877	1601	"	"	35
326	1930	"	681	1413	"	"	657	1472	1930	"	634	1541	"	"	498	1608	"	"	129

Law Reporter 11 Allahabad (Revenue)=All India Reporter

LRA)	A. I. R.			LRA)	A. I. R.			LRA)	A. I. R.			LRA)	A. I. R.			LRA)	A. I. R.		
1	1929	*A*	928	29	1930	*Notes*	20*e*	73	1930	*A*	737	104	1930	*A*	481	167	1930	*A*	534
6	"	"	916	31	"	*A*	215	77	1929	"	901	107	"	"	450	170	"	"	497
8	"	"	935	33	"	"	259	78	1930	"	206	111	"	"	449	172	"	*Notes*	11*b*
11	"	"	914	35	"	"	452	86	"	"	260	115	"	"	483	173	"	*A*	818
15	"	"	930	40	"	"	324	87	"	"	280	121	"	"	490	176	"	"	596
16	"	"	903	42	"	"	214	89	"	"	277	128	"	"	401	177	1931	"	53
18	"	"	901	45	"	"	261	93	"	"	319	141	"	"	265	181	"	"	3
21	"	"	937	48	1929	"	932	94	"	"	329	159	"	"	532	187	"	"	10
25	"	"	940	53	"	"	919	96	"	"	274	163	"	"	493	190	"	"	14
27	"	"	931	70	1930	"	263	101	"	"	407								

Law Reporter 11 Allahabad (Criminal)=Al lIndia Reporter

LRA)	A. I. R.			LRA)	A. I. R.			LRA)	A. I. R.			LRA)	A. I. R.			LRA)	A. I. R.		
2	1929	*A*	586	44	1930	*A*	413	132	1930	*A*	309	202	1930	*A*	434	283	1930	*A*	845
7	"	"	609	46	"	"	375	137	"	"	578	204	"	"	630	286	"	*O*	465
13	"	"	560	50	"	"	311	140	"	*Notes*	22*e*	207	"	"	611	294	"	"	468
14	"	*Notes*	38*a*	52	"	"	352	144	"	"	12*e*	214	"	"	478	300	1931	*A*	28
16	"	*A*	702	54	"	"	313	146	"	*O*	319	217	"	"	653	305	"	"	57
18	1930	*O*	49	65	1929	"	781	149	"	*Notes*	20*c*	220	"	"	521	308	1930	*O*	496
20	1929	*Notes*	28*d*	90	1930	"	350	150	"	*A*	193	236	"	"	655	309	"	"	473
22	"	"	23*f*	97	"	"	516	179	"	"	455	238	"	"	640	311	"	*A*	762
24	1930	*O*	69	103	"	"	419	180	"	"	441	241	"	"	869	321	"	"	600
28	"	"	110	106	"	"	433	183	"	"	519	250	"	*Notes*	8*b*	330	1931	"	16
32	"	"	51	107	"	"	426	186	"	"	441	251	"	*A*	795	340	"	"	20
35	1929	*A*	609	110	"	"	399	189	"	"	436	256	"	"	856	349	1930	"	713
39	1930	"	302	114	"	*Notes*	22*a*	194	"	"	410	267	"	*Notes*	14*e*	362	1931	"	91
41	"	"	518	121	"	*A*	427	198	"	"	353	270	"	*A*	657	385	"	*O*	21
42	"	"	254													397	"	"	32

(Board of Revenue cases are not included)

13 All India Criminal Reports=All India Reporter

AICrR)	A.I.R.			AICrR)	A.I.R.			AICrR)	A.I.R.			AICrR)	A.I.R.			AICr.R)	A.I.R.		
1	1929	*A*	898	46	1929	*L*	325	75	1929	*L*	637	117	1929	*A*	914	173	1930	*L*	62
2	"	"	914	48	1928	*Notes*	35*a*	78	"	*N*	193	120	"	*N*	239	175	1929	*A*	940
4	"	*C*	160	49	1929	*L*	597	80	"	*P*	145	122	"	*A*	930	177	1930	*N*	96
7	"	*B*	134	52	"	*A*	928	89	"	"	160	123	"	*L*	422	178	1929	*L*	607
8	"	*C*	182	56	"	"	916	91	"	"	156	126	"	*A*	935	180	1930	*A*	215
14	"	*B*	136	58	"	*L*	720	93	"	*L*	846	129	"	*C*	174	182	"	*P*	203
15	"	*A*	904	59	"	*P*	203	94	"	"	163	131	"	*A*	901	183	1929	*C*	503
17	"	"	950	60	"	*L*	665	95	"	"	766	133	"	*P*	157	185	"	*P*	514
21	"	*M*	236	61	1928	*C*	752	97	"	"	584	137	"	*A*	931	190	1930	*A*	452
30	"	*A*	917	63	1929	*N*	152	99	"	"	676	138	"	"	937	193	"	*Notes*	20*e*
32	"	*M*	342	65	"	*M*	495	103	"	*C*	172	142	"	"	903	195	1929	*L*	540
34	"	*L*	542	66	1928	*R*	135	106	"	*L*	718	143	"	*P*	275	199	"	*B*	236
37	"	"	371	67	1929	*P*	103	108	"	*P*	111	157	"	*N*	350	213	1930	*A*	259
39	1928	"	692	69	1928	*C*	879	111	"	*L*	872	165	1930	*P*	199	214	"	"	324
41	1929	"	791	70	1929	*L*	252	112	"	*P*	139	167	1929	*N*	328	217	1929	*C*	401
45	"	*M*	544	73	"	*C*	203	115	"	*L*	867								

13 All India Criminal Reports=All India Reporter—(*Concld.*)

AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.		
225	1929	*L*	576	262	1929	*A*	932	323	1930	*L*	158	382	1930	*L*	520	418	1929	*C*	723
226	"	"	493	266	1930	*S*	99	329	"	*P*	209	384	1926	*N*	360	420	1930	*N*	61
227	1930	"	305	272	"	*A*	214	341	"	"	168	385	1930	*L*	206	424	"	*A*	206
230	"	"	60	275	"	"	261	347	"	*L*	168	389	"	"	414	430	1929	*B*	309
232	"	"	50	277	"	*L*	227	352	"	*C*	61	391	1929	"	719	436	"	*P*	651
234	"	*S*	56	278	"	"	55	355	1929	*M*	487	393	"	"	787	441	"	*C*	309
236	"	*L*	95	280	"	"	312	359	"	"	883	396	"	*M*	862	450	1930	*A*	260
239	"	*S*	53	283	1929	*C*	527	361	1930	*L*	342	398	1930	*R*	76	451	"	"	280
241	"	*L*	163	284	1930	*L*	82	363	1929	*P*	851	399	"	*N*	59	453	1929	*C*	319
245	"	*S*	51	286	1929	*A*	919	366	"	*L*	803	402	"	*R*	53	458	1930	"	220
249	"	*L*	361	301	"	*C*	563	367	1930	"	309	406	"	*N*	49	461	"	*M*	242
251	"	"	265	306	1930	*L*	269	371	1929	"	794	408	1929	*L*	837				
253	"	"	90	310	1929	*C*	785	375	"	*C*	281	410	1930	"	348	468	1929	*B*	410
255	"	"	263	314	1930	*L*	415	379	1930	*A*	263	414	1929	*M*	754	472	1930	*M*	246
258	"	"	81	316	"	*C*	97	381	1929	*M*	864	417	1930	*N*	119	475	1929	*B*	404

14 All India Criminal Reports=All India Reporter

AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.		
1	1930	*A*	277	102	1930	*PC*	57	222	1930	*A*	265	314	1930	*L*	450	430	1930	*A*	497
5	1929	*L*	886	108	"	*R*	124	239	"	*P*	353	317	1929	*P*	705	432	"	*Notes*	11b
7	"	*M*	744	115	"	*N*	33	241	1929	*C*	724	324	1930	*A*	532	434	"	*A*	818
9	1930	*A*	319	120	"	*M*	191	246	1930	*M*	189	328	1929	*C*	755	436	1929	*C*	765
10	"	"	329	121	"	*C*	219	247	1929	*C*	768	329	1930	*L*	465	439	"	"	730
12	1929	*L*	587	124	"	*A*	449	249	1930	*O*	497	325	*Not sanctioned*			443	1930	*L*	666
14	"	"	120	128	"	"	483	256	1929	*P*	522	337	1930	*A*	493	445	"	*M*	678
17	1930	*M*	188	131	"	*R*	114	257	"	"	513	341	"	*M*	225	447	"	*L*	667
19	"	*L*	318	151	"	*A*	490	260	"	*M*	846	342	1929	*C*	773	450	"	*P*	292
23	"	*PC*	60	159	1929	*C*	729	263	1930	*L*	484	344	"	*O*	527	452	"	*L*	658
31	"	*L*	259	161	"	"	328	266	"	"	457	345	1930	*L*	51	455	"	"	591
38	"	*A*	274	165	1930	*M*	185	270	1929	*Notes*	31e	346	1929	*O*	543	456	"	*P*	216
44	1929	*L*	375	168	"	*N*	150	272	"	*L*	801	349	1930	*P*	344	458	"	*L*	659
50	1930	*L*	884	169	"	*P*	148	274	1930	"	532	351	1929	*L*	850	464	"	*A*	596
52	"	*A*	407	171	1929	*B*	447	277	1929	*P*	714	370	"	*C*	756	465	1931	"	53
54	"	*P*	291	179	"	*C*	332	281	1930	*M*	102	392	1930	*L*	54	469	1930	*N*	242
57	1929	*C*	346	183	1930	*A*	401	284	1929	*Notes*	32c	393	"	*P*	347	494	"	*L*	662
64	"	*P*	630	196	"	*N*	108	287	"	*M*	841	394	"	"	346	497	"	*A*	746
66	"	*C*	343	201	1929	*Notes*	8a	289	"	"	748	395	"	"	221	506	"	*C*	228
71	1920	*P*	501	205	"	*C*	514	294	1930	"	103	401	"	*B*	155	511	"	*M*	705
76	"	*C*	60	207	"	*P*	517	295	"	"	128	406	"	"	120	514	"	"	704
78	1929	"	644	209	"	"	643	297	1929	*P*	710	408	"	"	153	516	1931	*O*	77
80	"	"	390	211	1930	*N*	150	301	1930	*L*	461	413	"	"	160	521	1930	*L*	665
85	1930	*A*	481	213	1929	*P*	518	304	1929	*M*	849	415	"	*C*	286	523	1929	*C*	769
88	"	"	450	216	"	"	520	305	1930	"	190	420	"	*O*	252	527	1930	"	209
92	1929	*B*	443	219	"	*Notes*	7d	308	"	*PC*	144	427	"	*A*	534	534	"	*B*	163
99	"	"	385																

31 Cr. L. J. & 121 to 128 I. C.=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1930 Lahore.**

For **1930 Criminal Cases=All India Reporter**

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1930 Nagpur.**

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1930 ALLAHABAD with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N. B.—Column No. denotes pages of the ALL INDIA REPORTER, 1930 ALLAHABAD.
Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1930 Allahabad=Other Journals

A.I.R	Other Journals	
1FB	1930 *A L J*	45
	122 *I C*	872
	52 *All*	338
	14 *R D*	46
9	1929 *A L J*	741
	121 *I C*	387
15	1930 *A L J*	224
	120 *I C*	125
	14 *R D*	63
17	1930 *A L J*	82
	1930 *Cr C*	33
	31 *Cr L J*	8
	120 *I C*	202
19 (1)	1930 *Cr C*	35
	31 *Cr L J*	32
	120 *I C*	264
19 (2)	31 *Cr L*	85
	1930 *Cr C*	35
	120 *I C*	433
22 (1)	1929 *A L J*	1105
	123 *I C*	683
22 (2)	121 *I C*	385
	51 *All*	61
23	31 *Cr L J*	1
	1930 *Cr C*	39
	1930 *A L J*	254
	120 *I C*	193
24	1929 *A L J*	1261
	31 *Cr L J*	33
	1930 *Cr C*	40
	120 *I C*	264
26	1930 *A L J*	244
	120 *I C*	547
	1930 *Cr C*	42
	31 *Cr L J*	133
28	1930 *Cr C*	44
	30 *Cr L J*	1146
	120 *I C*	114
	1930 *A L J*	486
	52 *All*	207
29	31 *Cr L J*	26
	1930 *Cr C*	45
	120 *I C*	257
33	1930 *Cr C*	49
	121 *I C*	549
	31 *Cr L J*	288
34	1930 *Cr C*	50
	31 *Cr L J*	40
	120 *I C*	272
	1930 *A L J*	527
	52 *All*	212
35	31 *Cr L J*	6
	1930 *Cr C*	51
	120 *I C*	197
37	1930 *Cr C*	53
	121 *I C*	559
	31 *Cr L J*	801
38	1930 *Cr C*	54
	51 *All*	864
	121 *I C*	819
	31 *Cr L J*	356
45	1930 *Cr C*	61
	31 *Cr L J*	37
	120 *I C*	268
49FB	1930 *A L J*	1
	126 *I C*	801
66	1930 *A L J*	152
	121 *I C*	690
	52 *All*	74
69FB	1929 *A L J*	1294
	123 *I C*	321
	52 *All*	363
72	121 *I C*	550
73	1929 *A L J*	1223
	120 *I C*	549
76	118 *I C*	375
	1929 *A L J*	1174
77	1929 *A L J*	1178
	119 *I C*	9
	51 *All*	1046
81	118 *I C*	717
	1930 *A L J*	233
	52 *All*	167
82	126 *I C*	357
86	118 *I C*	707
87	1929 *A L J*	1285
	120 *I C*	555
	52 *All*	153
89	10 *L R A Rev*	151
	13 *R D*	440
91 (1)	1929 *A L J*	1195
	122 *I C*	894
91 (2)	122 *I C*	415
	14 *R D*	96
92	1930 *Cr C*	81
	120 *I C*	117
	1930 *A L J*	85
	30 *Cr L J*	1149
95	126 *I C*	361
96	124 *I C*	18
97	1930 *A L J*	336
	52 *All*	442
	126 *I C*	365
	14 *R D*	98
98	1930 *A L J*	290
	126 *I C*	364
99	1930 *A L J*	280
	122 *I C*	183
	52 *All*	252
100	122 *I C*	402
101	1930 *A L J*	799
	124 *I C*	405
104	1930 *A L J*	350
	52 *All*	439
	126 *I C*	252
105	124 *I C*	92
	14 *R D*	99
106	122 *I C*	406
108	122 *I C*	414
	14 *R D*	101
109	121 *I C*	701
	1930 *A L J*	595
109	52 *All*	222
110	1930 *A L J*	330
	122 *I C*	409
	52 *All*	232
112	121 *I C*	546
	1930 *A L J*	394
113	1930 *A L J*	321
	124 *I C*	476
	52 *All*	426
115	122 *I C*	177
116	121 *I C*	827
117	1930 *A L J*	343
	122 *I C*	178
	14 *R D*	102
118	1930 *A L J*	324
	122 *I C*	763
121 (1)	122 *I C*	182
121 (2)	122 *I C*	415
	52 *All*	329
122	121 *I C*	545
	1930 *A L J*	454
123	124 *I C*	22
124	124 *I C*	24
125	122 *I C*	893
	14 *R D*	104
126	122 *I C*	184
127	1930 *A L J*	452
	122 *I C*	685
128	1930 *A L J*	347
	123 *I C*	827
	52 *All*	381
130	122 *I C*	895
131	123 *I C*	821
132	1930 *A L J*	297
	121 *I C*	828
	52 *All*	238
136FB	1930 *A L J*	156
	124 *I C*	733
	52 *All*	281
158	1929 *A L J*	1157
	124 *I C*	478
	1930 *Cr C*	182
	1930 *A L J*	249
	121 *I C*	547
	31 *Cr L J*	286
162	1930 *A L J*	397
	122 *I C*	186
	52 *All*	235
163	124 *I C*	27
165	122 *I C*	185
166	122 *I C*	740
167	124 *I C*	23
168	1929 *A L J*	1103
	120 *I C*	560
169	1930 *A L J*	109
	123 *I C*	369
	52 *All*	368
175	124 *I C*	401
177	122 *I C*	865
	1930 *A L J*	594
179	122 *I C*	416
179	14 *R D*	233
180	1930 *A L J*	99
	123 *I C*	324
186	1930 *A L J*	337
	122 *I C*	401
	52 *All*	325
188	1930 *A L J*	474
	122 *I C*	179
192	1930 *Cr C*	84
	121 *I C*	550
	31 *Cr L J*	300
193FB	1930 *A L J*	256
	124 *I C*	540
	14 *R D*	201
	11 *L R A Rev*	150
	52 *All*	501
206FB	1930 *A L J*	209
	31 *Cr L J*	485
	123 *I C*	330
	52 *All*	263
	1930 *Cr C*	310
	11 *L R A Cr*	73
	13 *A I Cr R*	424
209	1930 *A L J*	78
	122 *I C*	741
211 (1	126 *I C*	361
211 (2)	125 *I C*	591
213	117 *I C*	817
	14 *R D*	230
214	1930 *A L J*	459
	11 *L R A Cr*	42
	13 *A I Cr R*	272
	52 *All*	444
	31 *Or L J*	1220
	127 *I C*	522
	1930 *Cr C*	237
215	1930 *Cr C*	194
	1930 *A L J*	572
	11 *L R A Cr*	31
	13 *A I Cr R*	180
	52 *All*	455
	127 *I C*	587
	32 *Cr L J*	22
216	127 *I C*	521
217	1930 *A L J*	693
	52 *All*	536
	127 *I C*	523
218	127 *I C*	586
219	1930 *A L J*	303
	14 *R D*	229
	127 *I C*	587
220 (1)	1930 *A L J*	369
	128 *I C*	13
	52 *All*	475
220 (2)	127 *I C*	515
222	127 *I C*	514
223	1930 *A L J*	289
	52 *All*	434
224	127 *I C*	513
	14 *R D*	227

A. I. R. 1930 Allahabad=Other Journals—(*Contd.*)

A.I.R.	Other Journals	
225FB	1930.A *L J*	402
	125 *I C*	477
	52 *All*	619
252	1930.A *L J*	327
254	11 *L R.A Rev*	12
	1930.A *L J*	352
	14 *R D*	115
255 (1)	1930.A *L J*	375
	14 *R D*	225
255 (2)	...	
257	1930.A *L J*	521
	52 *All*	257
	31 *Cr L J*	995
	126 *I C*	253
	1930*Cr C*	369
259	11 *L R A Cr*	33
	13 *A I Cr R*	213
	1930.A *L J*	635
	31 *Cr L J*	998
	126 *I C*	256
	52 *All*	457
	1930*Cr C*	371
260	1930.A *L J*	615
	124 *I C*	728
	13 *A I Cr*	450
	11 *L R A Cr*	86
	31 *Cr L J*	719
	1930*Cr C*	372
	52 *All*	491
261	11 *L R A Cr*	45
	1930.A *L J*	682
	13 *A I Cr R*	275
	126 *I C*	827
	52 *All*	542
	31 *Cr L J*	1121
	1930*Cr C*	373
262	1929.A *L J*	616
	12 *A I Cr R*	47
	30 *Cr L J*	522
	115 *I C*	641
	10 *L R A Cr*	95
	1930*Cr C*	374
263	1930.A *L J*	547
	31 *Cr L J*	590
	13 *A I Cr R*	379
	124 *I C*	17
	11 *L R A Cr*	70
	1930*Cr C*	375
265FB	1930.A *L J*	354
	31 *Cr L J*	546
	123 *I C*	673
	14 *R D*	566
	11 *L R A Cr*	141
	14 *A I Cr R*	222
	52 *All*	568
	1930*Cr C*	433
274	1930.A *L J*	389
	31 *Cr L J*	627
	124 *I C*	40
	14 *A I Cr R*	38
	11 *L R A Cr*	96
	52 *All*	448
	1930*Cr C*	442
277	31 *Cr L J*	630
	124 *I C*	45
	14 *A I Cr R*	1
	11 *L R A Cr*	89
	1930*Cr C*	445
279	31 *Cr L J*	631
	124 *I C*	46
	1930*Cr C*	447
280	1930.A *L J*	465
	31 *Cr L J*	553
	123 *I C*	756
	13 *A I Cr R*	151
	11 *L R A Cr*	87
	1930*Cr C*	448
281	123 *I C*	105
282	1930.A *L J*	370
	126 *I C*	363
	52 *All*	476
283	1930.A *L J*	610
	126 *I C*	366
286	51 *All*	974
	1929.A *L J*	1045
	119 *I C*	90
287	51 *All*	850
	1929.A *L J*	883
	118 *I C*	175
288	1930.A *L J*	643
	124 *I C*	34
289	126 *I C*	28
291	1930.A *L J*	641
	14 *R D*	274
	126 *I C*	229
292	52 *All*	391
	126 *I C*	230
299	1930.A *L J*	564
	14 *R D*	268
	126 *I C*	29
	52 *All*	464
302	51 *All*	897
	117 *I C*	107
	1929.A *L J*	1081
	11 *L R A Rev*	39
	14 *R D*	36
303	126 *I C*	225
304	1930.A *L J*	637
	14 *R D*	266
	126 *I C*	225
305	1929.A *L J*	1257
	120 *I C*	200
	14 *R D*	28
307	120 *I C*	447
309 (1)	1929.A *L J*	1047
	117 *I C*	104
	1930*Cr C*	957
309 (2)	14 *R D*	327
	123 *I C*	828
	11 *L R A Rev*	132
311	11 *L R A Rev*	50
	127 *I C*	588
312	122 *I C*	595
	1930.A *L J*	792
	52 *All*	538
313 (1)	11 *L R A Rev*	54
	127 *I C*	520
	14 *R D*	153
313 (2)	1930.A *L J*	286
	52 *All*	436
	127 *I C*	518
	14 *R D*	164
315	14 *R D*	350
	127 *I C*	516
318	127 *I C*	585
319 (1)	1930*Cr C*	432
	1930.A *L J*	484
	52 *All*	91
	14 *A I Cr R*	9
	11 *L R A Cr*	93
	125 *I C*	463
	31 *Cr L J*	839
319 (2)	125 *I C*	583
321	127 *I C*	524
322SB	124 *I C*	465
324	11 *L R A Cr*	40
	13 *A I Cr R*	214
	122 *I C*	596
	31 *Cr L J*	429
	1930*Cr C*	452
326	1930.A *L J*	885
	125 *I C*	464
	52 *All*	553
	1930*Cr C*	449
329	124 *I C*	716
	11 *L R A Cr*	94
	14 *A I Cr R*	10
	31 *Cr L J*	711
	1930 *Cr C*	451
	52 *All*	214
330	1930.A *L J*	305
	127 *I C*	428
337	1930.A *L J*	648
	123 *I C*	753
338	123 *I C*	377
341	126 *I C*	345
348	1930.A *L J*	836
	123 *I C*	376
350	11 *L R A Rev*	90
	122 *I C*	404
	14 *R D*	249
	1930.A *L J*	811
	52 *All*	548
352	1930.A *L J*	599
	126 *I C*	362
	14 *R D*	152
	11 *L R A Rev*	52
353	124 *I C*	471
	11 *L R A Rev*	198
	14 *R D*	355
354	122 *I C*	887
	1930.A *L J*	766
355	126 *I C*	817
	52 *All*	471
357	1930.A *L J*	139
	52 *All*	406
	126 *I C*	819
362	123 *I C*	375
363	1930.A *L J*	561
	124 *I C*	30
	127 *I C*	589
	52 *All*	532
365 (1)	1930.A *L J*	769
	14 *R D*	357
365 (2)	1930.A *L J*	461
	122 *I C*	742
368	1930.A *L J*	1018
	126 *I C*	353
369	14 *R D*	359
	129 *I C*	371
371	122 *I C*	403
372	1930.A *L J*	345
	127 *I C*	417
374	1930.A *L J*	686
	127 *I C*	418
375	1930.A *L J*	332
	11 *L R A Rev*	46
	127 *I C*	425
	14 *R D*	160
377	123 *I C*	767
	14 *R D*	363
379 (1)	1930.A *L J*	634
	52 *All*	499
379 (2)	127 *I C*	419
380	122 *I C*	189
	1930.A *L J*	1034
383	123 *I C*	763
	1930.A *L J*	1025
387 (1)	127 *I C*	577
387 (2)	127 *I C*	577
389	1930.A *L J*	579
	52 *All*	419
	127 *I C*	579
392	1930.A *L J*	590
	52 *All*	459
	127 *I C*	581
395	124 *I C*	713
396	124 *I C*	560
	52 *All*	755
397	124 *I C*	33
	1930.A *L J*	1411
398	1930.A *L J*	684
	124 *I C*	21
	14 *R D*	365
399	1930.A *L J*	550
	11 *L R A Rev*	110
	123 *I C*	384
	14 *R D*	313
	52 *All*	566
401FB	1930.A *L J*	713
	125 *I C*	470
	31 *Cr L J*	840
	14 *A I Cr R*	183
	11 *L R A Cr*	128
	52 *All*	775
	1930*Cr C*	625
407	1930*Cr C*	631
	11 *L R A Cr*	101
	1930.A *L J*	1010
	14 *A I Cr R*	52
	125 *I C*	753
	31 *Cr L J*	898
408	1930.A *L J*	866
	124 *I C*	706
	31 *Cr L J*	710
	1930*Cr C*	565
	52 *All*	593
409	1930.A *L J*	281
	1930*Cr C*	525
	52 *All*	254
	127 *I C*	420
	31 *Cr L J*	1215
410	123 *I C*	757
	11 *L R A Rev*	194
	14 *R D*	367
413 (1)	126 *I C*	831
413 (2)	11 *L R A Rev*	44
	126 *I C*	829
	14 *R D*	113
415	122 *I C*	758
	1930.A *L J*	834
416	122 *I C*	411
	1930.A *L J*	750
	52 *All*	539
417	124 *I C*	408
419	121 *I C*	825
	11 *L R A Rev*	103
	14 *R D*	309
	1930.A *L J*	1046
420	123 *I C*	830
422	124 *I C*	413
	14 *R D*	371

Comparative Tables

A. I. R. 1930 Allahabad=Other Journals—(*Contd.*)

A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals	
426 (1)	11 *LRARev*	107	458	124 *I C*	403	498 (2)	126 *I C*	24	545	52 *All*	688
	123 *I C*	109	459	122 *I C*	768		1930 *A L J*	1541	550	1930 *A L J*	1003
	14 *R D*	306	461	127 *I C*	424	503	1930 *A L J*	373		125 *I C*	460
426 (2)	124 *I C*	557	462	1930 *A L J*	616		124 *I C*	28	552	1930 *A L J*	989
	1930 *A L J*	1312		124 *I C*	722		52 *All*	430		125 *I C*	28
427	1930 *A L J*	469		52 *All*	710	504	124 *I C*	759	556	1930 *A L J*	1177
	11 *LLARev*	121	466	123 *I C*	108		1930 *A L J*	1073		14 *R D*	482
	14 *R D*	287	467	1930 *A L J*	552	506	1930 *A L J*	1163		128 *I C*	231
	123 *I C*	759		123 *I C*	820		126 *I C*	8	558	1930 *A L J*	1126
430	124 *I C*	714		52 *All*	480	509	123 *I C*	336		128 *I C*	238
431	126 *I C*	17	471 (1)	1930 *A L J*	805		1930 *A L J*	1087	560	123 *I C*	762
433	121 *I C*	826		122 *I C*	188	510	1930 *A L J*	1119		1930 *A L J*	1070
	11 *LRARev*	106		52 *All*	546		14 *R D*	416	561	1930 *A L J*	890
	14 *R D*	308	471 (2)	1930 *A L J*	316		127 *I C*	591		125 *I C*	754
434 (1)	124 *I C*	712		52 *All*	385	511	1930 *A L J*	1095	568	124 *I C*	717
	11 *LRARev*	202		124 *I C*	410		128 *I C*	3	573	124 *I C*	180
	1930 *A L J*	1015	474	126 *I C*	13	513	124 *I C*	48		1930 *A L J*	1153
	14 *R D*	381	475	123 *I C*	97	514	124 *I C*	179	576	124 *I C*	710
434 (2)	124 *I C*	183	476	124 *I C*	711		14 *R D*	420	577 (1)	124 *I C*	710
	1930 *A L J*	1012		1930 *A L J*	1125	516	11 *LRARev*	97		1930 *A L J*	1208
436	11 *LRARev*	189		52 *All*	837		14 *R D*	297	577 (2)	128 *I C*	225
	14 *R D*	407	477	1930 *A L J*	1166		122 *I C*	765		1930 *A L J*	1295
	128 *I C*	7		126 *I C*	14		1930 *A L J*	1109		52 *All*	907
437	121 *I C*	826	478	14 *R D*	414	517	123 *I C*	335	578	11 *LRARev*	137
	1930 *A L J*	1017		11 *LRARev*	214		1930 *A L J*	1103		14 *R D*	333
438	125 *I C*	506		125 *I C*	504		14 *R D*	423		123 *I C*	755
440	122 *I C*	894	479	1930 *A L J*	908	518	11 *LRARev*	41	580 (1)	123 *I C*	754
	1930 *A L J*	1008	481	124 *I C*	553		127 *I C*	421		1930 *A L J*	1038
441 (1)	124 *I C*	559		11 *L RACr*	104		14 *R D*	117*b*		52 *All*	560
	11 *LRARev*	186		14 *A I Cr R*	85	519	123 *I C*	681	580 (2)	126 *I C*	16
	14 *R D*	400		31 *Cr L J*	716		11 *LRARev*	183		1931 *A L J*	39
	1930 *A L J*	1102		1930 *Cr C*	701		14 *R D*	409	582	1930 *A L J*	1291
441 (2)	14 *R D*	404	483	1930 *A L J*	665	520	121 *I C*	818		128 *I C*	385
	11 *LRARev*	180		14 *A I Cr R*	128	521	124 *I C*	757		52 *All*	863
	1930 *A L J*	1032		128 *I C*	14		1930 *A L J*	1091	584	1930 *A L J*	1147
	125 *I C*	475		32 *Cr L J*	78		14 *R D*	460		126 *I C*	10
443	124 *I C*	708		11 *LRA Cr*	115		11 *LRARev*	220	587	128 *I C*	441
	1930 *A L J*	984		1930 *Cr C*	702	523	128 *I C*	235	592	1930 *A L J*	1211
	52 *All*	756	485	1930 *A L J*	573	525	...			128 *I C*	397
444	1930 *A L J*	1129		52 *All*	331	527	124 *I C*	177	593	125 *I C*	468
	124 *I C*	412		126 *I C*	824		14 *R D*	487		52 *All*	705
445	1930 *A L J*	711	489	1930 *A L J*	1168	529 (1)	122 *I C*	751		1930 *A L J*	1439
	423 *I C*	380		128 *I C*	2		1930 *A L J*	765	595	1930 *A L J*	911
446	1930 *A L J*	1115		32 *Cr L J*	81	529 (2)	124 *I C*	763		1930 *Cr C*	817
	128 *I C*	5		12 *LRACr*	22		1930 *A L J*	1042		125 *I C*	503
	52 *All*	562		15 *A I Cr R*	66	530	123 *I C*	370		31 *Cr L J*	866
449	1930 *A L J*	849		1930 *Cr C*	733	531	124 *I C*	556	596	1930 *Cr C*	888
	11 *LRARev*	111		52 *All*	881		1930 *A L J*	1039		11 *LRARev*	176
	1930 *Cr C*	669	490	1930 *A L J*	955	532	1930 *Cr C*	757		14 *AICrR*	464
	125 *I C*	589		14 *A I Cr R*	151		125 *I C*	585		130 *I C*	5
	31 *Cr L J*	865		11 *L R ACr*	121		31 *Cr L J*	862	597	1930 *A L J*	1302
	14 *A I Cr R*	124		31 *Cr L J*	954		14 *A I Cr R*	324	600	1930 *A L J*	1274
	52 *All*	894		126 *I C*	5		11 *L RACr*	159		11 *LRARev*	321
450	14 *A I Cr R*	88		1930 *Cr C*	734		1930 *A L J*	1405		14 *R D*	691
	11 *LRACr*	107		52 *All*	856	534	1930 *Cr C*	759		128 *I C*	227
	1930 *Cr C*	670	493	1930 *A L J*	1121		11 *LRACr*	167	602	1930 *A L J*	807
	125 *I C*	767		11 *LAACr*	163		32 *Cr L J*	158	604 (1)	128 *I C*	398
	31 *Cr L J*	899		14 *A I Cr R*	337		14 *4 I Cr R*	427		1930 *A L J*	1279
452	11 *L R A Cr*	35		1930 *Cr C*	737		128 *I C*	601	604 (2)	1930 *A L J*	924
	13 *A I Cr R*	190		129 *I C*	707	536	122 *I C*	413		126 *I C*	832
	127 *I C*	422	495	1930 *Cr C*	739		1930 *A L J*	775	605	128 *I C*	433
	31 *Cr L J*	1217		31 *Cr L J*	764	537	1930 *A L J*	793	609	124 *I C*	191
	1930 *Cr C*	672		125 *I C*	32		125 *I C*	762		1930 *A L J*	1020
455	14 *R D*	398	497	1930 *A L J*	1113		52 *All*	596	610	1930 *A L J*	1278
	11 *LRARev*	179		125 *I C*	577	541	121 *I C*	817		128 *I C*	436
	1930 *A L J*	1065		31 *Cr L J*	861	542	124 *I C*	721	611	1930 *A L J*	756
	52 *All*	714		11 *L RACr*	170		1930 *A L J*	1062		11 *LRARev*	207
	129 *I C*	373		14 *A I Cr R*	430	543	1930 *A L J*	1181		125 *I C*	23
456	1930 *A L J*	771		1930 *Cr C*	732		128 *I C*	226		14 *R D*	450
	124 *I C*	474	498 (1)	1930 *A L J*	588	545	1930 *A L J*	673		52 *All*	823
	52 *All*	494		122 *I C*	762		124 *I C*	35			

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622	1930.1 *L J*	1048
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	1930.1 *L J*	1378
	52 *All*	789
644	1930.1 *L J*	938
	128 *I C*	438
	52 *All*	924
646	1930.1 *L J*	923
	128 *I C*	437
647	126 *I C*	830
	14 *R D*	564
648	1930.1 *L J*	818
	125 *I C*	449
	52 *All*	696
652	1930.1 *L J*	1391
	129 *I C*	433
655	14 *R D*	505
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	129 *I C*	435
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	125 *I C*	452
	1930*Cr C*	907
	52 *All*	592
	31 *Cr L J*	839
659	1930.1 *L J*	945
	129 *I C*	382
661	1930.1 *L J*	777
	125 *I C*	453
669	1930.1 *L J*	623
669	125 *I C*	507
675	1930.1 *L J*	1373
678	1930.1 *L J*	1385
	130 *I C*	8
681	1930.1 *L J*	1326
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	125 *I C*	1
	52 *All*	716
699	1930.1 *L J*	1400
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704	124 *I C*	705
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706	1930.1 *L J*	842
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709	128 *I C*	768
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753	1930.1 *L J*	875
	125 *I C*	14
758	1930.1 *L J*	901
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	52 *All*	927
762	1930.1 *L J*	857
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	14 *R D*	681
767	1930.1 *L J*	1170
	128 *I C*	775
771	1930.1 *L J*	653
	124 *I C*	185
	52 *All*	604
778	1930*A L J*	1052
	128 *I C*	758
	52 *All*	883
779	1930.1 *L J*	825
	126 *I C*	20
	52 *All*	910
784	14 *R D*	705
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785 (1)	1930.1 *L J*	1112
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786	1930*A L J*	926
793	124 *I C*	728
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	129 *I C*	263
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796	1930*Cr C*	1018
797	1930*A L J*	724
	126 *I C*	237
	52 *All*	793
814	128 *I C*	234
	1930*A L J*	1463
815	1930*A L J*	1057
	128 *I C*	753
817	129 *I C*	260
	1930*A L J*	1076
	1930*Cr C*	1201
818	11 *L R ACr*	173
	129 *I C*	369
	14 *A I CrR*	434
	1930*Cr C*	1202
	32 *Cr L J*	314
820	1930*A L J*	1316
	129 *I C*	436
	1930*Cr C*	1204
	12 *L R ACr*	25
	15 *A I CrR*	176
	32 *Cr L J*	306
822	1930*A L J*	974
	128 *I C*	239
	15 *R D*	67
	52 *All*	961
824	1930*A L J*	1066
824	129 *I C*	439
826 (1)	1930.1 *L J*	1297
	129 *I C*	441
826 (2)	1930.1 *L J*	1135
830	128 *I C*	765
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831	125 *I C*	578
832 (1)	1930.1 *L J*	1090
	128 *I C*	766
832 (2)	128 *I C*	780
	1930.1 *L J*	1097
834	1930*Cr C*	1137
	129 *I C*	370
	32 *Cr L J*	315
	1930.1 *L J*	1492
835	129 *I C*	259
	1930.1 *L J*	1320
	15 *A I CrR*	90
	1930*Cr C*	1233
	12 *L R ACr*	30
	15 *A I Cr*	181
836	1930.1 *L J*	1215
	1930*Cr C*	1138
	128 *I C*	605
	32 *Cr L J*	161
837	1930.1 *L J*	978
	52 *All*	748
840	123 *I C*	617
	1930.1 *L J*	1584
841	124 *I C*	729
	1930.1 *L J*	1200
	52 *All*	839
843	128 *I C*	818
845	128 *I C*	820
	11 *L R A Rev*	283
	14 *R D*	594
847	122 *I C*	871
	52 *All*	248
848	128 *I C*	598
	1930.1 *L J*	1217
852	128 *I C*	829
	1930.1 *L J*	1528
856	11 *L R A Rev*	256
	14 *R D*	586
	1931.1 *L J*	45
	128 *I C*	825
858	1930.1 *L J*	1416
861	1930.1 *L J*	852
	52 *All*	768
863	128 *I C*	827
865	125 *I C*	765
	1931.1 *L J*	49
866	123 *I C*	375
869	11 *L R A Rev*	241
	14 *R D*	522
	129 *I C*	378
	1931.1 *L J*	214
873	1930.1 *L J*	997
	52 *All*	947
875	128 *I C*	763
877	128 *I C*	755
	1930.1 *L J*	1537
881	128 *I C*	760
	1930.1 *L J*	1587
884	1931.1 *L J*	24
885	126 *I C*	18
886	125 *I C*	592
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Note—*Cases not bearing parallel references against them are not reported elsewhere.*

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G. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

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ALLAHABAD HIGH COURT

* * A. I. R. 1930 Allahabad 1
Full Bench

SULAIMAN, MUKERJI AND KING, JJ.

Dip Narain Singh—Defendant—Appellant.

v.

Nageshar Prasad and *others* — Respondents.

Second Appeal No. 2069 of 1927, Decided on 8th November 1929, from decree of the Sub-Judge, Ghazipur, D/- 31st August 1927.

*** (a) Transfer of Property Act Ss. 54 and 58—Distinction between contract to transfer immovable property and conveyance is that while former is governed by Contract Act, only latter is governed by Transfer of Property Act, and so much of Contract Act as made applicable thereto.**

There is a clear distinction between a contract which still remains to be performed and specific performance of which may be sought, and a conveyance by which title to property has actually passed. Cases of mere contract are governed by the provisions of the Contract Act. Cases of transfer of immovable property are governed by Transfer of Property Act. A mere contract to mortgage or sell would not amount to an actual transfer of any interest in the immovable property, but a deed of sale or mortgage if duly registered, would operate as a conveyance of such interest. Once a document transferring immovable property has been registered, transaction passes out of the domain of a mere contract into one of a conveyance. Such completed transaction is governed by the provisions of Transfer of Property Act and so much of the Contract Act as are applicable thereto. [P 2 C 1, 2]

*** (b) Transfer of Property Act, S. 6 (h) and (i)—Scope.**

So far as Cl. 6 (h) and (i) go, they do not lay down the law that if non-transferable interest is included among other transferable properties, the whole transaction is illegal. [P 2 C 2]

*** (c) Transfer of Property Act, S. 6 (h)—Object or consideration not unlawful but transfer ineffective—S. 6 (h) does not apply.**

In order to bring in operation S. 6 (h) the object or consideration for the transfer should be unlawful. The section would be inapplicable where the object of the consideration for the transfer is itself not unlawful but the transfer may be ineffective on some other ground. [P 2 C 2]

(d) Agra Tenancy Act (2 of 1901), Ss. 20 and 21—Scope—Sections 20 and 21 do not forbid or prohibit such transfer but only declare it to be void.

Sections 20 and 21 merely make an attempted transfer absolutely void and incapable of being enforced by a Court of law on the ground of incompetency of the tenant to make the transfer. The language of these two sections does not justify the inference that such a transfer has been expressly forbidden and prohibited by law. Nor can the scope of cases which fall under the category of being opposed to public policy, be widened. [P 2 C 2; P 3 C 1]

*** (e) Contract Act, S. 24—S. 24 does not apply to transfer of immovable property.**

Section 24 has not been made applicable to transfer of immovable property. There is therefore no justification for stating broadly that even if the transfer of several items of properties can be split up and separated, the whole transaction is void because one part of it may be vitiated. Of course where the object of the consideration of the transfer is unlawful, as that word is defined in S. 23, the transfer is not effective. [P 3 C 1]

*** (f) Contract — Construction — Distinction between agreement forbidden by law nd one declared void.**

There is a clear distinction between an agreement which may be forbidden by law and one which is merely declared to be void. In the former case the legislature penalises it or prohibits it. In the latter case it merely refuses to give effect to it. If a void contract has been carried out and consideration has passed the promisor may not in equity be allowed to go back upon it without restoring the benefit which he has received. But if the promisee

comes to Court to enforce it he would receive no help from a Court of law. [P 3 C 1]

* * (g) **Contract Act S. 24 — Right to enter contract partly beyond competence of promisor — Promisee for good consideration can enforce part within competence.**

Contract may be invalidated either by the illegality of the object or the consideration itself or by the incapacity of the promisor to enter into such contract. In cases of inherent illegality, it is sometimes impossible to say whether the legal or the illegal portion of the consideration affected the mind of the promisor most. But in cases of contract only partly beyond the competence of the promisor, there is no good ground why the promisee who has paid good consideration should not be allowed to enforce that part of the promise which the promisor was competent to make. [P 3 C 2]

* * (h) **Transfer of Property Act, S. 6 (h) —Registered mortgage deed including part of property untransferable—Other part can be enforced — Claim to recover principal amount can be enforced — Transfer of Property Act S. 68.**

Where a transfer made by registered mortgage deed includes along with other properties which are transferable, non-transferable occupancy lands, the legal effect of including non-transferable occupancy lands along with other properties which are transferable is not to make the whole transaction bad, if without defeating the provisions of the Transfer of Property Act or the Tenancy Act, part of the mortgage can be enforced by allowing claim to principal amount : *A. I. R.* 1921 *All.* 392 and *A. I. R.* 1925 *All.* 543, *Dist.*, *Case law Referred.* [P 3 C 2]

M. L. Agarwala—for Appellant.

A. P. Pandey—for Respondents.

Sulaiman, J.—The principal question of law which arises in this appeal is as to the legal effect of including non-transferable occupancy lands along with other properties, which are transferable, in a registered mortgage deed.

There can be no doubt that there is a clear distinction between a contract which still remains to be performed and specific performance of which may be sought, and a conveyance by which title to property has actually passed. Cases of mere contract are governed by the provisions of the Contract Act. Cases of transfer of immovable property are governed by the Transfer of Property Act. A mere contract to mortgage or sale would not amount to an actual transfer of any interest in the immovable property (S. 54, T. P. Act), but a deed of sale or mortgage, if duly registered, would operate as a conveyance of such interest. Once a document transferring immovable property has been registered the transaction passes out of the domain of a mere contract into one of a conveyance. Such a completed transaction would be governed by the provisions of the Transfer of Property Act, and only so much of the Contract Act as are applicable thereto.

It is significant that the whole of the Contract Act has not been made applicable to transfer of immovable properties. S. 4, T. P. Act, merely makes certain provisions of the Transfer of Property Act, relating to contracts as part of the Contract Act and not vice versa.

It is S. 6 (h), T. P. Act, which lays down that no transfer can be made for an unlawful object or consideration within the meaning of S. 23, Contract Act. Sub-Cl. (i), further provides that nothing in that section would authorise a tenant having an untransferable right of occupancy to assign his right as such tenant.

Thus an attempted transfer of an untransferable right of an occupancy tenant is merely declared to be unauthorised and therefore void and ineffectual. Similarly, a transfer for an unlawful object or consideration is declared to be void and ineffective. So far as these sections go they do not lay down the law that if such a non-transferable interest is included among other transferable properties the whole transaction is illegal. It is noteworthy that in order to bring in the operation of S. 6 (h), the object or consideration for the transfer should be unlawful. The section would be inapplicable where the object of the consideration for the transfer is itself not unlawful but the transfer may be ineffective on some other ground.

Coming to the Agra Tenancy Act, it is also quite clear that the transfer of occupancy lands has been merely declared to be void on the ground of the incompetency of the tenant to make the transfer and has not been actually forbidden or prohibited by law or declared to be otherwise illegal. S. 20, Agra Tenancy Act (Act 2 of 1901) provided that the interest of an occupancy tenant is not transferable, that is to say, the interest cannot pass from the tenant except in the cases mentioned therein. Similarly S. 21 of that Act made it clear that where the interest of a tenant is not transferable he shall not be competent to transfer his holding. These provisions merely make an attempted transfer absolutely void and incapable of being enforced by a Court of law. The langu-

age of these two sections does not justify the inference that such a transfer has been expressly forbidden and prohibited by law. Nor can we widen the scope of the cases which fall under the category of being opposed to public policy.

Coming back to the question how much of the provisions of the Contract Act, are to be deemed to have been incorporated in the Transfer of Property Act, I must point out what has in some cases been overlooked that S. 24, Contract Act, has not been made applicable to transfers of immovable property. There is therefore no justification for stating broadly that even if the transfers of several items of properties can be split up and separated, the whole transaction is void because one part of it may be vitiated. Of course where the object of the consideration of the transfer is unlawful, as that word is defined in S. 23, Contract Act, the transfer is not effective.

Section 23, Contract Act, makes the consideration or object of an agreement unlawful where (1) it is forbidden by law or (2) is of such a nature that, if permitted, it would defeat the provisions of any law or (3) is fraudulent or involves or implies injury to the person or property of another, or is immoral or opposed to public policy.

Leaving out the third category which is not applicable to the case itself, we have to see whether the mortgage was forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law.

There is a clear distinction between an agreement which may be forbidden by law and one which is merely declared to be void. In the former case the legislature penalises it or prohibits it. In the latter case, it merely refuses to give effect to it. If a void contract has been carried out and consideration has passed the promisor may not in equity be allowed to go back upon it without restoring the benefit which he has received. But if the promisee comes to Court to enforce it he would receive no help from a Court of law. As pointed out above the transfer of an occupancy tenancy is not actually forbidden by law but is declared to be void. If the effect of enforcing the contract would necessarily be to defeat the provisions of any law the contract would undoubtedly be void, but if it consists of several distinct parts which can be separated, the whole transaction would not be bad unless the provisions of S. 24, Contract Act, are applicable to it.

The general rule which prevails in England as stated by Wallis, J., in *Pickering* v. *Ilfracombe Railway* (1):

"Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them, whether the illegality be created by statute or any law, you may reject the bad part and retain the good."

Now contracts may be invalidated either by the illegality of the object or the consideration itself or by the incapacity of the promisor to enter into such contracts. In cases of the inherent illegality, it is sometimes impossible to say whether the legal or the illegal portion of the consideration affected the mind of the promisor most. But if we take the case of a contract only partly beyond the competence of the promisor, there is no good ground why the promisee, who has paid good consideration should not be allowed to enforce that part of the promise which the promisor was competent to make.

In the case before us the consideration passing from the mortgagee was hard cash. That in itself was not unlawful. The difficulty came in from the side of the mortgagor inasmuch as he was not competent to mortgage a part of the property. It would therefore follow that if without defeating the provisions of the Transfer of Property Act or the Tenancy Act part of the mortgage could be enforced, the whole transaction cannot be bad.

Taking the case of an out-and-out sale it can hardly be contended that if a vendor has purported to sell his zamindari property along with certain occupancy lands and has received full consideration agreed upon, the title to the transferable property has not legally passed. Under the Transfer of Property Act both sales and mortgages are transfers and are governed by similar principles. The only distinction is that the mortgagee may have to come into Court to enforce the covenants entered into by the mortgagor but he does so not under the provisions of the Specific Relief Act or the Contract Act but under the statutory right given to him by the Transfer

(1) 3 C.P. 250.

of Property Act. If that Act does not debar him from claiming partially I fail to see why he should be completely thrown out of Court.

In most cases of simple mortgages there is a primary undertaking to repay the loan and there is a collateral security offered for the realization of the amount in case of failure of payment. If the security offered includes non-transferable properties there is nothing to prevent the creditor from giving up the security altogether and claiming repayment of his money by enforcement of the personal covenant. Such a personal covenant is by no means illegal. On the other hand in most usufructuary mortgages the primary obligation is to put the mortgagee in possession and the right to recover the loan only accrues after there is a failure to deliver possession. If the mortgagor has promised to mortgage non-transferable properties, which promise cannot be enforced in a Court of law, the creditor cannot be allowed to say that the mortgagor has broken his contract because he has failed to perform that which he was by law not bound to perform. If there has been no such failure, the creditor's claim to recover his money on the ground of such a supposed failure cannot be entertained.

It seems to me that if the mortgagee's right to recover his money is under the terms of the document dependent only on the failure of the mortgagor to hand over possession of his occupancy lands which are non-transferable, the right cannot be enforced because the law cannot recognize that there has been any breach. A man cannot be deemed to have broken a contract which is void in law. But if the right to recover the money is based on a primary undertaking to repay the loan and is independent and separable from the collateral security offered, such a promise may be enforced if it is contained in a deed of transfer which actually affects transfer of some property not disallowed by law; for such a case would be governed by the Transfer of Property Act, and not the Contract Act. But if the mortgaged property consists wholly of tenancies which are not transferable in law, the transfer as such is absolutely void and there is no mortgage transaction governed by the Transfer of Property Act. The transaction is merely one of a contract between the parties evidenced by a registered document, which would be governed exclusively by the provisions of the Contract Act and S. 24 of the Act may apply, unless the security offered can be separated from the personal covenant.

The previous cases of this Court have been discussed at length by Mukerji, J., and as none of them is a Full Bench case I do not propose to discuss them afresh. But I should like to refer to two cases decided by Benches of which I was a member.

In the case of *Tulshi Ram* v. *Sat Narain* (2), the main purpose of the mortgage deed was to mortgage the occupancy holdings and to put the mortgagee in possession and it was provided that in the event of the mortgagee not obtaining possession he would be entitled to recover his mortgage money with interest by sale of three groves and a well. We held that the alternative promise to pay was incapable of being separated from the agreement to deliver possession and that the right to recover the amount was dependent on the failure of the mortgagor to put the mortgagee in possession of the occupancy holdings. The right to recover the money by the sale of the groves and the well did not accrue till there had been a failure to deliver possession of the occupancy lands. We distinguished the two previous cases of this Court on the ground that in the case before us the mortgage was primarily one of the occupancy holdings only and it was only in the event of their possession not being delivered that a right was given to realize the money by sale of the other property which right could only come into force on the failure of the mortgagor to carry out his illegal contract.

In the case of *Sital Rai* v. *Ram Khelawan Panday* (3) the usufructuary mortgagee, whose right to recover money was dependent on the failure to deliver possession, was retaining possession of the occupancy lands which could not have been transferred and was trying to recover the other property mortgaged. Had the claim been decreed the result would have been to enforce the whole of the contract part of which was admittedly unenforceable. As the mortgagee

(2) A. I. R. 1921 All. 392=43 All. 81.
(3) A. I. R. 1925 All. 543=47 All. 780.

did not offer to restore the occupancy lands taken possession of by him in an unauthorized manner we declined to decree his claim.

In the case before us the document in suit is a registered deed for Rs. 399-15-6 and provides that the executants would pay on the 30th of every Jeth Rs. 36 as interest on the principal amount, but if they failed to pay the amount to the creditors they would put them in possession of properties consisting of certain *sir* lands, mortgaged lands and tenancy holdings if the executants or their cosharers dispossessed the creditors of the zamindari plots and the plots sub-mortgaged to them the executants would be liable therefor and in case they did not take upon themselves the liability for such dispossession, the creditors would have power to realise from them in a lump sum the principal amount of the mortgage together with interest at the rate of Rs. 1-8-0 per cent per mensem and costs. The deed again repeats covenant that the creditors were at liberty to realize Rs. 36 as interest and in lieu of it to be entitled to enter into possession and occupation of the plots. As regards the sub-mortgaged lands it was provided that whenever that original proprietors paid that amount the creditors would have to redeem the plots.

It is quite clear from the terms of this deed that the first obligation was to pay interest regularly and the second was to put the creditors in possession of the mortgaged lands in case of failure of payment, and lastly if there was any dispossession of the creditors from the zemindari plots and the plots sub-mortgaged to them (not the occupancy plots) the creditors had a right to realise the principal and interest in a lump sum. The right to recover the whole amount with interest was in no way dependent only on the failure to deliver possession of the occupancy lands. It accrued after the creditors were dispossessed from the zamindari plots or from the plots previously mortgaged.

It is an admitted fact before us that the mortgagors have appropriated the mortgage money relating to the lands previously mortgaged and have failed to deliver the possession of the zamindari property. I have therefore no hesitation in saying that the claim to recover the principal amount ought to prevail because in giving such a decree we are enforcing the mortgagee's rights under S. 68, T. P. Act and not enforceing the contract to mortgage the occupancy lands and therefore not defeating the provisions of any law.

The creditors have thought fit to give up the entire security and are suing for money. There is much less reason for disallowing such a claim. I would therefore dismiss this appeal.

Mukerji, J.—This appeal has been referred for decision to a Full Bench. No particular question has been framed for decision but the learned Judges who made the reference found that there was some conflict of opinion in this Court and were anxious that a definite answer might be given. The facts of the case briefly are these. Defendant 1 who is the appellant in the case, along with the husband of defendant-respondent 3 who has since died executed the deed in suit on 28th May 1905 in favour of the plaintiff-respondents to secure a sum of Rs. 399-15-6 borrowed by them. It was agreed that the borrowers would pay interest at the rate of Rs. 36 per annum on the 15th of Jait Sudi every year and in default they would put the lenders in possession of certain properties which they mortgaged by the deed in question. The deed covers an area of between three and four bighas of land out of which only 12 biswas are an occupancy holding. The rest of the property consists of zamindari lands and lands over which the borrowers had possession as mortgagees. These last mentioned plots were also zamindari property. The plaintiffs came to Court on the allegation (after amendment of the plaint) that after a certain period the borrowers stopped paying the annual interest and they failed to put the plaintiffs in possession of the mortgaged property. Subsequently, they executed a bond for arrears of interest. The lenders received payment from their own mortgagors and released the lands that had been mortgaged to them, although they were bound to hand over the money received by them to the plaintiffs. The plaintiffs, security having thus diminished by the default of the borrowers themselves, the plaintiffs were entitled to recover the money lent by them. The plaintiffs' claim is, there-

fore, based under the provisions of S. 68, T. P. Act.

The defence, inter alia, was that the transaction in suit was illegal, because a part of the land mortgaged was occupancy holding which could not be transferred by law. The learned Munsif dismissed the suit on the ground that the transaction was illegal and could not be enforced by a suit. On appeal, a learned Subordinate Judge held, on the authority of *Rajendra Prasad* v. *Ram Jatan Rai* (4) that the transaction was not illegal and decreed the suit for recovery of the principal amout of mortgage money and interest for six years at 9 per cent per annum, being the rate originally agreed upon.

Defendant 1 has appealed and it has been contended on his behalf that the transaction was an illegal one and the suit must be dismissed.

The argument for the appellant is based on S. 23, Contract Act. It lays down that the consideration or object of an agreement shall be deemed to be lawful, unless, inter alia, it is forbidden by law or unless it is of such a nature that if permitted it would defeat the provisions of any law. It is pointed out that under S. 20, Agra Tenancy Act, the interest of 'an occupancy tenant is not transferable except under certain circumstances (which have not arisen in this case) and that S. 21 of the same Act, an occupancy tenant is declared to be incompetent to transfer his holding. It is urged that these two provisions of law, read with S. 24, Contract Act, make the transaction in suit entirely void. S. 24, Contract Act, reads as follows :

"If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful the agreement is void."

We have to see how far this argument is valid.

It has not been denied before us that the transaction in question was, to start with, one of mortgage, though it was agreed that possession was not to be delivered to the lenders till there was a default in the payment of the annual interest. A mortgage is defined in S. 58, T. P. Act as :

"the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced ..... by way of a loan ....."

(4) [1917] 39 All. 539=39 I. C. 785=15 A. L. J. 544.

The present case therefore is one of of a transfer of immovable property. S. 5, T. P. Act defines what "transfer of property" means. It says that a "transfer of property" is an act by which a living person conveys property in present or in future to one or more other living persons. . . . . ." It further says that "to transfer property" is to perform such an act. If we read the definition of the expression "transfer of property" and compare it with the definition of a contract, we shall see at once that a transfer of property, although it may be based, initially, on a contract, is not, in its essence, any longer a contract, after the transfer has become an accomplished fact. In other words, if a transfer of property takes place in pursuance of an agreement to transfer, the agreement would be an agreement within the meaning of the Contract Act, but after the transfer has actually taken place, the matter is no longer "a contract." The title to or an interest in the property has passed and there remains nothing, by way of a contract, to be enforced in a Court of law. A contract (see S. 2, Contract Act) is an agreement enforceable by law. An agreement is defined as, "every promise and every set of promises forming the consideration for each other."

To understand the nature of an agreement, we have to see what a promise is. A promise is a proposal when it has been accepted. And a proposal takes place when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence. When all these definitions are read together, it will be found that, in a contract, there must be something which is capable of being enforced in a Court of law. But in the case of a transfer of property, which has been completed in the manner directed by the law, (e. g., by execution of a registered deed, attested or unattested as the case may be) the title to or an interest in the property has passed to the transferee, and there is nothing to enforce. A suit may be necessary, for example, to obtain possession or to sell a property, but such suits would be based not on contract, but on the rights or titles conveyed by the transfer. It is significant that while by S. 4, T. P. Act,

the chapters and sections of the Transfer of Property Act, which relate to contracts are to be taken as a part of the Contract Act, it is nowhere laid down that the provisions of the Contract Act are to be read into the Transfer of Property Act. My opinion, therefore, is that there is an essential difference between a mere "contract" and a "transfer of property."

My view finds support from two cases decided in this Court. One is *Bajrangi Lal* v. *Ghura Rai* (5), decided by Richards, C. J., and Rafique, J. The other is *Rajendra Prasad* v. *Ram Jatan Rai* (4), decided by the same learned Chief Justice and Walsh, J. In the former case, a tenant who had both a fixed rate holding and an occupancy holding, sold both to the defendant. Thereafter, he sought to have the sale set aside on the ground that the transaction was illegal and did not convey any title to the transferee. It was held that the title to the fixed rate holding had passed to the transferee and that the title was a good one. The learned Judges say at p. 234 as follows :

"In considering the force of the contention we must bear in mind that we are not dealing with a case in which the Court is asked to decree specific performance or even to enforce a contract."

Again at p. 235 their Lordships say :

'It thus appears that a contract of sale is one thing and a deed of transfer another, and it does not necessarily follow that because the contract was unenforceable that the transfer is void."

In the second case, the suit was for sale of a fixed rate holding and was based on a mortgage, by which, besides the fixed rate holding, an occupancy holding had been mortgaged. It was held that the suit was maintainable. Richards, C.J., is reported to have said at p. 241 :

"In the present case, we are not concerned with the validity or invalidity of the original contract, nor need we deal with this case in the way we might have had to deal with it, if the present suit had been a suit by the mortgagee for specific performance of a contract to transfer certain property by way of mortgage. The transaction has long since passed the stage of contract."

With this remark I most respectfully agree. On principle, there is no difference between a sale and a mortgage. By both, an interest in an immovable property is transferred from one party to another. Such transactions are to be considered, having regard to the law enacted in the Transfer of Property Act, as already pointed out in an earlier portion of this judgment. In this view, the plaintiffs are entitled to maintain their suit and the decree of the Court below must be affirmed. In this case, three kinds of property were transferred, out of which a portion was an occupancy holding. From the fact that a mortgage of the occupancy holding could not take effect because the property was not transferable, it would not follow that the mortgage of the remaining property was bad. The mortgagees, the plaintiffs, were entitled to be put in possession of this property and if, owing to the default of the mortgagors, any portion of the property was lost or the mortgagees were not put in possession, the mortgagees are entitled to maintain a suit for recovery of the mortgage money, as provided for in S. 68, T. P. Act.

Before this judgment can be concluded, it is necessary to examine some cases and to find out whether in view of those cases, the law laid down above is good.

In *Kanhai* v. *Tilak* (6) there was a mortgage of an occupancy holding and the mortgagee claimed possession of the holding and in default asked for a decree for the mortgage money. Chamier, J., after stating that it had been conceded before him that the mortgagee was not entitled to possession, remarked as follows :

"The only question is whether he is entitled to a money decree against the mortgagor. . . . . To accede to the appellant's request would be equivalent to enforcing an agreement, part of the consideration of which was unlawful. Under S. 24, Contract Act, the whole contract must be considered to be void."

It will be noticed that the transfer by virtue of which the plaintiff was seeking relief conveyed no title as mortgagee to the plaintiff and there being no mortgage in existence, no suit based on S. 68, T. P. Act, could be maintained. In this view, the decision of the learned Judge may have been right, though I am unable to agree with him as to the reasons on which he based his judgment. As I have already pointed out, a mortgage or a sale is essentially different in their nature from a mere contract.

The case of *Puran Singh* v. *Jai Singh* (7) is another decision by the same

(5) [1916] 38 All. 232=32 I. C. 919=14 A. L. J. 270.

'6) [1912] 16 I. C. 542.
(7) [1912] 17 I. C. 522.

learned Judge (Chamier, J.) and he expresses more or less the same opinion as in the earlier case, though the expression of opinion in this particular case was a pure obiter dictum. It was held that no second appeal lay and the appeal was accordingly dismissed and the decree in favour of the plaintiff stood.

The case of *Ram Partap Rai* v. *Ram Phal Teli* (8) is a decision by a single Judge of this Court (Piggott, J.). There the property mortgaged was wholly an occupancy holding and the suit was decided on the basis of S. 24, Contract Act. In view of my remarks with respect to the case of *Kanhai* v. *Tilak* (6) any further remark on this case is not called for.

The case of *Mohammad Shakur* v. *Gopi* (9), was decided by Sunder Lal, J., and the facts were these. A simple mortgage of an occupancy holding was executed to secure some money lent and there was a promise to pay. It was held by the learned Judge that although the mortgage was invalid, there was no bar to the plaintiff recovering on the personal covenant. The case need not be considered at all, because the facts are entirely different from those of this case. Besides, it does not discuss the law on the point. The case of *Lachman Das* v. *Yusuf Khan* (10) was decided by a single Judge of this Court (Tudball, J.). It appears that the plaintiffs in the suit purchased the defendants' house in execution of a decree. There being some difficulty in obtaining possession, he exchanged the house with the defendants for the latter's occupancy holding. On that holding there stood a grove. That grove, on a suit by the defendants was restored to them. The plaintiffs thereupon sued to recover the house. It was held that the transaction could not succeed because it was impossible to replace the opposite party in the same position in which he was before the transaction was carried out. The case does not profess to discuss any law and is no authority for any proposition of law other than that laid down in the case.

The case of *Jarbandhan* v. *Badri Narain* (11) was a decision by two learned Judges of this Court. They simply re-affirm the decision by Sundar Lal, J. in the case of *Mohammad Shakur* v. *Gopi* (9). No law is discussed. The case has no application to the present one as already pointed out in discussing the decision of Sundar Lal, J.

The case of *Tulshi Ram* v. *Satnarain* (12) was this: a certain occupancy holding belonging to the defendants was usufructuarily mortgaged by them to the plaintiffs. The plaintiffs got possession and were dispossessed. Then they sought to recover the mortgage money by sale of certain other properties which had been given by way of security as it were, and it was held that the right to recover the money by sale was a subsidiary agreement to the main one which was illegal. This Court therefore (Sulaiman and Gokul Prasad, JJ.) upheld the decree by which this suit had been dismissed. It is clear that this case has no direct bearing on the facts of the present case before us and the two cases of *Bajrangi Lal* v. *Ghura Rai* (5) and *Rajendra Prasad* v. *Ram Jatan Rai* (4) were distinguished by the learned Judges themselves.

The case of *Har Prasad Tewari* v. *Sheo Gobind Tewari* (13) was decided by two learned Judges of this Court and the facts were these:

There were three mortgages covering partly an occupancy holding and partly fixed rate tenancy holding. The plaintiffs could not get possession over the entire portion of the holdings and, therefore, purported to bring the suit for recovery of the mortgage money under S. 68, T. P. Act. They failed in the Courts below on the ground that the entire transactions were void being in contravention of the provisions of the Agra Tenancy Act. Thereupon it was argued before the learned Judges of this Court that there was a personal covenant in each of these mortgages and the plaintiff was entitled to resort to them and ask for a simple money decree. The learned Judges did not accede to this request, but professing to follow the decision of Chamier, J., viz., the transactions were void under S. 24, Contract Act, dismissed the appeal. With all respect, S. 24, Contract Act, was not applicable to the cases of mortgages as already discussed.

(8) [1913] 18 I. C. 9.
(9) [1916] 35 I. C. 202.
(10) [1915] 13 A. L. J. 783=30 I. C. 192.
(11) A. I. R. 1924 All. 80=45 All. 621.
(12) [1920] 18 A. L. J. 703=57 I. C. 445=2 U. P. L. R. 229.
(13) A. I. R. 1922 All. 134=44 All. 486.

In the case of *Sital Rai* v. *Ram Khilawan Pandey* (14), there was an usufructuary mortgage of occupancy and fixed rate holding. The plaintiff alleged that he had been put in possession of both, that he was in possession of the occupancy holding but had been ousted from the fixed rate holding. He sued for possession over the fixed rate holding. The suit failed ultimately in this Court on the short ground that the plaintiff being in possession of lands over which he had no right to keep possession should not be allowed any relief in a Court of justice.

The case of *Rajendra Prasad* v. *Ram Jatan Rai* (4) already mentioned was relied on before the learned Judge, but they thought that the case did not require consideration, in view of the peculiar facts of the case.

In the case of *Daya Ram* v. *Thakuri* (15) the question was whether the plaintiff who was an usufructuary mortgagee of an occupancy holding, having been dispossessed therefrom, could succeed on a personal covenant to recover the money? Daniels, J., was of opinion that he could not. On commenting on the case decided by Sunder Lal, J., I have said that the facts of the case before that learned Judge, which are very similar to the facts of the case of *Daya Ram* v. *Thakuri* (15) have no bearing on the facts of the present case. I need not express any opinion on it.

Lastly comes the case of *Bhusi Rai* v. *Ganesh Rai* (16). In this case, there was a mortgage of an occupancy holding alone and it was held that the subsidiary contract to pay the money could not be enforced, as its effectiveness depended on the main contract of a mortgage of usufructuary holding which was illegal. This case has obviously no application to the facts of the present case.

In the result, I find that the decisions in this Court, have not been so constantly one way, as to lead one to suppose that the view of the majority of the learned Judges of this Court is against the view expressed in the two Division Bench cases, reported in *Bajrangi Lal* v. *Ghura Rai* (5) and *Rajendra Prasad* v. v. *Ram Jatan Rai* (4). My opinion is, therefore, what I have expressed above (p. 7) and I would dismiss the appeal with costs.

King, J.—I agree.

V.B./R.K. *Appeal dismissed.*

(14) A. I. R. 1925 All. 543=47 All. 780.
(15) A. I. R. 1924 All. 668=46 All. 622.
(16) A. I. R. 1927 All. 499 (F.B.).

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SULAIMAN AND SEN, JJ.

Muhammad Abdul Karim Khan and *others*—Plaintiffs—Appellants.

v.

Bishan Sahai and *others*—Defendants—Respondents.

First Appeal No. 257 of 1924, Decided on 22nd March 1929, from a decree of Sub-Judge, Shahjahanpur, D/- 8th March 1924.

(a) Civil P. C., S. 11—Suit by reversioner against widow claiming personal relief does not operate as res judicata in respect of suit for possession after the widow's death by the then reversioners.

Where in a suit the right claimed is not in common with the parties contesting the second suit and rights claimed in the two suits are based on different sale deeds, the former suit does not operate as res judicata.

Where, therefore, the relief sought by reversioners against certain widows is a personal one and no declaration has been sought for avoiding any particular transfer and there was no finding that any transfer was or was not for legal necessity, the mere dismissal of a suit for injunction cannot operate as res judicata in respect of a suit for possession after the death of the widows. A new cause of action arises in favour of the actual reversioners at the death of the widows and the second suit is not barred. [P 11 C 2]

(b) Evidence Act, S. 115—No act or omission by presumptive reversioners can amount to estoppel against actual reversioners — Hindu Law—Reversioner.

No act or omission committed by the presumptive reversioners can amount to an estoppel as against the reversioners who actually succeed to the estate. Their conduct may under certain circumstances raise a presumption in favour of legal necessity but can never debar the actual reversioners from claiming the estate in assertion of their own rights which they do not claim through the former reversioners. Therefore the result of a previous litigation by the presumptive reversioners does not amount to an estoppel. [P 12 C 1]

(c) Evidence Act, S. 13—Judgment in which right under dispute was recognized by Court is admissible as relevant fact.

Where the mortgagee's right to hold a valid charge on the property comprised in a mortgage is in dispute and it is found that in a previous suit the right was asserted by the representatives of the mortgagee and the right claimed was recognized by the Court, the judgment in that suit being an instance in which the mortgagee's right was recognized against the plaintiffs is a relevant fact and as such is admissible in evidence under S. 13. [P 14 C 1]

(d) Hindu Law — Alienation — Widow—

Necessity-Recital in deed may form evidence after long interval.

Recitals in documents executed by Hindu ladies are by themselves no proof of the existence of legal necessity. But in cases where there has been a long interval of time and the surrounding circumstances support the inference, the recitals in such deeds would be evidence of representation having been made to the transferees to that effect : *A. I. R.* 1916 *P. C.* 110, *Foll.* [P 14 C 2]

K. N. Katju, Iqbal Ahmad and *Mukhtar Ahmad*—for Appellants.

A. P. Dube, Akhtar Husain Khan and *Harnandan Prasad*—for Respondents.

Judgment.—First Appeals Nos. 256, 257 and 258 of 1924 are all connected and arise out of suits brought by reversioners and their transferees for possession of property to which the former succeeded on the death of a Hindu widow.

Bhawani Sahai was admittedly possessed of considerable property and owned about 26 or 27 villages. He died on 8th August 1870 leaving two widows known as Mt. Rani Chunno Kunwar and Rani Maharani. He left no issue. During their lifetime these widows made various transfers in consequence of which the bulk of the estate has come into the possession of the numerous transferees who are impleaded as defendants in the suit. Rani Chunno Kunwar died about 1903 or 1904 and Rani Maharani died on 16th February 1915.

Salig Ram and Dwarka Prasad claimed to be the immediate reversioners to whom the succession opened on the death of Rani Maharani. They have transferred part of their property to the other plaintiffs and a joint suit has been instituted on behalf of them all. The defendants are, as we have remarked above, the representatives of the various transferees. We shall deal with each of their cases separately.

The suits were instituted on 20th December 1921 and 10th January 1922.

The plaintiffs allege that the ladies were possessed of sufficient income and there was no necessity whatsoever for them to raise money either by mortgage or sale and that accordingly all the transfers were without legal necessity and are not binding on the plaintiffs.

The pleas in defence were (1) res judicata, (2) estoppel and (3) existence of legal necessity. There was also a denial of the pedigree set up by the plaintiffs.

The learned Subordinate Judge has found that the plaintiffs' pedigree is proved and that there was legal necessity for some of the transfers and that there was no legal necessity for the others. But he has found in favour of the defendants as regards the pleas of res judicata and estoppel and has dismissed both the suits in toto. Three appeals have been preferred out of the three suits. The finding of the Court below that the plaintiffs' pedigree is established has not been challenged before us. We propose to dispose of the legal pleas of res judicata and estoppel in the first instance.

In appears that in 1877 Suit No. 65 of that year was filed by four persons who were on the pedigree the immediate reversioners to the estate namely by Sheo Ghulam, Mihin Lal the father of the present plaintiff Dwarka, Chunni Lal father of the present plaintiff Salig Ram and Dudha Lal (or Binda Lal). The plaint is embodied in the decree which is printed at p. 69 (F. A. 258). The plaintiffs to that suit had alleged that the widows were possessed of property assessed to Government revenue of Rs. 9,179-6-0 and that they had without any valid necessity borrowed about Rs. 13,000 from one Chaturi Lal Sahukar. The plaintiffs challenged the right of the widows to fritter away .the property by transfers and claimed two specific reliefs :

"By right of inheritance according to the pedigree and the evidence of the witnesses the right of the plaintiffs may be established and declared."

and

"the defendants may be prohibited from making a transfer of the property detailed in the plaint."

Then followed a list of 23 items of property showing the Government revenue against the shares in the villages specified. This suit was filed on 13th December 1877. On 19th February 1878, Chaturi Lal defendant filed a written statement (p. 9 of the Supplemental Record to F. A. 256), in which he alleged that under the mortgage of 1873 money had been lent by him for payment of Government revenue and that subsequently another deed was executed and the money borrowed by the ladies for the construction of Thakurdwara, temple, tank and chatri. After which another mortgage deed for Rs. 11,000 was executed and later they took further sums for the payment of Government

revenue. Thus in all Rs. 13,000 had been advanced by him in good faith for lawful and necessary expenses. The ladies also filed a joint written statement (p. 11 of the same Supplemental Record). They alleged that all the acts done by them had been done in good faith and lawfully for the benefit of their husband in the next world and for the protection of the property. They further asserted in para. 6 that most of the villages yielded a very small amount of income and damages had to be paid in respect of certain others, and no expenses over and above the expenses incurred in the lifetime of their husband had been incurred. They reiterated the statement that the jama (revenue) was considerable and the amount of the income was small. Of course these pleadings are not in themselves legal proof of the fact recited therein. They show the position taken up by the parties to that suit at that time. On 9th March 1878, (p. 89 of F. A. No. 256), Sheo Ghulam applied to withdraw the suit, the reason given by him in the application was that he had no hopes that he would remain alive and survive the ladies and prayed that he be exempted from the costs of the suit. On p. 91 is a copy of the application dated 12th March 1878 filed by another plaintiff, Mihin Lal (or Mithan Lal), who also withdrew his claim stating that he had no concern with the claim as he was not a member of the family of Bhawani Sahai and also disputed the correctness of the genealogical table which had been filed in the case.

The judgment, described as rubkar, is to be found on p. 15 of the Supplemental Record to F. A. No. 256. It is dated 13th March 1878. The learned Judge noted that two of the plaintiffs had by their application withdrawn the suit and the other two plaintiffs "had not given any proof regarding the second point." He, therefore, ordered that the claim of two of the plaintiffs be dismissed because they relinquished their claim "and that of the other plaintiffs be dismissed in default of proof." The dismissal of the suit of the other two plaintiffs was, therefore, not one on account of want of prosecution but was on account of absence of proof on the second point. The judgment does not make it clear what the second point in the case was. That is left entirely to conjecture, but having regard to the reliefs claimed in the plaint embodied in the decree quoted by us, it seems clear to us that the second point was the question of the alleged waste being committed by the widows for which an injunction to restrain them had been asked for. This being our interpretation of the judgment it is clear that the suit was dismissed for want of proof that any waste had been committed by the ladies. We may further note that in the plaint no transfer had been specified by date and no relief had been claimed for a declaration that any such transfer had not been made for legal necessity. So far as the relief for the establishment of the plaintiffs' right to the estate by inheritance was concerned that was a relief claimed personally by the then plaintiffs which of course could not be granted, as it was impossible to hold who would be heirs to the estate so long as the widows were alive. So far as that relief went the claim was misconceived, and in any case it is quite clear that such claim could not be said to have been one brought in a representative capacity on behalf of the entire body of reversioners who may be born afterwards. The learned Subordinate Judge has held that the result of this litigation operates as a bar of res judicata against the present plaintiffs. We are wholly unable to accept this finding. No declaration had been sought for avoiding any particular transfer and there was no finding that any specific transfer was or was not without any legal necessity. The mere dismissal of the suit for an injunction cannot be res judicata when the plaintiffs are now suing for possession of the estate after the death of the widows. Having regard to the fact that a new cause of action arises in favour of the present plaintiffs after the death of the widows and the relief for the establishment of the then plaintiff's rights in 1878 was a personal one, it cannot be said that the result of that suit stands in the way of the present plaintiffs.

The learned advocate for the respondents has urged that the dismissal might be assumed to amount to a finding that there was no proof of the pedigree set up by the then plaintiffs. We have already noted that the absence of proof noted by the Judge was as re-

gards the second point and not the first. Accordingly we are unable to accept the finding that that judgment operates as res judicata.

The finding that the result of that litigation amounts to an estoppel which prevents the present plaintiffs from suing is absolutely untenable. No act or omission committed by the presumptive reversioners at that time can amount to an estoppel against the present plaintiffs who have actually succeeded to the estate. Their conduct may under certain circumstances raise a presumption in favour of the existence of the legal necessity, but can never debar the present plaintiffs from claiming the estate in assertion of their own rights which they do not claim through the former reversioners. We would therefore hold that neither res judicata nor estoppel is a bar to the suit.

In this connexion we may dispose of another plea of res judicata which has been raised for the first time before us and which is based on a judgment dated 25th October 1923 printed on p. 27 of the Supplementary Record to F. A. No. 256. As a result of several advances of loan Chaturi Lal had obtained a decree for money in 1878. In part payment of that decree he took a sale deed in 1891 of three villages. Part of that mortgage decree was paid off by the sale of Sibnagar in favour of the respondents represented by Mr. Pearey Lal Banerji. In a suit brought by the present plaintiffs against Chaturi Lal's representatives to set aside the sale deed of 1891 it was held that that sale was good because it had been taken in order to pay off Chaturi Lal's mortgage decree which had been established in that case to have been in lieu of previous debts which were for legal necessity. Mr. Peary Lal Banerji contends that inasmuch as Chaturi Lal's representatives in that suit set up this mortgage-decree of 1878 and the finding was in their favour and against the present plaintiffs, that finding ought to operate as res judicata in favour of his clients even though they were not parties to the former litigation. This argument is based on the ground that under Expln. 6 to S. 11 Chaturi Lal's representatives should be deemed to have been litigating bona fide in respect of a private right claimed in common for themselves and the present contesting respondents. We find it impossible to accept this contention. The right which the then respondents were claiming was the right based on their sale deed of 1891 and in order to prove its validity they were relying on a previous mortgage decree of Chunni Lal. The transfer in favour of the contesting respondents is of 1879. The ground which Chaturi Lal's representative might have set up in order to prove the validity of their own sale-deed cannot be a right claimed in common for themselves and the present respondents, who have to substantiate the validity of another sale deed. It is quite clear that in the former litigation Chaturi Lal's representatives were not claiming any right in common with the present contesting respondents. We are therefore unable to hold that even this judgment operates as res judicata and prevents the plaintiffs from challenging other transfers which were not in dispute in the former litigation. In this view of the case, the matter need not be pursued any further.

We now proceed to examine whether the various transfers were or were not supported by legal necessity. Before we take these transfers individually we should like to state a few broad facts which are established by the evidence. We have already referred to the decree in the suit brought by the reversioners in 1877 which gives a list of 23 items of property left by Bhawani Sahai. No doubt as observed by their Lordships of the Privy Council in the case of *Kumar Gopika Raman Roy.* v. *Atal Singh*, *A. I. R.* 1929 *P. C.* 99 findings of fact or statements of fact in a judgment delivered in one case are not admissible as proof of those facts in another case when the parties are not the same. But even on this record there are khewats of no less than 13 villages, the total Government revenue of which cames to over Rs. 5,000. We also have an official report printed on p. 47 (F. A. No. 258) stating. that Bhawani Sahai had been in affluent circumstances and besides the village Nagla Lahori he had 26 or 27 other zemindari villages in that very pergana. When the Government revenue of 13 villages amounted to more than Rs. 5,000 it may be taken roughly that the total Government revenue of the entire property would have been

about Rs. 10,000. Thus the statement in the decree is borne out by this calculation. There is no direct evidence on the record to show the actual profits, namely the net income of the villages but it may be assumed for the purposes of argument in favour of the plaintiffs that it might have been about equal to the Government revenue. The conclusion therfore is irresistible that the widows were possessed of considerable properties after the death of their husband. At the same time we know that there was a great famine in the years 1876 to 1878 and during that time the condition of the villages in the district of Shahjahanpur was precarious. Even the plaintiffs Salig Ram and Puttu Lal (pp. 35 and 41 F. A. No. 256) admit that Bhawani Sahai had started the building of a temple, a shivalay and a tank in his lifetime and that these constructions had not been completed when he died and had to be completed afterwards by the widows. The defendants' witnesses like Ram Dayal and others of course said that large sums of money were required by the ladies for completing these constructions. That the completion of these works which had been started by Bhawani Sahai in his lifetime would have been a legal necessity has not been disputed before us. Unfortunately, however, we do not know the exact part of the constructions which had been left uncompleted when Bhawani Sahai died. We have already referred to the bare assertions of the ladies themselves that the Government revenue of the villages was very heavy and the income was small.

There is no doubt that during their lifetimes these widows from time to time made numerous transfers with the ultimate result that the bulk of the property passed out of their hands. This raises a grave suspicion against the transferees.

Although we have held that the proceedings in the suit brought by the presumptive reversioners' do not amount to res judicata it is impossible to altogether ignore that litigation. The present plaintiffs come to challenge these transactions after a period of 40 to 50 years. At a time when the original transferees and the persons connected with the execution of the various documents are all dead, they call upon the defendants to establish legal necessity for debts which their predecessor-in-title had advanced. A large number of these defendants are not the descendants of the original creditors or vendees but are subsequent transferees from these people. It is therefore very hard on them to be called upon after this long lapse of time to substantiate the ancient transactions by direct proof of legal necessity. We have the further fact that not only the reversioners have waited such a long time before impugning these transfers but the fathers of the two of the present plaintiffs and their uncles did make an attempt in 1878 against the ladies and Chaturi Lal but for some reason or other did not proceed further with the case. That was the occasion when the whole question could have been conveniently threshed out and it could have been established one way or the other whether the legal necessity had existed. Although the present plaintiffs are not bound by the conduct of those reversioners, it is a fact which cannot be lost sight of that at the time when the truth would have been more effectively enquired into, those reversioners did not choose to press the matter. There is the further fact that although there is no proof of legal necessity, yet it is shown that the ladies as well as Chaturi Lal were prepared to substantiate the case that legal necessity had existed and that as early as 1878 it was definitely alleged that the previous transfers had been for lawful purposes.

We shall deal with each of the deeds in favour of Chaturi Lal hereafter but at this stage we may mention that by September 1878 Chaturi Lal had succeeded in obtaining a decree from a Court of law in his favour against the widows. Thus the outside world had the fact before it that the reversioners had sued to challenge the previous transfers and had withdrawn their suit or allowed their suit to be dismissed, and that the transferee Chaturi Lal had actually obtained a decree from the Court. It was after these events that the transfers which are now impugned took place.

There is one more circumstance against the plaintiffs which we may now mention. Although we have held that the judgment of the Subordinate Judge dated 25th October 1923 cannot be taken advantage of for the purpose of res judi-

cata, it does not follow that that judgment is wholly inadmissible in evidence. It is true that the contesting defendants who wished to rely upon it were not parties to it but the present plaintiffs were themselves parties and they lost their claim against Chaturi Lal's representatives. Now Chaturi Lal and his representatives were in a better position to establish the validity of the mortgagees in favour of Chaturi Lal than the present defendants who are subsequent transferees. The plaintiffs had the full opportunity to challenge the validity of Chaturi Lal's transactions but failed in their attempt. Under S. 13, Evidence Act, when the question as to the existence of any right arises in a transaction by which that right was claimed, recognized or asserted, any particular instance in which that right was claimed, recognized or exercised is a relevant fact and therefore, admissible. In the present suit Chaturi Lal's right to hold a valid charge on the property on account of the mortgagees in his favour is in dispute. This right was denied by the plaintiffs and was asserted by Chaturi Lal's representatives in the previous suit, and the result of that suit was an instance in which the right claimed was recognized by a Court of law. Although the value of the judgment by itself may not be great inasmuch as evidence may vary from case to case, the fact remains that that judgment is an instance in which the validity of Chaturi Lal's mortgages was not only asserted but recognized by the Court and recognized as against the present plaintiffs.

We now come to the transactions in which Chaturi Lal was concerned. All the relevant documents are to be found in the Supplementary Record of F. A. No. 256. On p. 1 is the hypothecation bond dated 31st May 1873 in favour of Ajudhya Prasad and Bishnu Dayal for Rs. 2,000. It recites that the money was required for the payment of Government revenue on account of the instalment of May 1873. The endorsement on the back of this document contains the admission made at the time of the registration and is to the effect that the amount had really been deposited in the Pawayen Tahsil on 30th May preceding and that the said amount was to be credited towards the payment of Government revenue. Now the recitals in documents executed by Hindu ladies are by themselves no proofs of the existence of the legal necessity mentioned. But in cases where there has been a long interval of time and the surrounding circumstances support the inference, the recitals in such documents would be evidence of the representation having been made to the transferees to that effect. We may in this connexion quote the words of their Lordships of the Privy Council in the case of *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya* (1) at p. 196 of 44 *Cal.*

"The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital coupled with such circumstances, would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that the transaction would ultimately be incapable of justification merely owing to the passage of time."

As the dispute has arisen after a long interval of time we are of opinion that having regard to the various circumstances which we have referred to above it is only fair that this recital should be accepted as proof of a representation having been made and believed to be correct by the mortgagee, particularly as that assertion was subsequently repeated.

On 14th June 1873 another mortgage-deed (p. 3) was executed for Rs. 4,000 in favour of Chaturi Lal. Under this, money due to Ajudhya Prasad and Janki Prasad was paid off and a further sum was required to pay off the Government revenue instalment. The learned advocate for the respondents has suggested that this Ajudhya Prasad might be a different person from the other Ajudhya Prasad. There is, however, the fact that Ajudhya Prasad mentioned in both the documents was the resident of the same place Pawayan.

On 29th April 1875 (p. 5) a possessory mortgage-deed was executed for Rs. 11,000 under which the amount due on the previous deed dated 14th June 1873 was paid off and so were also the three promissory notes paid off and the balance was paid at the time of registration. It is a fact against the defendants that there was in the mortgage-deed of 1875 no ex-

(1) A. I. R. 1916 P. C. 110=44 Cal. 18?=43 I. A. 249 (P.C.).

press recital of necessity for the amounts due on the promissory notes and the cash paid at the time of registration. On the other hand we have already stated that in 1878 when the reversioners first challenged the debts of Chaturi Lal, he did assert in Court that the money had been required for the payment of Government revenue and for the construction of Thakurdwara temple tank and chhatri (p. 9 of the Supplemental Record of F. A. No. 256) and we also know that the ladies asserted that they had acted in good faith and lawfully. We have already shown that the reversioners' suit was dismissed (p. 15) and it is a fact that Chaturi Lal obtained a decree on the basis of this mortgage-deed on 25th September 1878 (p. 17).

The defendants have produced some oral evidence on the need for completing the temple, the Shivalay and the tank and it was admitted by the plaintiffs Pattu Lal and Salig Ram that these constructions had remained incomplete when Bhawani Sahai died. The evidence is no doubt meagre. In an ordinary case it might have been difficult to accept it as conclusively establishing the plea of legal necessity but having regard to the long lapse of time after which the question has been raised, having regard to the failure on the part of the then reversioners to press their claim at a time when the matter might have been thoroughly investigated and having regard to the other circumstances mentioned by us above, we feel that it would not be proper to upset the finding of the Court below on this point and we accordingly hold that Chaturi Lal's decree dated 25th September 1878 may be taken to have been obtained on account of a debt which was binding on the estate. (Their Lordships then discussed the transfers separately and disposed of the appeal).

R.M./R.K. *Order accordingly.*

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SULAIMAN AND PULLAN, JJ.

Ram Khelawan Singh and *others*—Defendants—Appellants.

v.

Maharajah of Benares — Plaintiff — Respondent.

First Appeal No. 32 of 1928, Decided on 22nd June 1929, from order of Dist. Magistrate, Benares, D/- 9th August 1927.

(a) Evidence Act, S. 115—Person opposing appeal on ground that it should have been filed in particular Court is estopped from changing his contention and asserting subsequently that it could not be filed in the particular Court.

A preferred an appeal to the Commissioner from an order rejecting certain objections to the confirmation of a sale. The appeal was opposed by *B* on the ground that the case was governed by the new Tenancy Act and that the appeal should have been filed in the High Court. The appeal was returned and presented to the High Court. *B* then changed his position and contended that the case was not governed by new law but by old law and no appeal lay to the High Court.

Held: that *B* was estopped from raising any question of jurisdiction inasmuch as it was on his own insistence that the appeal was returned by the Commissioner. By his objection he had accepted the jurisdiction of the High Court as the proper forum of appeal. [P 16 C 1]

(b) Agra Tenancy Act (3 of 1926), Ss. 242 and 248—Appeal lies from order refusing to set aside sale—Appeal lies to High Court where subject matter of suit exceeds Rs. 5,000.

Under S. 248, Cl. (c) an appeal lies from any order of a Collector mentioned in O. 43, R. 1, Civil P. C , and that order includes one refusing to set aside a sale. Under proviso to S. 242 the appeal from such an order where the subject matter of the suit exceeds Rs. 5,000 lies to the High Court. [P 16 C 2]

(c) Limitation Act. S. 5—Prosecution of appeal in good faith before wrong Court is sufficient cause.

Where, an appeal which lies to the High Court, is filed beyond time but the appellant sufficiently explains the delay by the circumstance that he was prosecuting in good faith the appeal before other Courts, time for filing the appeal should be extended. [P 16 C 2]

A. Sanyal and *Bhagwat Sankar*—for Appellants.

N. P. Asthana and *Rama Nama Prasad*—for Respondent.

Judgment.—A preliminary objection is taken that no appeal lies to this High Court and it is based on the contention that the case is governed by the old law and not by the new Tenancy Act (Local Act 3 of 1926).

The appeal purports to be from an order rejecting certain objections to the confirmation of a sale. Under the old law an appeal from such an order undoubtedly lay as far as we are aware to the Commissioner and not to the High Court. An appeal was preferred to the Commissioner. But it was opposed by the decree-holder on the ground that the case was governed by the new law and that an appeal should really have been filed under S. 248, sub-Cl. 3 of the new Tenancy Act. The Commissioner entertained this objection raised on behalf of the decree-holder and returned the appeal for presentation to the proper Court.The judgment-debtor presented his appeal to the District Judge instead of to the High Court. The learned Judge has held that the valuation of the suit having been more than Rs. 5,000 the appeal ought to have been preferred to the High Court. He has accordingly returned the memorandum of appeal for presentation to this High Court. The appeal has now been preferred in this High Court.

The learned advocate for the decree-holder now changes his position and urges that the case is not governed by the new Act at all but by the old law and that no appeal lies to the High Court. We think that when on the objection having been taken by the decree-holder himself the appeal was returned for presentation to the proper Court, he has accepted the jurisdiction of this Court as the proper forum for purposes of appeal. He cannot now be allowed to raise the question that the appeal should not have been returned by the Commissioner at all. In our opinion he is estopped from raising any question of jurisdiction inasmuch as it was on his own insistence that the appeal was returned by the Commissioner. We, therefore think that we cannot allow the decree-holder's counsel to raise the question that the case is not governed by the new Act.

It may in this connexion be pointed out that the sale actually took place on 20th July 1927, and objections to the sale were made subsequently and they were rejected by the Commissioner at a time when the new Act was actually in force.

There can be no doubt that under the new Act an appeal lies to the High Court. Under S. 248, sub-Cl.(c), an appeal lies from any order of a Collector mentioned in O. 43, R. 1, Civil P. C., and that order includes one refusing to set aside the sale. Under the proviso to S. 242 the appeal from such an order where the subject matter of the suit exceeds Rs. 5,000 lies to the High Court. There is no doubt, therefore, that the old law under which the appeal was filed to the High Court no longer prevails and the right of appeal exists.

On the merits we have no doubt whatsoever that the order of the District Collector (wrongly described as District Magistrate) cannot be supported and ought to be set aside.It is not any judicial adjudication of the numerous objections raised by the judgment-debtor. No reason is given in it and it is not at all clear whether the various objections raised by the judgment-debtor which were five in number were considered and disposed of. Nor does it appear that he was given any opportunity to produce evidence to substantiate the objections which he had raised.

We accordingly allow this appeal and setting aside the order of the District Collector dated 9th August 1927, send the case back to his Court to be disposed of according to law.

As regards the question that this appeal has been preferred beyond time it may be pointed out that the law had been altered shortly before the appeal was filed and there is nothing to suggest that the judgment-debtor was acting in bad faith in filing the appeal before the commissioner. As a matter of fact he had a longer time to file his appeal in the High Court. The appellant has sufficiently explained the delay by the circumstance that he was prosecuting his appeal in good faith before the Commissioner and the District Judge. We accordingly extend the time fixed for filing the appeal under S. 5, Lim. Act. We direct that the costs of this Court should abide the event.

R.M./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 17

BOYS AND YOUNG, JJ.

Goli—Applicant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 373 of 1929, Decided on 24th June 1929, from an order of Sess. Judge, Gorakhpur,.D/- 20th February 1929.

(a) Criminal Trial — Court's duty — Opportunity should be afforded to accused to explain evidence against him.

Neither a Magistrate nor a Judge is entitled to cross-examine an accused person but it is their bounden duty to question him generally on the case and give him an opportunity of explaining any point in the evidence against him. [P 17 C 2]

(b) Criminal Trial—Court's duty—Greater care should be given to cases under S. 75 of Penal Code—Previous convictions should not prejudice Court—Penal Code S. 75.

In cases where S. 75, Penal Code is to be applied a great deal more care should be given to the inquiry and trial than is usually given to them. An accused person though he has several convictions behind him is entitled to have his case treated as if it was not a foregone conclusion that he is guilty. [P 19 C 1]

M. Waliullah—for the Crown.

Judgment.—Goli appeals from his conviction under S. 477 read with S. 75, I. P. C. and a sentence of transportation for life. The charge under S. 75, I. P. C. referred to no less than 5 previous convictions of theft and house-breaking with sentences beginning with three months and ending with three years. The accused pleaded guilty to all these convictions, with the exception of one, which he said had been set aside in appeal. But the learned Judge says that he has seen the record of that case and finds that the appeal was dismissed. It is a regrettable feature of these cases, where a man has already had a number of convictions, that everything seems to be assumed against him and that care is not devoted to the enquiry as to whether the present charge is well founded or not. The record of the evidence is very small, but we have had to give the case considerable time, because it was obviously neither desirable that a man who was of a bad character should escape punishment, if he were really guilty, nor that he should suffer further punishment unjustly merely because he had already committed several offences. The accused was arrested in Nautanwa Bazar of Bhundi, which is evidently close to Nautanwa Bazar, the place of his arrest being variously described. These places are close upon the Nepal border. The home or birth place of the accused is in Nepal, but the place where he lives is a village in Purandarpur in the district of Gorakhpur. Purandarpur is about 20 miles south-west from Nautanwa Bazar. Nautanwa Bazar is in the police circle of Naikot and at Nautanwa Bazar or Bhundi there is only a police outpost. The story for the prosecution is that the complainant, Kahabir Thapa, was half asleep in the middle of the night when he noticed sombody moving about in his house. According to the first information report, he jumped up and seized the person and had a struggle with him. The thief escaped from him and he chased him a distance of 30 or 40 yards and seized him with a stolen brass vessel in his hand Upon the outcry of the complainant three persons came up and helped him to secure the thief. Two of these three alleged witnesses have been produced to give evidence. They are Gorey Thapa, and Jas Bahadur Thapa. The accused was taken to the police outpost, and in the morning to the police station at Naikot, where the first information report was recorded, and he was later sent up for trial.

The accused's story is that he had only been released from jail in Gorakhpur a few days previously and having gone part of the way by train, he went to his own home. Finding his wife not there he made enquiries and eventually set off for Nepal to fetch his wife. He does not say whether he found his wife there or whether he did not, and neither the Magistrate nor the learned Judge thought it worth while questioning him on this point. It is hardly necessary to repeat that neither a Magistrate nor a Judge is entitled to cross-examine an accused person, but it is their bounden duty to question him generally on the case and give him an opportunity of explaining any point in the evidence against him. In cases of the description of the one before us we fear that a conviction is generally regarded as more or less a foregone conclusion and very little trouble is taken to enquire into the facts. This man had made a statement about having gone in search of his wife and being, on his way back to his village, found at Nautanwa

Bazar where he was arrested. There is nothing improbable prima facie in that story. That is one mention of the wife. Again the Judge's attention was specifically drawn to the fact that the accused really had a wife, because the defence witness mentioned her as being the person at whose instance she (the witness) was giving evidence. This fact the Judge has used to discredit the defence witness, but it did not suggest the desirability, as it should have, of making any enquiry as to where the wife was at the time of the offence.

The accused talking continues that he was asked by the police where he was going to spend the night and told them that he was sleeping in a hut in Nautanwa Bazar, when the police on their rounds paid him no less than three visits, on the first occasion asking him who he was and on the second occasion assuring themselves that he was still sleeping in the hut. He says that on the third occasion at 5 O'clock in the morning he was aroused and arrested and this false charge brought against him. Taking the prosecution evidence first, we find that in the first information report a mention, very berif it is true, but still a clear mention of a struggle between the complainant and the accused finds place. On the other hand, there is also mention of the fact that in the complainant's own house were sleeping at the time three visitors, Pahari pensioners. It is manifest that if a struggle did take place and if three Pahari pensioners were, as admittedly they were, sleeping in the house at the time, they must have known a great deal more about it than anybody who merely saw from outside what happened at a later stage. None of these three men have been produced and no explanation is offered as to why. It may be that they left the place, as they were apparently only birds of passage. On the other hand, they were pensioners and they must have been known to the complainant, for he gave them shelter in his house and prima facie there could have been no difficulty in tracing them. It is noteworthy that all mention of the struggle in the house is dropped in the complainant's deposition. We were disposed ourselves to feel doubts about the correctness of this conviction in view of the points that we have already mentioned. There is a third point, that the accused is alleged to have been actually arrested with a brass vessel worth only Rs. 2 in his hand. It is a small point, but it does strike us as improbable that a thief, being pursued and seeing himself about to be caught, would be actually so foolish as to keep a brass vessel that he had just stolen in his possession. No doubt he could not have concealed the fact that he had it, but his first instinct would be to throw it away.

We did feel, however, that there was one point which might strongly be urged in favour of the truth of the story told by the police. The accused was arrested at Nautanwa Bazar and the learned Judge has made a great point against him as to what could he be doing in this village 20 miles away from his own home so soon after he had been released. We have already referred to the accused's story as giving a not unreasonable explanation of his presence in Nautanwa Bazar, but the very fact of the distance of Nautanwa Bazar suggests another consideration in favour of the prosecution and that is, how did the police know anything about this man? If it were suggested that the case was a false one brought by them merely in order to get into jail again the well known offender, how did they know that he was a previous convict? The accused alleged that they had paid him no less than three visits on the night in question. This fact alone should have raised the Magistrate's and the Judge's suspicion and, at, any rate, led to some enquiry on the point. We felt that as the case stood we were unable to feel satisfied as to the correctness of the conviction. Having arrived at that view, we decided to look into the police diary to see whether there was anything further that ought to have been brought on the record of the case. If the learned Judge had done that, as he should have done, not with a view to using it as evidence, but with a view to seeing whether further evidence was available, he would have found that the accused was perfectly well known to the police of Naikot and the police of Nautanwa Bazar. It appears that of the previous sentences which the accused had served, at least two or three of them were in respect of offences which had been committed at Nautanwa and the police at Naikot not

only knew the man well as a previous convict, but even knew that his home was at Gol Suqra. This being so, it is very natural indeed that when they found him again at Nautanwa Bazar they would recognise him and pay him several visits in order to see whether he was still sleeping in the hut. In this we find much corroboration of the story told by the accused and it further removes the main difficulty that we had, which was to answer the question, why should the local police 20 miles away from Gol Suqra and perhaps three times that distance from Gorakhpur, have had what is commonly described as a down upon this particular man ? This only increases the doubts which had already formed in our minds. We feel that the conviction cannot stand. In conclusion, we would suggest to the Magistrate and to the Judge that in these cases, where S. 75, I. P. C. is to be applied, a great deal more care should be given to the enquiry and trial than is usually given to them, and was given in this particular case. An accused person, though he has several convictions behind him, is entitled to have his case treated as if it was not a foregone conclusion that he is guilty. We set aside the conviction and sentence and direct that the accused be forthwith released. Let copies of the judgment be sent to the Judge and the Committing Magistrate.

R.M./R.K. *Conviction set aside.*

A. I. R. 1930 Allahabad 19 (1)

YOUNG AND SEN, JJ.

Emperor

v.

Timman and *others*—Opposite Parties.

Criminal Revn. No. 387 of 1929, Decided on 9th September 1929, from order of First Class Magistrate, Meerut, D/- 27th February 1929.

Criminal P. C., S. 562 — Scope—Section should not be applied to case of people in possession of dangerous drugs in defiance of law.

Section 562, dealing with first offenders, should not be applied to the case of people discovered with cocaine and other dangerous drugs upon them in defiance of the Excise Act, it being almost certain in all these cases the occasion on which they have been discovered in possion of the drug is not really the first time they have been in such possession. [P 19 C 2]

U. S. Bajpai—for the Crown.

S. Majid Ali—for Opposite Parties.

Judgment.—In this case Timman, Azmat and Summan were charged before Mr. Thomas, Magistrate of the First Class, Meerut, under S. 60 (a), Excise Act, for being in possession of cocaine. It appears that the police, having obtained a warrant for the search of a gaming house, carried out the search and these three accused were there discovered, and on being searched packets of cocaine were found upon them. It has not been disputed by the accused that the cocaine was found upon them, and indeed it would have been impossible for them to dispute this fact. The learned Magistrate sentenced each of them to a fine of Rs. 75. The Local Government filed an application in revision asking for the enhancement of the sentence.

It is pressed on behalf of the opposite party that this is a case of first offence with regard to all three. We are of opinion that the section of the Criminal Procedure Code dealing with first offenders should not be applied to the case of people discovered with cocaine and other dangerous drugs upon them in defiance of the Excise Act, it being almost certain that in all these cases the occasion on which they have been discovered in possession of cocaine is not really the first time they have been in such possession.

We are satisfied that the sentence is totally inadequate, and we enhance it to one of six months' rigorous imprisonment each. The fine already imposed is to stand.

R.M./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 19 (2)

YOUNG AND SEN, JJ.

Sultan and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 493 of 1929, Decided on 30th August 1929, from order of Addl. Sess-Judge, Meerut, D/- 10th May 1929.

Penal Code, S. 366—Scope — Underlying policy is to throw protection over minor girls — Consent of girl does not exonerate seducer.

Section 366 is an aggravated form of S. 363. The consent of the girl does not exonerate the seducer. The underlying policy of the section is to uphold the lawful authority of parents or guardians over their minor wards, to throw a ring of protection over the girls themselves

and to penalise sexual commerce on the part of persons who corrupt or attempt to corrupt the morals of minor girls by taking improper advantage of their youth and inexperience.

[P 21 C 1]

K. O. Carleton—for Appellants.

U. S. Bajpai—for the Crown.

Judgment. — Sultan, Mohammad Baksh, Allah Baksh, Ismail, and Kala were committed to take their trial before the learned Sessions Judge of Muzaffarnagar under S. 366, I. P. C. Bundu was committed under S. 368 of the said Code. The learned Sessions Judge has convicted all of them and sentenced them to four years' rigorous imprisonment each.

The first five accused persons were charged with the offence of kidnapping, Mt. Jamila, a girl, alleged to be under 16 years of age from the lawful gurdianship of her father Mohammad Qazim with intent that she might be seduced to illicit intercourse. The offence is said to have been committed in mauza Khudda in the district of Muzaffarnagar on or about 5th May 1928.

Bundu was charged with the offence of wrongfully concealing Mt. Jamila in his house at village Dadheru for nearly two months from 5th May 1928 with the knowledge that Mt. Jamila was a kidnapped girl.

There was considerable social disparity between Mohammad Qazim and the accused, the former being a Sheikhzada and the latter being Garhas by caste.

The case for the prosecution was that Mt. Jamila was an unmarried girl below 16 years of age, that she had twice eloped with Sultan during the temporary absence of her father from home; that the final elopement took place on 5th May 1928 with Sultan and that the four other accused excepting Bundu were associated with Sultan in kidnapping the girl.

Sultan is the nephew of Mohammad Baksh. Allah Baksh and Mohammad Baksh's sisters are married in the same family. Bundu's uncle's daughter is married to Siddiq, the own brother of Sultan. Ismail alias Billi and Allah Baksh are close friends.

Qazim's household consisted of himself, his daughter Jamila and a stepdaughter Mt. Mahfuzan, aged 10 or 11 years, who was given in marriage to Qazim's son Nawab. Qazim appears to have been a man with a religious turn of mind whose time was mostly spent in prayers and meditations and who did not take much interest in mundane affairs. The result was that there was no discipline in his household and Mt. Jamila was practically left free to sport as she pleased.

Sultan is a young man aged about 21 years. He lived in a house with an enclosure, next door to Qazim's. He had access to Qazim's house without any let or hindrance. No parda was observed with him. Mt. Jamila and Sultan came to know each other about a year or six months before the alleged occurrence. They fell in love and their love grew into an infatuation.

One of the neighbours told Qazim about Sultan' visits. Qazim said: "It does not matter." The voice of scandal was not silent but:

"Qazim did not care for the talk in the village."

While Qazim was away at Saharanpur, Sultan took away Mt. Jamila with him to Meerut and returned after three days. Mt. Jamila was dressed in male attire. The next day, Ghasita, brother-in-law of Qazim attempted to take Mt. Jamila to his house in Chhappar. He put her into a bullock cart but Sultan and Kala arrived on the scene. Kala caught hold of Ghasita and Sultan dragged Mt. Jamila away. She returned, however, at about 8 p. m. When this matter was brought to the notice of Qazim, he abused Mt. Jamila and took her to task. He also threatened to get her seducer and his confiderates condignly punished.

It is remarkable, however, that Qazim lodged no report to the police nor instituted any complaint about either of these two incidents.

The last elopement took place the same day, namely 5th May 1928, after Qazim had left his house to say his Isha prayers. This infuriated Qazim. It is true that he did not make any report at the police station but a formal complaint was instituted in the Court of a Magistrate against the first five accused persons under S. 366, I. P. C., on 12th May 1928. Qazim backed his complaint by his deposition, which was recorded on 14th May 1928.

Qazim died under very tragic circumstances on 7th July 1928 and the question as to how he met his death is the

subject of enquiry in the connected appeal.

The defence was that Mt. Jamila had been given in marriage to Sultan by Qazim himself, that she was over 16 years of age on 5th May 1928 and that the offence of kidnapping under S. 366, I. P. C., had not been committed. Bundu denied having concealed Mt. Jamila in his house.

Mt. Jamila was examined in the case as a witness for the defence on 4th April 1929. She says she is the lawful wife of Sultan and that her age is between 17 and 18 years.

The judgment of the Court below is a document of portentous length, teeming with repetitions, irrelevant matters and with many deductions, which are either illogical or are non sequitor. Now and again, ingenious attempts have been made either to explain away or to water down points which tell against the prosecution. This was absolutely unjustified and this minimises the value of a judgment which is otherwise a monument of industry. What appears to have happened is that upon a consideration of certain features of the case, the learned Judge was morally convinced of the guilt of the accused ; and this moral conviction warped his judicial vision to such an extent that he failed to view the evidence in its true perspective.

The learned Sessions Judge found that Mt. Jamila was not the wedded wife of Sultan, that she was below 16 years of age on 5th May 1928, and that all the accused persons were guilty of the offence of which they stood charged.

It may be observed here that S. 366, I. P. C., is an aggravated form of S. 363, I. P. C. The consent of the girl does not exonerate the seducer. The underlying policy of the section is (1) to uphold the lawful authority of parents or guardians over their minor wards ; (2) to throw a ring of protection round the girls themselves and (3) to penalise sexual commerce on the part of persons, who corrupt, or attempt to corrupt, the morals of the minor girls by taking improper advantage of their youth and inexperience.

The learned Sessions Judge has given excellent reasons for holding that Mt. Jamila was not married to Sultan. This finding is supported by the evidence of witnesses, who were in a position to know ; and also by the probabilities of the case.

Mohammad Qazim, belonging as he did to the old school of thought, could never have dreamt to give his daughter in marriage to a Garha. It is difficult to conceive the idea of his officiating as Qazi on the occasion of his daughter's marriage.

Certain Qazi's registers have been produced, but they contain no entry in support of this marriage. Defendants' witnesses have told a farrago of lies and have been rightly disbelieved by the Court below. We endorse the finding of the trial Court on this point and hold that there was no marriage.

There is no direct evidence on the record that Sultan or any of his four associates kidnapped Mt. Jamila, At the time of the alleged kidnapping, Qazim was away from home. Mt. Mahfuzan, the only other inmate of the house was in another part of the house easing herself. Mt. Mahfuzan heard certain whispers. We do not know what these whispers were about. We do not know whose whispers they were. When she came inside the house, she discovered that Mt. Jamila was gone.

That Mt. Jamila eloped with Sultan is a settled fact. It is not unlikely that Mt. Jamila, in response to her own passion for Sultan singed her wings. It is equally probable that Sultan allured her with his seducer's voice. What part the other accused persons played cannot be predicated with certainty, the evidence on the point being vague and cloudy. It has been suggested that all these persons had conspired with Sultan. It is said that on a particular date as Qazim and his party were returning from the Court of the Magistrate in Muzaffarnagar, Qazim demanded the restitution of his daughter to him. He held out the threat that if the daughter was not restored, the case against the accused persons " will be prosecuted to the bitter end." Ismail is said to have retorted that he did not care, as he would wipe Qazim out and install Mt. Jamila and Sultan in Qazim's house. Sometimes before Mt. Jamila's elopement, Nawab son of Qazim had run away with one Mt. Khatoon, daughter of Lala Garha. Ismail and Allah Bakhsh are said to have remarked at the village panchayat, which was held over Mt. Jamila's elope-

ment that Mt. Jamila had been kidnapped by the Garhas by way of retributive justice.

The story seems plausible but it is unsafe to accept the statement of Ghulam Muhammad Mukhia who has told a string of lies and is not a disinterested witness. (After considering the evidence and holding that the other four accused were not proved to have joined Sultan in kidnapping Mt. Jamila and that Mt. Jamila was not proved to have been below 16 years on 5th May 1928, their Lordhsips proceeded.) The charge, therefore, fails against all the accused persons including Bundu. The evidence discloses that Mt. Jamila lived in the house of Bundu without the least attempt to conceal the fact. Mt. Jamila being over 16 years of age, there could be no offence of kidnapping with reference to her. The lease under S. 368, I.P.C., against Bundu therefore fails.

In the result we allow the appeal, set aside the convictions and sentences and direct that Kala be immediately released and the other five accused persons be released unless they are wanted in some other case.

R.M./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 22 (1)

SULAIMAN AND PULLAN, JJ.

In re—An Advocate.

Misc. Case No. 664 of 1929, Decided on 22nd July 1929.

Bar Councils Act (1926), S. 8—Weight should be attached to recommendations of Bar Council.

Weight should be attached to the recommendations of the Bar Councils which represents the view of the legal profession regarding enrolment of legal practitioners. [P 22 C 2]

K. N. Malaviya—for Advo-cate.

Nanak Chand—for Bar Council.

Judgment.—Mr. Shushil Chandra Chaturvedi of Firozabad is already on the roll of vakils but is actually engaged in trade and has suspended his practice. He applies to be enrolled as an advocate of this High Court. The Bar Council recommends that his application may be refused but he should be allowed to apply afresh when he disassociates himself from the business.

There can be no question that the High Court has power to refuse admission to any person at its discretion. This is so even if there are rules to the contrary, vide proviso to S. 9 of Act 38 of 1926. We think that weight should be attached to the recommendation of the Bar Council which represents the views of the legal profession. We accordingly refuse this application for the time being giving him liberty to revive his application after he has ceased to carry on trade.

There is no order as to costs.

V.S./R.K. *Application rejected.*

* A. I. R. 1930 Allahabad 22 (2)

KENDALL AND NIAMAT-ULLAH, JJ.

Murli—Defendant—Appellant.

v.

Ghamar and *others*—Plaintiffs—Defendant—Respondents.

Second Appeal No. 281 of 1926, Decided on 22nd June 1928.

*** Hindu Law—Alienation—Legal necessity—Sale must be found wholly valid or otherwise according as there is necessity or not—Whether it was absolutely essential to sell property should be decided.**

Where in a suit by members of joint Hindu family for setting aside the sale of a house the Court finds the legal necessity to be proved only in respect of a certain sum and decrees the plaintiff's claim on condition that they repay the sum, the finding is not in accordance with law. The sale is either wholly valid or invalid according as it is found to have been made for necessity or the reverse. Considerations that would be of importance in order to decide whether it was necessary to sell the house in suit to raise the particular sum would be whether the parties concerned had any other property out of which they could meet the necessary expenditure, whether it would not have been possible to raise the sum by mortgage and matters of a like nature: *A. I. R.* 1927 *P. C.* 37 and 246, *Ref.* [P 23 C 2]

Piarai Lal Banerji and *Kumuda Prasad*—for Appellant.

K. Malaviya—for Respondents.

Judgment.—This second appeal arises from a suit brought by some members of a joint Hindu family for a declaration that the deed of sale in respect of their house, dated 27th July 1927, executed by Bhagwan Das on their behalf as next friend when they were minors and by Mt. Munni in favour of the present defendant-appellant was invalid, and claiming restoration of possession to the plaintiffs. The sale consideration was Rs. 1,400, and the plaintiffs claimed that there had been no necessity for the execution of the sale deed. The defence was that the sale had been concluded in order to pay off the plaintiffs' debts, and there was also a plea that Rs. 1,000 had been spent by the defendant-appellant on the house.

Both the Courts below have found that legal necessity has been proved to the extent of Rs. 967 out of the sale consideration of Rs. 1,400 and they have decreed the plaintiffs' claim on condition that they repay Rs. 967 the sum which is found to have been advanced for legal necessity.

In the light of the recent decisions of their Lordships of the Privy Council it is clear that this finding is not in accordance with the law as at present in force. The sale is either wholly valid or invalid, according as it is found to have been made for necessity or the reverse. It is clear from the case of *Sri Krishan Das* v. *Nathu Ram* (1) and the case of *Gauri Shankar* v. *Jiwan Singh* (2) which had been published when the present suit was before the lower Courts that suits of this nature must be considered from a rather different point of view from the one that used to be favoured in this province. Considérations that would be of importance in order to decide whether it was necessary to sell the house in suit in order to raise a sum of Rs. 967 would be whether the parties concerned had any other property out of which they could meet the necessary 'expenditure, whether it would not have been possible to raise the sum by mortgage instead of selling the house outright and matters of a like nature. There is not at present material on the file to enable us to decide this question, and we there fore remit the following issue to the lower appellate Court :

"Was there no way in which the sum of Rs. 967 could have been raised by the joint family except by the sale of the house in suit."

It may be necessary in order to reply to this question, to find out what the value of the house was in 1917, and if so, or if it is desirable for any other reason, the parties will be allowed to adduce fresh evidence.

The finding on this issue should be returned by 20th October and ten days thereafter will be allowed to the respondents for filing objections.

R.M./R.K. *Case remanded.*

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(1) A. I. R. 1927 P. C. 37=49 All. 149=54 I. A. 79 (P. C.).
(2) A. I. R. 1927 P. C. 246.

A. I. R. 1930 Allahabad 23

SEN, J.

Alayar Khan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 470 of 1929, Decion 27th August 1929.

(a) Criminal P. C. S. 439—Consideration of evidence is not question of law—Practice—Evidence.

Where both the parties have tendered evidence the question of weight is not a question of law. [P 23 C 1]

(b) Criminal P. C., S. 110—Section is intended to put curb on persons dangerous to society.

S. 110 is intended to put a curb upon the activities of persons who set the ball of discord in motion and try to create or foment dissensions between man and man or between one community and another in matters which result in or have a tendency to result in breach of peace. [P 24 C 2]

Zahur Ahmad—for Applicant.

M. Waliullah—for the Crown.

Judgment.—On 18th March 1929, Mr. Browne, the learned District Magistrate of Jalaun, directed that Alayar Khan, the applicant, should under S. 110, Criminal P. C. execute a bond for Rs. 2,000 with two sureties in Rs. 2,000 each to be of good behaviour for a term of one year. He appealed to the learned Sessions Judge who set aside the finding of the trial Court so far as it related to the charge under S. 110 (d) but maintained the findings in other respects. The learned Sessions Judge observed that in view of the dangerous activities of the appellant in communal matters, he was not prepared to reduce the security. Alayar Khan has applied for revision to this Court.

Alayar Khan is a man of considerable influence at Konch and is a member of the Municipal Board. The township of Konch is torn by factions. The necessary consequence is political differences and communal dissensions.

Notice was issued to him to show cause as to why he should not be bound over inasmuch as :

(1) he habitually cheats, commits extortion and counterfeits coins and currency notes:

(2) he habitually commits and abets the commission of offences involving a breach of the peace:

(3) he is so desparate and dangerous as to render his being at large without security hazardous to the community.

Forty-eight witnesses were examined before the trial Court to prove these al-

legations. The applicant appears to have been convicted under Ss. 147, 149 and 325, I. P. C. on 26th August 1915 and sentenced to term of imprisonment which was reduced in appeal by the High Court. He was also bound over under S. 107, Criminal P. C. On 9th March 1928, he was bound over for one year under S. 107, Criminal P. C. The trial Court in an elaborate judgment, consisting of 70 type-written pages arrived at the conclusion that Alayar Khan habitually commits cheating and extortion; habitually commits and attempts to commit, and abets the commission of offences involving a breach of the peace specially in connexion with religious riots and is so desparate and dangerous that his being at large without security is hazardous to the community. The learned Sessions Judge on appeal held that the evidence of general repute was not sufficient to establish the charge relating to cheating and extortion as no specific acts had been proved. He maintained the finding and the order of the Court below on the other counts.

The learned Sessions Judge observes as follows :

"My opinion, after carefully examining the evidence on the record, is that the evidence of general repute given by the witnesses for the prosecution, taken in combination with the specific instances proved, establishes that Alayar Khan is a fomentor of communal discord and that he likes to excite trouble and create bad blood. The fomenting of communal trouble amounts to an abetment of offences calculated to involve a breach of the peace. My impression from the evidence is that Alayar Khan is a firebrand of a dangerous type. A man who stirs up communal enmity and who does and says things which must inevitably create such enmity is clearly an instigator and thus an abettor of offences involving a breach of the peace. A man of this character is a danger to society and should undoubtedly be made to give security."

This Court has considerable hesitation in going into the merits of a case under S. 110, Criminal P. C., unless the Court below in dealing with the evidence has made a material departure from legal principles. I have been referred to the evidence on the record and have considered the criticisms of the learned counsel for the applicant. I do not think that the Court below has erred in admitting evidence which ought to have been excluded or in ignoring evidence which might have told in favour of the accused. Where both the parties have tendered evidence, the question of weight is not a question of law.

The applicant has been carrying on his game amongst people whose passions and prejudices are easily roused and who are driven to lawlessness by his sinister influence. He is a menace to the community to which he belongs and to the social order generally.

Section 110, Criminal P. C., is intended to put a curb upon the activities of persons who set the ball of discord in motion and try to create or foment dissensions between man and man or between one community and another in matters which result in or have a tendency to result in breach of the peace. Alayar Khan deserved to be dealt with a strong hand. Accepting the finding of the Court below, I hold that the order passed against the applicant was fully justified. I reject the application.

R.M./R.K. *Application rejected.*

A. I. R. 1930 Allahabad 24

YOUNG AND SEN, JJ.

Emperor

v.

Mohammad Israil—Accused.

Criminal Appeal No. 416 of 1929, Decided on 22nd August 1929.

(a) Criminal P. C., S. 297—Charge to jury—Judge is bound to explain law with clearness and distinctness.

A Judge is bound to explain the law to the jury with clearness and distinctness and failure to do so prejudices the trial. Where the Judge withholds from the jury the legal assistance, the assistance in points of law, which the case demands, he fails in his duty. So also the Judge ought not to omit to state in his charge that if the jury entertains a reasonable doubt as to the guilt of the accused they are bound to return the verdict that the accused is not guilty. [P 25 C 2]

(b) Criminal P. C., S. 418—Misdirection or nondirection is matter of law.

Where there has been a trial by jury the appeal has to be confined within the restricted limits prescribed by the legislature. Misdirection or non-direction is a matter of law. If the verdict of the jury has been influenced by evidence which was inadmissible or proceeds upon no evidence at all, this is a matter of law. If this defect has affected the Crown or the accused prejudicially the order passed by the Court below ought to be set aside [P 26 C 1]

U. S. Bajpai—for the Crown.

Mohammad Hussain—for Accused.

Judgment.—Mohammad Israil was committed to the Court of Sessions to take his trial under Ss. 380 and 467, I. P. C. The trial was held with the aid of a jury. The verdict of the jury was

that Mohammad Israil was not guilty of theft under S. 380, I. P. C., but that he was guilty of forgery under S. 467, I. P. C. The Sessions Judge accepted the verdict of the jury in its entirety. In the result, he acquitted Mohammad Israil of the offence of theft but convicted him under S. 467, I. P. C., and sentenced him to one year's rigorous imprisonment and a fine of Rs. 1,000 or in default to undergo six months' rigorous imprisonment.

The order of the Sessions Judge has been challenged by the Local Government, which has preferred an appeal to this Court against the acquittal of Mohammad Israil on the charge of theft and by Mohammad Israil against his conviction under S. 467, I.P.C.

There is a firm of the name of Mohammad Sami Abdul Hakim at Allahabad, which held two hundis in due course one of which was for Rs. 500 and the other for Rs. 365. These hundies were endorsed in favour of Jawaharmal Lachmi Narain, their Bombay agents for collection; but the hundis never reached the latter firm.

The case set up by the Crown was that the hundis were put inside an envelope with a view to being posted to Bombay, that the envelope mysteriously disappeared, either from the office of Mohammad Sami Abdul Hakim or somewhere in the course of transit and that it never reached the firm of Jawaharmal Lachmi Narain. It was a later discovery that the hundies had come into the possession of Mohammad Israil, who negotiated them and collected the money.

The case for the prosecution was that the accused had obtained possession of the hundis by dishonest means and that he was guilty of theft.

The charge of forgery was founded upon the fact that the accused had obliterated or effaced the original endorsement in favour of Jawaharmal Lachmi Narain and had entered the name of Abdul Hamid Mohammad Sami there being no firm of that name.

The charge framed by Mr.A.B. Hardie, the committing Magistrate was not happily worded. It embraced two distinct offences under the second count:

(1) Forging the signature of Abdul Hamid on the hundi Ex.2, and (2) selling the said hundi to one Lala ParsotamDas.

The accused admits that he was in possession of the hundis and that he negotiated them but he contended that Abdul Hakim son of Mohammad Sami was indebted to him for Rs. 900 and that in satisfaction of this debt, he had transferred the two hundis to him.

The charge to the jury by the Sessions and Subordinate Judge, Mr. Rup Kishun Agha has been adversely criticized by the counsel, appearing for the Crown and also by the counsel for Mohammad Israil. The common ground is that the charge is vitiated by misdirections and non-directions, which misled the jury and resulted in a miscarriage of justice.

The heads of the criticism need not be noticed in detail. The learned Judge has not only travelled outside the record but has confounded the identity of one of the witnesses Shamsuddin examined in Court with another of the same name, who was not before the Court and was never examined. But this is not all. The learned Judge has not explained to the jury the necessary ingredients of the offences under Ss. 380 and 467, I. P. C. The constituent elements of the two offences were essentially different. The learned Judge was bound to explain the law with clearness and distinctness and his failure to do so has seriously prejudiced the trial. The result of the omission has produced a hopeless confusion in the minds of the jury. The charges of theft and of forgery, in view of the peculiar features of the case, were interdependent in certain respects and inextricably mixed up in other respects. The learned Judge failed in his duties by withholding from the jury the legal assistance, the assistance in points of law, which the case demanded. The consequence of this omission was almost inevitable. We are faced with an astonishing verdict that Mohammad Israil is not guilty of theft, as Abdul Hakim had delivered the hundis to him and with the further verdict that he is guilty of the offence under S. 467, I. P. C. It is another astonishing feature that the learned Judge did not apply his mind to the nature and effect of the findings by the jury and accepted them without any discrimination or hesitation.

The Sessions Judge ought not to have omitted to state in his charge that if the jury entertained a reasonable doubt as to the guilt of the accused, they were bound to return a verdict that the ac-

cused was not guilty. This principle ought to have been clearly placed before the jury and, in fact, emphasised.

This appears to be the second case, in the course of the week in which, to our extreme regret, this omission has been conspicuously noticed in Mr. Rup Kishun Agha's charge to the jury. We hope that our observation will be kept in view and this defect from the charge avoided in future.

We do not think that this is a proper case in which the guilt or innocence of the accused should be determined by this Court on the merits. Under S. 418, Criminal P. C:

"An appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury in which case the appeal shall lie on a matter of law only."

Where there has been a trial by jury; the appeal has to be confined within the restricted limits, prescribed by the legislature. Misdirection or non-direction is a matter of law. If the verdict of the jury has been influenced by evidence, which was inadmissible or proceeds upon no evidence at all, this is a matter of law. If this defect has affected the Crown or the accused prejudicially, the order passed by the Court below ought to be set aside.

We are convinced that in the present case, there has been no proper trial and we are of opinion that this case should go back for a fresh trial before a Judge other than Mr. Rup Kishun Agha and that the case should be tried with theaid of a fresh jury. We direct accordingly.

The learned Sessions Judge of Allahabad may either try the case himself or send the case to a competent tribunal for trial.

R.M./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 26

SEN, J.

Gauri Shankar—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 591 of 1929, Decided on 2nd September 1929.

(a) Jurisdiction—Civil Court—Civil Court is the only forum for determining suit relating to property between Municipal Board and private individual—U. P. Municipalities Act, S. 265.

Where there is a clash between Municipal Board on one side and a private individual on the other with reference to some property the matter has got to be adjudicated by the civil Court which is the only forum for determining the title. The straightforward course in such a case is the institution of a suit in the civil Court. The remedy provided by S. 265 may be cheap, swift and within a certain range effective. S. 265, however, is not intended to arm a Municipal Board with powers to disturb the possession of any person who asserts a lawful title to the property in controversy.

[P 26 C 2, P 27 C 1]

(b) Evidence Act, Ss. 35—Document neither shown to be prepared by public servant nor shown as forming the act or record of public officer is inadmissible—Evidence Act S. 74.

Where a record plan has not been shown to be prepared by a public servant in the discharge of his official duty or by any other person in pursuance of his duty specially enjoined by the law of the country, nor has it been established by evidence that the said document formed the act or record of the act of public officers within the meaning of S. 74, the record plan cannot be admitted in evidence either under S. 35 or S. 74 in the absence of proper evidence and of necessary particulars. [P 27 C 1]

(c) U. P. Municipalities Act, S. 265—Crown has to prove that disputed site forms part of public street.

The onus of proving that the site in dispute is a public street or part of a public street lies upon the Crown. [P 27 C 1]

(d) Evidence Act, S. 36—Site-plan prepared for a case has very little probative value on question of title.

A site plan prepared for the purposes of a case can have a very little probative value on the question of title. Entries in such documents in support of title of a Municipal Board are no more than admission in favour of the Board and are not relevant. [P 27 C 2]

(e) U. P. Municipalities Act—Fact of Municipal Board demolishing Chabutra does not amount to assertion of title.

The fact that a Municipal Board has on several occasions demolished a chabutra constructed by a party on the disputed land and realised the cost does not amount even to an assertion of title on the part of the Municipal Board and is absolutely inconclusive. [P 27 C 2]

Judgment.—This is a reference by Mr. Rup Kishan Agha, Officiating Sessions Judge of Allahabad, recommending that the conviction of one Gauri Shankar Singh under S. 265, Municipalities Act, be set aside.

This case is a typical example of aggressiveness on the part of a Municipal Board with a view to establish a claim to property, the title to which is in dispute. S. 265, Municipalities Act, has its use; but not unoften the powers conferred by the section are abused. This is to be strongly deprecated. Where there is a clash between a Municipal Board on the one side and a private individual on the other with reference to some property, the matter has got to be adjudicated by the civil Court

which is the only forum for determining the title. The straightforward course in such a case is the institution of a suit in the civil Court. The remedy provided by S. 265, Municipalities Act, may be cheap, swift and within a certain range effective. The section, however, was never intended to arm a Municipal Board with powers to disturb the possession of any person who asserts a lawful title to the property in controversy.

Gauri Shankar Singh was convicted by a Bench of Honorary Magistrates on 12th December 1928, under S. 265, Municipalities Act, and sentenced to a fine of Rs. 2. The head and front of his offence is that he tied his cow on a piece of land which is in the immediate vicinity of his house but which the Municipal Board claims as part of a public lane. The title to this piece of land is disputed. Gauri Shankar Singh denied that it was part of a public lane, asserted his own title to the same and alleged that the land belonged to him and was his sahan darwaza. The trial Court describes the property as a blind lane throgh which other persons pass. The appellate Court agrees with the trial Court that it is a blind lane which is used by the occupants of two other houses bearing the Municipal Nos. 272 and 273. The learned Sessions Judge has very clearly described the position and boundary of the disputed site.

"It abuts on a public street on the west and there is a short narrow lane at the south east corner giving access to another open land bounded by houses Nos. 272 on the south, 273 on the east and 274, applicant's house, on the north."

The onus of proving that the site in question was a public street or part of a public street lay upon the Crown. The trial Court held in substance that the site formed part of a public lane. Reliance was placed upon the record plan filed on behalf of the municipality. It has not been shown that this document was prepared by a public servant in the discharge of his official duty or by any other perrson in pursuance of his duty specially enjoined by the law of the country, nor has it been established by evidence that the said document formed the act or record of the act of public officers within the meaning of S. 74, Evidence Act. In the absence of proper evidence and of necessary particulars, the record plan could not be admitted in evidence either under S. 35 or under S. 74, Evidence Act.

The site plan prepared for the purposes of the case can have a very little probative value on the question of title. The entries in the aforesaid documents, in support of the title of the Municipal Board, are no more than admissions in favour of the Board and are not relavant.

The fact that the Municipal Board has on certain occasion in the past demolished a chabutra constructed by Gauri Shankar Singh upon this land and realised the cost, does not amount even to an assertion of title on the part of the Municipal Board and is absolutely inconclusive.

There was no justification for the finding by the trial Court upon the evidence indicated above that the property was a public lane. The finding is further vitiated by the fact that an important title deed filed by Gauri Shankar Singh was completely ignored by the trial Court. This was a document more than 30 years old and produced from proper custody. The genuineness of this document does not appear to have been challenged either before the trial Court or before the Court of appeal. The latter Court refers to the document; but lays it aside with the observation that:

"measurements are not given therein and it is difficult to say how far it covers the land in dispute, supposing it was a genuine transaction."

The judgment of the appellate Court is open to a further criticism that it fails to see the distinction between ownership and a mere right of easement. The appellate Court treats the owners or the occupants of the two houses Nos. 272 and 273 as "a portion of the public." From the fact that these occupants had a right to pass along the land in dispute it concludes that the land is a public street. The learned Magistrate fails to see that a right of easement may have been acquired by the occupants of these two houses but the said right is reconcilable with the right of ownership claimed by Gouri Shankar Singh.

I accept the reference and set aside the order dated 7th March 1929, affirming the order passed by a Bench of Honorary Magistrate on 12th December 1928. The fine, if paid, should be refunded.

R.M./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 28

YOUNG, J.

Jagmohan Singh and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 622 of 1929, Decided on 20th August 1929, from order of Sess. Judge, Allahabad, D/- 13th June 1929.

(a) Criminal P. C., S. 297—Where evidence is equally balanced Judge ought to give usual direction that benefit of doubt should be given to accused.

Where prima facie the evidence is more or less equally balanced to the ordinary jury the Judge ought to give the usual direction to the jury that if they have any reasonable doubt in their minds as to the guilt of the accused they should give the accused the benefit of it. In such a case it is almost impossible to say that the omission of this very important portion of the charge to the jury might not affect the minds of the jury. [P 29 C 1]

(b) Criminal P. C., S. 297 — For miscarriage of justice by misdirection there should be reasonable ground that misdirection affected jury's verdict.

Miscarriage of justice through misconsideration means that there must be a reasonable ground for apprehending that the misdirection may have affected the jury's verdict. Where it is possible that the omission of a charge under the particular circumstances might have affected the minds of the jury, it is a proper case for retrial by another jury : *A. I. R.* 1926 *All.* 429, *Rel. on.* [P 29 C 1]

(c) Criminal P. C., S. 297—Judge should reduce charge to writing as soon as possible after charging jury.

If a Judge does not write his charge before delivery which whenever practical is the better course, he should reduce the charge to writing as soon as possible after charging the jury so that what he said is fresh in his mind. A delay makes it impossible for an appellate Court to know whether the written charge was really the charge which was given to the jury. [P 29 C 2]

Iqbal Ahmad, *Peari Lal Banerji*, *Durga Charan Singh*, *Krishna Bahadur* and *Aditya Narain*—for Appellants.

Sankar Saran—for the Crown.

Judgment.—This is an appeal by four persons against a conviction by the learned Officiating Sessions Judge of Allahabad and a jury under Ss. 330/34 and 384/34, I. P. C.

The appellants were found guilty for voluntarily causing hurt to extort a confession and money, and for house trespass. As this was a jury case, the appellants can only succeed if they can show that there has been any misdirection by the learned Judge to the jury which has in fact occasioned a miscarriage of justice. The prosecution story was that four Koals were seized by the accused, who were officials of the Manda estate, and that they were put to torture and beaten in order to make them confess that they had cut the barley produce of one Ram Partab. The defence evidence was that the whole story of the prosecution was mythical, and the defence called several witnesses to say that they had been present all the day in question with the accused and that no such thing took place.

The points made by Mr. Iqbal Ahmad, the counsel for the appellants in this case, are that there was misdirection in that, firstly, the learned Judge summed up in too summary a manner the evidence for the prosecution. I do not like to criticise the summing up of an experienced Judge such as the learned Officiating Sessions Judge of Allahabad; but I must say I think the evidence for the prosecution might have been dealt with at greater length.

If the criticizm of the charge to the jury had been confined to this point alone, I would not have interfered. The next portion of the charge which has been criticized is that part where the learned Officiating Sessions Judge deals with the evidence which he himself called under S. 540. He says in his charge to the jury:

"Abdul Sattar was questioned upon the same point and had made a statement to the effect that no enquiry had been made by the Manda estate."

I have been referred to the evidence on this point, and it is not quite correct to say that this witness said this. What he did say was that it was not within his knowledge that an enquiry had been made, which is quite a different matter. The Judge himself deals rather severely with the defence evidence upon this point, and it is quite possible that this misdirection might have had some effect upon the minds of the jury.

The third and last point is that the learned Officiating Sessions Judge failed altogether to give the usual direction to the jury, that if they had any reasonable doubt in their minds as to the guilt of the accused, they should give the accused the benefit of it. It is conceivable that in some cases such an omission might not neces-

sarily be vital. If, for instance, the evidence for the prosecution was overwhelming, so that no reasonable jury could possibly have any doubt, or where it would be unlikely that a jury would have any doubt on the matter, in such cases I think it is clear that the mere omission of this ordinary direction would not amount to such a misdirection that it might be said that there had been a miscarriage of justice. In this case, however, I am infuenced by a statement of the learned Judge himself where he says:

"Turning next to the evidence for the defence, it is apparently as strong as the evidence on the other side."

This means that prima facie to the ordinary jury the evidence was more or less equally balanced. In such a case, it is almost impossible to say that the omission of this very important portion of the charge to the jury might not have affected the minds of the jury. I have to consider in this case whether the misdirection was such as actually did occasion a miscarriage of justice. As to the definition of what a miscarriage of justice would be, I am in agreement with the judgment of Daniels, J. in the case of *Chiraji* v. *Akasi* (1), at p. 510 he says:

"It means that there must be a reasonable ground for apprehending that the misdirection may have affected the jury's verdict."

I think it is possible to say in this case that the omission of this charge may, under the circumstances of this particular case, have affected the minds of the jury. Each case must be considered on this point on its own facts. It is impossible to lay down any direction of law which will be binding in every case. Coming as I do to the conclusion that the jury may possibly have been affected by the omission to which I have just alluded, and also by the other points to which criticizm has been directed by the appellants, I hold that the verdict of the jury cannot stand.

It has been urged by the Government Pleader, that, as I have found that the verdict of the jury is vitiated, it is within the power of the appellate Court to go through the evidence and decide the case as if it were an ordinary appeal and not an appeal from the verdict of the jury. I am very doubtful if there is any warrant for this contention in Ss. 418 and 423, Criminal P. C. In any case I do not need to decide this point as I am satisfied that this is a proper case for retrial by another jury. I think, under all the circumstances of the case, and without making the smallest reflection upon the learned Officiating Sessions Judge who tried the case, that the retrial should be conducted by some other Judge. This case will, therefore, be sent back to the Sessions Judge of Allahabad to be tried by him or by any Judge to whom the Sessions Judge of Allahabad may send the case for trial. In the meantime the appellants will be admitted to bail to the satisfaction of the District Magistrate.

In this case I have not examined the evidence, and express no opinion, as to the weight of evidence either for the prosecution or the defence. Nothing that I have said must weigh with the Court trying the case.

In this case there was a delay of nine days after the learned Judge charged the jury until he reduced the charge to writing. If a Judge does not write his charge before delivery which, whenever practical, is the better course, he should reduce the charge to writing as soon as possible after charging the jury so that what he said is fresh in his mind. A delay of this character makes it impossible for an appellate Court to know whether the written charge was really the charge which was given to the jury.

R.M./R.K. *Case remanded.*

(1) A. I. R. 1926 All. 429.

A. I. R. 1930 Allahabad 29

YOUNG AND SEN, JJ.

Mt. Khuban—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 550 of 1929, Decided on 5th September 1929, from an order of the Sess. Judge, Etah, D/- 28th May 1929.

(a) Evidence Act, S. 24—Confession—Definition—Confession is admission made by accused.

A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime. [P 32 C 2]

(b) Evidence Act, S. 30—Self-implication is guarantee for truth of accusation against co-accused.

When the statement is self-incriminatory and also implicates a co-accused, the self-implication is the guarantee for the truth of the accusation against the co-accused and may be

taken to be a substitute for the sanction of oath. [P 32 C 2]

(c) Evidence Act, S. 114, Illus. (b)—Evidence of accomplice should be accepted when corroborated in material particulars by cogent evidence.

The statement made by an accomplice should be accepted when it is strongly corroborated in material particulars by clear and cogent evidence for authenticity of which is not open to doubt. [P 32 C 2]

(d) Evidence Act, S. 24—Retracted confession—Person making confession may be convicted when Court thinks that it is voluntary and true.

There is nothing in law to prevent a Court from convicting a person upon a confession which has been subsequently retracted, provided that the Court is convinced that the statement is voluntary and true. If there be anything from the barest suspicion to positive evidence that the confession has been obtained by threat, persuasion, etc., such confession has of course to be discarded. But where a confession is made by a person who is sui juris before a Magistrate in an atmosphere untainted by the influence of the police or by any other influence and there are no suspicions features about it there is no reasonwhy the statement should not be accepted. [P 32 C 2, P 33 C 1]

A. M. Khawaja—for Appellant.

U. S. Bajpai—for the Crown.

Judgment. — Mt. Khuban, Chand, Buddha and Bhanta alias Bhagwanta were committed to the Court of Sessions at Etah to take their trial under S. 302, I. P. C.

Mr. Iftikhar Hussain, Additional Sessions Judge who heard the case, acquitted Buddha, Chand and Bhanta. He convicted Mt. Khuban and sentenced her to death.

Mt. Khuban has appealed to this Court and the record has been submitted by the Sessions for confirmation of sentence.

The Local Government has appealed from the judgment acquitting Bhagwanta alias Bhanta. No appeal has been preferred against the order of acquittal regarding Chand and Buddha.

On the night between 14th and 15th January 1929, one Mt. Jawwa and her two infant daughters aged seven years and five months respectively were murdered. It is clear that the murder was effected by more than one person. It was a cold-blooded murder, a murder premeditated, organized and executed with fiendish malignity.

Syed Mohammad Mohsin Jaffery, Sub-Inspector posted at the Etah Kotwali received information through Ishtiak Ali, constable on 15th January 1929 that the corpses of a woman and two girls had been recovered from a well. The well was beyond the houses of Mt. Khuban and Mt. Jawwa deceased and beyond the octroi post.

There is nothing on the record to indicate the distance between the well and the house of Mt. Khuban.

The bodies were sent in usual course to the Civil Surgeon of Etah for a post-mortem examination. The post-mortem examination was held on 16th January 1929. The Civil Surgeon was of opinion that the death of the two small girls was caused "possibly" by strangulation. In the case of Mt. Jawwa, he was of opinion that cause of death was "probably" a deep wound on the neck of Mt. Jawwa.

Mt. Jawwa had no less than seven incised wounds. One of these was a large gaping incised wound 8" long from ear to ear cutting the neck above the larynx, cutting the upper part of aesophagus and deep vessels of the neck on either side notching the spine behind. It is not impossible that this wound was caused by a butcher's knife used with tremendous force. The four incised wounds on the fingers indicate that there may have been a struggle.

The age of Mt. Jawwa was about 35 years. Her first husband was Azim Ullah. Upon the latter's death, she married one Chand, who was a different person from Chand the accused. Upon the death of the second husband, she had some connexion with Chand the accused. She left Chand and then she either had nikah with or passed into the keeping of Akbar, butcher, husband of Mt. Khuban.

Akbar with his wife Mt. Khuban lived in one house. Mt. Jawwa with her children, one of whom was a grown up lad called Mahboob, lived in a different house.

When Mt. Jawwa left Chand the accused, the latter could not be expected to treat the matter with philosophical equanimity. He might well have conceived a grievance against Mr. Jawwa on that account.

Mt. Khuban appears to have conceived an intense hatred towards Mt. Jawwa, who was her rival in the affection of her husband.

This case is illustrative of the limits of brutal savagery to which a woman may be driven whose passions have been roused by jealousy.

On the night between 14th and 15th January 1929, there was a wedding, a 'butchers' wedding in Barla in the district of Aligarh. Most of the butchers of Etah had gone to this wedding and Akbar, the husband of Mt. Khuban had also joined the throng. The time was opportune. The coast was clear. Mt. Khuban went to Mt. Jawwa's house and entreated her to come to her house and sleep for the night, as she was alone. The instinct of Mt. Jawwa warned her and she at first refused; but she was prevailed upon by the entreaties of Mt. Khuban and went to Mt. Khuban's house with her two daughters; on this fateful night Mt. Jawwa and her two daughters did not emerge from that house alive.

The evidence of Mahboob is of some importance. He times the first visit of Mt. Khuban to Mt. Jawwa's house at about 10 p. m. He gives the details of the conversation between Mt. Khuban and Mt. Jawwa and how the latter was prevailed upon to go to Mt. Khuban's house. He is positive that his mother and two sisters accompanied Mt. Khuban to her house and did not come back in the morning. He saw Mt. Khuban standing on the chabutra of one Fakirey. Mt. Khuban asked him where his mother was. He replied that she might have gone somewhere. Mt. Khuban said that Mt. Jawwa might have been taken by some orderly peon to cook food at the house of some officer.

Mr. Jaffery, the investigating officer had examined the house of Mt. Jawwa and he found nothing in the house to indicate that any murder with violence had been committed there. He next visited the house of Mt. Khuban. He found that the ground of a kotah and the thatch in front of it had been recently plastered. He found blood stains on the wall of the kotah and blood marks on a corner of a doorleaf of the room on the inside. He also noticed blood marks on the patti and band of a cot in the kotah. He also recovered a knife having faint marks of blood. He took the earth of the wall and cut a specimen out of the doorleaf. These were sent to the Chemical Examiner and the Imperial Serologist in due course. Upon analysis, it was discovered that the stains were those of human blood.

The above evidence is sufficient to bring home the guilt to Mt. Khuban. She had motive for the offence. Her house was searched shortly after the recovery of the corpses. The recent plastering of certain portions of the room and the finding of stains of human blood on the wall and the doorleaf of the said room and also on the cot are unexplained. It is proved that the stains were of human blood and not of goat's blood which one might expect to find in the house of a butcher. It is further proved that Mt. Khuban had decoyed Mt. Jawwa to her house and that Mt. Jawwa and her two infant children were not seen returning from the house alive.

On 19th January 1929, the statement of Mt. Khuban was recorded by a Magistrate of the First Class under S. 164, Criminal P. C. This statement is full of circumstantial details. The Magistrate, who took down the statement, certifies that the statement is voluntary. There is nothing on the record to suggest that this statement was extorted by the police by threat or ill treatment or procured by persuasion.

On the same day, the aforesaid Magistrate recorded the statement of Bhagwanta alias Bhanta. There is nothing on the record to indicate that this statement was not voluntary.

The statements of Mt. Khuban and Bhanta agree on all material points. There are certain variations in the two statements which are indicative of the fact that the statements were not the result either of preconcert or tutoring.

Mt. Khuban states that about two or three years before the murder, there was liason between Chand accused and Mt. Jawwa. Mt. Jawwa gave up Chand and contracted an intimacy with her husband Akbar. She became pregnant by him and Akbar married her. For this reason, Chand began to cherish ill-will. When her husband was away from home, Chand sent Bhanta Ahir to her. Bhanta instigated Mt. Khuban to go and to bring Mt. Jawwa to her place to sleep for the night. Bhanta and Mt. Khuban went to take Mt. Jawwa. During her absence from home Chand was sitting on the roof of her house in the company of another Ahir. When Mt. Jawwa was coming to the house of Mt. Khuban, Bhanta was at the head of the party. On reaching Mt. Khuban's house Mt. Khuban took one charpai and Mt. Jaw-

was with her two daughters went to sleep on the other charpai in the same room. Bhanta, Chand and another Ahir, unnamed, killed Mt. Jawwa. Mt. Akbari woke up and wept. Mt. Khuban called the girl to her but Chand caught hold of the girl, sent for a rope through Bhanta Ahir and throttled Akbari. Chand also killed Anwari by throttling her. Chand tied the dead body of Mt. Jawwa into a bundle and made Mt. Khuban to hold the knots of the bundle. The three dead bodies were carried out of the houss in two bundles. When they were carrying the bundles, Chand told her that she should whitewash the house so that there be no trace of blood in the house. Chand also told her that she should bury the knife with which the murder had been committed. She whitewashed the house but did not bury the knife. She washed the knife and kept it. She admits having shown marks of blood to the Sub-Inspector. She admits having pointed out the charpai on which the murder was committed. She also admits that she made over the knife to the Sub-Inspector.

The aforesaid confession is corroborated in material particulars. The corpses were found in two bundles. The house was found by the Sub-Inspector newly whitewashed and plastered. A blood stained knife was found in the house and this was given by Mt. Khuban to the Sub-Inspector. The statement of Mt. Khuban is self-incriminating. She admits having decoyed Mt. Jawwa to her house; she knew that Mt. Jawwa was going to be murdered. She helped in the tying up of the bundles. She was present when Chand knifed Mt. Jawwa and throttled the two daughters. The chain of evidence against her is complete.

If ever there was a case which deserved capital punishment this was one. We dismiss Mt. Khuban's appeal, affirm the conviction and sentence and direct that the same be carried out according to law.

We are clearly of opinion that Bhagwanta alias Bhanta has been improperly acquitted by the Court below. The learned Sessions Judge was wrong in holding that the statement of Mt. Khuban under S. 164, Criminal P. C., was not a confession. We accept the definition of confession as given by Stephen and which has been quoted in the judgment of the trial Court :

"A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime."

We have quoted the major portion of the statement of Mt. Khuban and it would appear from the same that the statement fits in with the definition of "confession" as given by Stephen. The statement is self-incriminatory and it also implicates Bhanta. The self-implication is the guarantee for the truth of the accusation against the co-accused and may be taken to be a substitute for the sanction of oath. Under S. 30, Evidence Act :

"When more persons than one are being jointly tried for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such a person as well as against the person who makes such confession."

The confession of Mt. Khuban was affecting herself and also affecting Bhanta. This confession is, therefore, admissible in evidence against Bhanta.

Illustration (b), S. 114, Evidence Act, is an authority for the proposition that an accomplice is unworthy of credit unless he is corroborated in material particulars.

We have already shown above that the statement of Mt. Khuban is strongly corroborated in material particulars by clear and cogent evidence, the authenticity of which is not open to doubt.

The statement of Mt. Khuban chimes in with all the important particulars narrated by Bhanta in his confession before the Magistrate. It is true that both these confessions were subsequently retracted. It was observed by a Full Bench of this Court in *re, Raggha v. Emperor* (1) at (p. 833 of 23 *A. L. J.*) that a confession in its normal state is an entirely suspicious article and that a retracted confession is worse.

There is nothing in law to prevent a Court from convicting a person upon a confession which has been subsequently retracted provided that the Court is convinced that the statement is voluntary and true. If there be anything from the barest suspicion to positive evidence that the confession had been

(1) A. I. R. 1925 All. 627 (F.B.).

obtained by threat, persuasion, etc., such confession has, of course, to be discarded. But where the confession is made by a person who is sui juris before a Magistrate, in an atmosphere, untainted by the influence of the police or by any other influence and there are no suspicious features about it, there does not seem to be any reason why the statement should not be accepted. Where two such confessions are made by two different persons and both of them are self-incriminatory and each of them affects the other co-accused, this is an important circumstance, which may be and ought to be taken into consideration at the trial.

Bhagwanta states that in the month of Asarh, Akbar butcher's wife told him that she had a co-wife and asked him to do such a thing that is, to kill the co-wife and promised to pay him some money. Bhagwanta said that it was beyond his power to commit such a deed. She said that she had a man in hand and asked Bhagwanta to take one man in addition. Bhagwanta refused. On the day when the murder was committed, Akbar Ali, the husband, had gone out. His wife met Bhagwanta at noon and told him:

"Now is the chance to do such a thing my husband is not at home. Kill my co-wife now."

At 10 or 11 O'clock at night, he found there Chand and Buddha. She concealed the three men in the house and went to call her co-wife. The co-wife with her two daughters came. Akbar's wife lay down on one charpai. The co-wife with her two daughters lay down on the other charpai and fell asleep. Chand had kept a knife under the charpai of Akbar's wife. Akbar's wife came and informed these people that her co-wife had gone to sleep. "Kill her now." Chand took up the knife, pressed the throat of the co-wife and plunged the knife into her person. Akbar's wife throttled the two daughters. The corpses were tied into two bundles :

"Akbar's wife, Chand and I tied the dead body into two bundles one of which was made of a printed sheet and the other of a red sheet of quilt."

Buddha, Chand and Bhagwanta went away taking the bundles with them.

The statements of Bhagwanta and Mt. Khuban agree in important particulars but there are variations. Although each of the accused persons assigns to himself or herself a less prominent part, the statements are clear acknowledgments of participation in the murder of Mt. Jawwa and her two daughters.

The confession of Bhagwanta is corroborated by certain particulars :

(1) There is the medical evidence that Mt. Jawwa was killed with a knife and her two daughters died of strangulation.

(2) Corpses in two bundles were recovered from a well.

(3) A knife was recovered from the house of Mt. Khuban, which bore stains of human blood.

(4) The murder had taken place inside Mt. Khuban's house as was proved to a demonstration by the condition of the room, the recent plastering and whitewashing and from the things recovered in the room.

Mt. Khuban was actuated by jealousy, a frailty common to women. Bhanta was a hired assassin. He got Rs. 10 from Mt. Khuban as blood money—Rs. 10 for three human lives.

It may be incidentally mentioned that Mt. Khuban had made a clean breast of the whole affair to Gulzari and had admitted that Rs. 10 had been agreed to be given to Bhanta as the price of murder.

We have no reasonable doubt that Bhanta alias Bhagwanta took part in the murder and is guilty of an offence under S. 302, I. P. C.

We allow the Government Appeal No. 724 of 1929, set aside the order of the Additional Sessions Judge dated 28th May 1929, acquitting Bhagwanta. We convict Bhagwanta alias Bhanta under S. 302, I. P. C., and sentence him to death and direct that the said sentence be carried out according to law.

R.M./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 33

YOUNG AND SEN, JJ.

Emperor

v.

Latoor—Opposite Party.

Criminal Ref. No. 503 of 1929, Decided on 12th Sep. 1929, made by Addl. Sess. Judge, Moradabad, D/- 18th July 1929.

Penal Code, S. 212—Accused not knowing that person staying with him is offender—Conviction under S. 212 cannot be sustain-

Advocate High Court
Jammu & Kashmir

ed—Offender means person contravening provision of and punishable under criminal law.

A person can be supposed to "know" where there is a direct appeal to his senses. Person "has reason to believe" under S. 26 ii he has sufficient cause to believe the thing but not otherwise. The word "offender" used under S. 212 means a person who has contravened the provisions of any criminal law, which is punishable either with death, transportation, imprisonment or fine. Where there is neither affirmative nor any circumstantial evidence to bring home to the door of the accused that he knew or had reason to believe that the person he was harbouring was an offender within the meaning of S. 212, his conviction under S. 212 cannot be sustained. [P 34 C 1 2]

M. Waliullah—for the Crown.

L. M. Roy—for Opposite Party.

Judgment.—This is a reference by the learned Sessions Judge of Bijnor recommeding the enhancement of sentence in the case of one Latoor who was convicted by a Magistrate of the First Class under S. 212, I. P. C. and, sentenced to a fine of Rs. 25.

If the conviction was justified, there can be no doubt that the sentence passed by the learned Magistrate was grossly inadequate and the reference made by the learned Sessions Judge was throughty justified and proper.

The reference is opposed by Latoor, who is represented by counsel. Mr. Roy challenges the propriety and legality of the conviction of Latoor under S. 212, I. P. C.

The charge preferred against Latoor was that on or about 30th January 1929, he was found concealing and harbouring one Baldewa an absconded "offender" under Ss. 396 and 366, I. P. C. knowing or having reason to believe that the said person was an offender and absconder. We have been taken through the evidence on the record and we do not find that there are any sufficient materials on the record to show that Baldewa had committed an offence under S. 396 or S. 366, I. P. C. We have been referred to the statement of Mt. Bharto who says that she was kidnapped by Baldewa. Baldewa has not yet been tried and the solitary statement of Mt. Bharto as to her being kidnapped by Baldewa does not commend itself to us.

The prosecution is confronted with another difficulty. There is neither affirmative nor any circumstantial evidence to bring home to the door of Latoor that he knew or had reason to believe that Baldewa was an offender within the meaning of S. 212, I. P. C. A person can be supposed to "know" where there is a direct appeal to his senses. A person "has reason to believe" under S. 26, I. P. C. if he has sufficient cause to believe the thing but not otherwise.

It may be that proclamations were issued broadcast against Baldewa. It is possible that his property may have been attached but it does not follow therefrom that Baldewa was an offender. The word "offender" used under S. 212, I. P. C. means a person who has contravened the provision of any criminal law, which is punishable either with death transportation, imprisonment or fine. Upon the evidence on the record, it is impossible for us to come to the conclusion that Baldewa was an "offender" under S. 212, I. P. C.

The result is that we reject the reference. We set aside the order of the Magistrate, convicting Latoor under S. 212, I. P. C. and direct that the fine if paid should be refunded to him.

R.M./R.K. *Reference rejected.*

A. I. R. 1930 Allahabad 34

SEN, J.

P. C. Chaudhri—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 592 of 1929, Decided on 2nd September 1929, made by Sess. Judge, Allahabad, D/- 10th August 1929.

Motor Vehicles Act. S. 16—U. P. Motor Vechicles Rules, R. 11—R. 11 is not applicable to cars registered outside United Provinces.

There is nothing in the wordings of these rules to show that R. 11 applies to cars registered outside the United Provinces. It is clear from the definition of "Registering Authority" in R. 3 that this expression, as used in R. 11, means the authority who had registered the car under the rules in force in the United Provinces. Where therefore the applicant's car is not registered in the United Provinces, but brought there for a short period, R. 11 has no application to his case. [P 35 C 1]

Judgment.—This is a reference by Mr. Kisch, the learned Sessions Judge of Allahabad with the recommendation that the order passed by a Magistrate, First Class of Allahabad convicting one Mr. P. C. Chaudhri under S. 16, Motor Vehicles Act, 1914, be set aside.

The learned Sessions Judge has given excellent reasons in support of his reference. The conviction is clearly illegal and must be set aside.

Mr. P. C. Chaudhri, resident of No. 4 Bankshall Street, Calcutta, came to Allahabad on a short visit. He brought with him his motor car bearing No. 23,047. On 14th April 1929, a constable on traffic duty demanded the production of the registration certificate. The Line Inspector who acts under the orders of the Superintendent of Police also made a similar demand. The certificate of registration was not produced. The result was that he was prosecuted for having contravened the provisions of R. 11 of the United Provinces Motor Vehicles rules and fined Rs. 5.

Rule 11 of the United Provinces Motor Vehicles rules provides as follows:

"Form of certificates and card; their production on demand. Certificates of registration and registration cards shall be in the forms provided in Schs. B and C, and shall be signed by the registering authority or by a person duly authorized by him in this behalf, and the owner of the vehicle in respect of which a certificate of registration has been issued shall be bound to produce the certificate when required so to do by the registering authority."

The "registering authority" referred to has been defined in the rules as meaning the Superintendent of Police, or an Assistant or Deputy Superintendent or Inspector of Police authorized by the Superintendent of Police to perform the duties of the "registering authority" under these rules. It is to be observed that there is nothing in the rules in force in the Presidency of Bengal corresponding to R. 11 of the United Provinces rules. The case lies within a very narrow compass. Do the United Provinces rules apply to a car registered in Calcutta and which has been brought to the United Provinces for a short duration? The learned Sessions Judge observes as follows:

"There is nothing in the wording of these rules to show that R. 11 applies to cars registered outside the United Provinces. It is clear from the definition of "registering authority" in R. 3 that this expression, as used in S. 11, means the authority who had registered the car under the rules in force in the United Provinces and as the applicant's car was not registered in the United Provinces, in my view, R. 11 has no application to his case."

I am in complete agreement with this view. I therefore accept the reference upon the ground set out in the referring order of the learned Sessions Judge dated 10th August 1929, set aside the conviction and sentence under S. 16, Motor Vehicles Act coupled with R. 11, of the United Provinces Motor Vehicles rules and direct that the fine, if paid be refunded.

R.M./R.K. *Conviction set aside.*

A. I. R. 1930 Allahabad 35

SEN, J.

Lala Bansi Dhar—Applicant.

v.

Brij Basi Lal—Opposite Party.

Criminal Ref. No. 482 of 1929, Decided on 14th August 1929, made by Sess. Judge, Mainpuri, D/- 13th June 1929.

Criminal P. C., S. 517 — Where house is not property in respect of which offence is committed no order under S. 517 can be made.

A house was in the occupation of *A*. It was alleged that one *B* was the owner of the house and *C* was in possession of the house on *B's* behalf. Later on *B* applied to the police to be put in possession of the house as *C* had disappeared. The police put *B* in possession, *B* sold the house to *D*. Thereupon *A's* son *E* instituted a complaint against *D* and others charging them with offences under Ss. 143, 380 and 448, Penal Code. Before filing complaint the police took possession of the house. The accused were acquitted. But during pendency of the case the key of the house was by order of a Magistrate delivered to *E*. *D* presented an application for an order directing *E* to hand over the key to him.

Held: that *E's* complaint being dismissed and the accused being acquitted it could not be said simply by reason of the fact that one of the charges was under S. 448, Penal Code, the house was a property in respect of which an offence was committed. The house therefore was not a property regarding which an offence was committed within the meaning of S. 517. The order as to the key was passed by a competent Court and *E's* possession of the key was not unlawful. Moreover when the Court was moved for an order directing *E* to hand over the key to *D* neither the house nor the key was in the custody of the Court. The Court therefore had no power to make an order under S. 517 in favour of *D*. [P 36 C 2]

Nehal Chand—for Applicant.

K. D. Malaviya—for Opposite Party.

Judgment.—This is a reference by the learned Sessions Judge of Mainpuri recommending that an order passed by Babu Ganga Prasad, Magistrate, First Class, on 15th January 1929, be vacated and that the said Magistrate be directed under S. 517, Criminal P. C., to recover a key from the possession of Brij Basi Lal and make over the same to Lala Bansidhar.

There is a house at Shikohabad which was in the occupation of Mr. Radha Kishun, pleader. Radha Kishun died in 1908.

It is alleged that one Govind Prasad was the owner of this house and that he had let out the same to one Mulua. It is further alleged that Mulua had continued in possession of this house on behalf of Govind Prasad between the years 1908 and 1920.

Trouble began in 1924 when Govind Prasad applied to the Mainpuri police to be put into possession of this house, inasmuch as the tenant Mulua had disappeared from the scene and had locked up the house. The police appeared to have put Govind Prasad into possession of this house.

On 20th September 1927, Govind Prasad sold the house to Bansidhar. On 26th September 1927, Brij Basi Lal, son of Radha Kishun, instituted a complaint in the Court of Mr. Jwala Prasad, Magistrate First Class, against Bansidhar and 17 others charging them with offences punishable under Ss. 143, 380 and 448, I. P. C. Before the filing of the complaint the police appear to have taken possession of the house and to have locked the house.

The Magistrate, upon the receipt of the police report, dismissed the complaint under S. 203, Criminal P. C., on 28th March 1928. The key of the house, however, continued to remain in the possession of the police. Upon an application for revision filed by Brij Basi Lal, the learned Sessions Judge of Mainpuri set aside the order dismissing the complaint and directed further enquiry. Bansidhar's application to the High Court against the order of the Sessions Judge was rejected. Under the orders of the District Magistrate of Mainpuri, the case was transferred for trial from the file of Babu Jwala Prasad to that of Mr. Kali Charan, a Tahsildar Magistrate. During the pendency of the case before Mr. Kali Charan, the key of the house was by the orders of Mr. Kali Charan delivered to Brij Basi Lal. The case was eventually transferred to Mr. Ganga Prasad, a Magistrate of the First Class, who on 29th December 1928 acquitted the accused.

An application was presented by Lala Bansidhar in the Court of Mr. Ganga Prasad for an order directing Brij Basi Lal to hand over the key to him, which had remained in his possession since the order of Mr. Kali Charan, the Tahsildar Magistrate. This application was refused by Mr. Ganga Prasad, mainly upon the ground that the key having been put into the possession of Brij Basi Lal by a competent authority, he had no jurisdiction either to revise or to overset the said order. On an application for revision filed by Lala Bansidhar the learned Sessions Judge of Mainpuri has referred the case to this Court under S. 438, Criminal P. C.

The title to the property is by no means clear. The complaint of Lala Brij Basi Lal dated 26th September 1927, having been dismissed and the accused acquitted, it cannot be said that simply by reason of the fact that one of the charges preferred was under S. 448, I. P. C., the house was a property in respect of which an offence had been committed. The allegation of the complainant that the accused persons had by use or by show of criminal force taken possession of the house did not find favour with the trial Court and was discredited.

The house was not a property regarding which an offence was committed within the meaning of S. 517, Criminal P. C. The house was at one stage, in custodia legis, the police being the agents of the Court. The possession of the key may under certain circumstances be evidence of symbolical possession of the house itself.

Mr. Kali Charan, the Tahsildar Magistrate, at one time had the seisin of the entire case by reason of the order passed by the District Magistrate of Mainpuri. It was within his competence to transfer the possession of the house to such person as he considered to be desirable and fit. He having directed that the key of the house should be transferred to Brij Basi Lal, it could not be said that Brij Basi Lal's possession of the key was unlawful and was open to challenge either on the ground of illegality or for want of any jurisdiction in Mr. Kali Charan, the Tahsildar Magistrate. The fact, however, remains that on 15th January 1929 or thereabout, when Mr. Ganga Prasad was moved for an order directing Brij Basi Lal to hand over the key to Bansidhar neither the house nor the key was in the custody of the Court. The Court therefore had no power to make an order

under S. 517, Criminal P. C., in favour of Bansidhar.

Mr. Nehal Chand in support of the reference has called my attention to S. 516 (a), Criminal P. C. That section has no application to the facts of the present case because neither the house nor the key is:

"property regarding which any offence appears to have been committed or which appears to have been used for the commission of an offence."

The key moreover was not produced before the criminal Court at any stage of the enquiry or trial.

My attention has also been drawn to S. 561 (a), Criminal P. C. and it has been argued that to allow Brij Basi Lal to retain possession of the key amounts to an abuse of the process of the Court and the ends of justice are likely to be met by restoring the status quo ante.

It is difficult, in view of the facts of this case, to say as to whether justice lies on the side of Lala Bansidhar. The title to the property cannot be effectively determined by the criminal Court. Any party aggrieved by the order of Mr. Ganga Prasad, dated 15th January 1929, is entitled to seek his proper remedy before the right forum. I refuse to entertain the reference. Let the papers be returned.

R.M./R.K. *Reference dismissed.*

A. I. R. 1930 Allahabad 37

YOUNG AND SEN, JJ.

Emperor

v.

Kudua Bari — Accused — Opposite Party.

Criminal Revn. No. 369 of 1929, Decided on 6th September 1929, from order of Sess. Judge, Mainpuri, D/- 21st February 1929.

Criminal P. C., S. 110 — Object of S. 110 is to offer protection to public — Evidence on question of repute should be tested in light of tangible facts.

The object of S. 110 is to offer protection to the members of the public and is not intended to be an engine of oppression. The Courts below have got, in all cases coming up either under Ss. 108, 109 or 110, to pay strict regard to the question whether the evidence produced is legal evidence in the case on the question of repute. Nothing is more easy than to put forward a general charge against a certain person that he is a burglar and thief. The said statement has got to be tested in the light of tangible facts and particulars if there are any such facts to support the story. If there are no such facts, the evidence loses its value.

[P 37 C 2 ; P 38 C 1]

U. S. Bajpai—for the Crown.

Jaikishan Lal—for Opposite Party.

Judgment.—Proceedings have been instituted against Kudua Bari under S. 110, Criminal P. C., on the allegation that he was a habitual burglar and thief and that his character was so desperate and dangerous that it was a menace to the community at large to allow him to remain without being bound over. Mr. Budh Sen, Magistrate, First Class of Mainpuri, under his order dated 22nd January 1929, held that the accused was a habitual thief and burglar but there was no evidence that he was so desperate and dangerous as to justify his being bound over on the second ground. The learned Magistrate ordered the accused to execute a personal bond for Rs. 200 with two sureties each in the same amount to be of good behaviour for a term of three years. The accused was not in a position to furnish security and the matter was placed before the learned Sessions Judge under S. 123 (2), Criminal P. C.

The judgment of the trial Court is an excellent model of what a judgment should not be. It is summary sketch and most unconvincing. Without caring to weigh the value of the evidence and without trying to consider whether the evidence produced before him was legal evidence of repute or otherwise, he has pronounced judgment in this case.

The learned Sessions Judge has taken considerable pains in analysing and dissecting the evidence and in testing their value. The whole evidence in this case may be placed under two groups: (1) evidence which cannot be treated as evidence of repute and is no evidence at all, and (2) evidence which is legally admissible but is not sufficient or reliable. The learned Sessions Judge has sifted this evidence very carefully and we have not the slightest doubt as to the correctness of his conclusion.

The object of S. 110, Criminal P. C., is to offer protection to the members of the public and is not intended to be an engine of oppression. The Courts below have got, in all cases coming up either under Ss. 108, 109 or 110, Criminal P. C., to pay strict regard to the question whether the evidence produced is legal evidence in the case on the question of re-

pute. Nothing is more easy than to put forward a general charge against a certain person that he is a burglar and thief. The said statement has got to be tested in the light of tangible facts and particulars if there are any such facts to support the story. If there are no such facts, the evidence loses its value.

The maintenance of a history-sheet may have its uses and a history-sheet may in some cases form good evidence against the accused. The difficulty which we experience in case after case is that it turns out that the history-sheet is no more than an ex parte proceeding and that the accused does not know upon what ground the history-sheet has been opened against him, nor does he know what facts it contains.

We are in entire agreement with the view of the learned Sessions Judge and are clearly of opinion that the present application for revision ought not to have been made. The learned Government Advocate as usual with him has placed the case for the Crown in its true and correct perspective. We dismiss this application.

R.M./R.K. *Application dismissed.*

A. I. R. 1930 Allahabad 38

YOUNG AND SEN, JJ.

Emperor

v.

Narbada Prasad and *another* —Respondents.

Criminal Appeal No. 304 of 1929, Decided on 10th September 1929, against order of Magistrate, First Class, Allahabad, D/- 28th January 1929.

(a) District Boards Act, S. 34 — "Interest in contract" means financial interest with profit.

The expression "interest in a contract" means a financial interest with profit or hope of profit from the contract as the object of the person interested. This must be inferred from the facts in evidence in each case. [P 38 C 2]

(b) Criminal Trial—Evidence—Crown can rely on incriminatory evidence found in house search of accused.

The Crown is entitled to rely upon any material evidence of an incriminatory character found in the house of an accused person as the result of house search. [P 41 C 2]

(c) Evidence Act (1872), S. 34 — Necessity of formal proof that books are kept in course of business has been dispensed with.

Under the old Evidence Act 2 of 1855 books to be admissible had to be "proved to have been regularly kept in course of business. In the later Act I of 1872 the words "proved to have been" have dropped. This amounts to material alteration in the law. The legislature has dispensed with the necessity of any formal proof that the books were kept up in the regular course of business. It is a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the regular course of business. The only limitation imposed by the statute is that the statement contained in the account books "shall not alone be sufficient to charge any one with liability." The value of the entries is corroborative and cannot be used as independent evidence to charge any person with liability : 18 *All.* 92, *Rel. on* ; 27 *Cal.* 118, *Ref* ; 4 *Bom.* 576, *Dist.* [P 41 C 2, P 42 C 1].

(d) Evidence Act, S. 68—Account book is not document required by law to be attested.

An account book is not a document which is required by law to be attested and S. 68 can have no application to a case in which such account book is produced in evidence. [P 42 C 1]

(e) Criminal Trial—False allegation in defence against respectable person of conspiracy to bring false charges, aggravates original offence.

False allegation against innocent and respectable persons of criminal conspiracy to bring false charges, when used as defence aggravate greatly the original offence. This type of defence is much too common in India and it ought to be recognized that where a defence of this character is obviously false, that fact oughtto be taken into consideration in awarding punishment. [P 45 C 1, 2]

U. S. Bajpai—for the Crown.

K. N. Katju and *A. P. Pandey* and *Gaya Prasad*—for Respondents.

Judgment.—Pandit Narbada Prasad and Jagannath Prasad alias Kunnoo were charged before Mr. S. W. Bobb, Frst Class Magistrate of Allahabad, under S. 168, I. P. C., and Ss. 168, I. P. C., and 168/109,. I. P. C., for contravention of S. 34, District Boards Act of 1922. The Magistrate acquitted both the accused.

Section 34, District Boards Act reads as follows :

"(1) A member of the Board who otherwise than with the permission in writing of the Commissioner, knowingly acquires or continues to have directly, or indirectly by himself or his partner, any share or interest in any contract or employment with, by or on behalf of the Board, shall be deemed to have committed an offence under S. 168, I. P. C."

An "interest in a contract" we hold to mean a financial interest with profit or hope of profit from the contract as the object of the person interested. This must be inferred from the facts in evidence in each case.

In the month of January 1928, the District Board of Banda was suspended by order of the Government. It ap-

pears to us, after reading of the activities of this Board in this case, that the Banda District Board might have been suspended earlier with great advantage to the citizens of Banda. The administration of the District Board was placed in the hands of the District Magistrate, who appointed Mr. Chakarvarti as Official Chairman of the Board. Mr. Chakarvarti, on investigation into the affairs of the District Board, thought it proper to request Rai Bahadur Thakur Jaswant Singh, a Special Magistrate of Banda, to investigate the connexion of Narbada Prasad, who had been Chairman of the Mau Sub-Committee of the District Board, with a contract for metalling one mile of a road in the Mau Sub-Division which had been given to the second accused, Jagannath Prasad. It is to be noted that the investigation was started officially and not at the instigation of Thakur Jaswant Singh. On 24th March 1928, Thakur Jaswant Singh had finished his investigation and made his report in this matter to Mr. Chakarvarti. The police then took the matter in hand and as a result the Government sanctioned the prosecution of Narbada Prasad on 7th July 1928. In view of the nature of the defence in this case to which we will allude hereafter these dates are important. Mr. Vishnu Sahai, a First Class Magistrate of Allahabad, originally commenced the hearing, but, on an application for transfer being made to the High Court, the case was ordered to be transferred to Mr. S. W. Bobb.

The evidence produced by the prosecution consisted of :

(a) The circumstances surrounding the grant of the contract to Jagannath and the treatment accorded to Messrs. Mohammad Sharif and Gulab Chand, who had in January 1927 originally tendered for the contract and had their tender accepted by the Engineer, subject to the sanction of the Board which was never granted.

(b) The evidence of 13 labourers, who were engaged in the construction of the road or in collecting kankar who gave evidence to the effect that they had been engaged by Narbada Prasad and paid by him either on the road or at his house.

(c) The evidence of 5 cart-men, who said that Narbada Prasad had hired their carts and paid them the agreed sums.

(d) The evidence of 3 boatmen, who carried the kankar used on the road, that their boats were engaged by Narbada Prasad aud that they were paid by Narbada Prasad at his house.

(e) The evidence of Ram Kumar, the ferry contractor of Rajpur Ghat, who said that Narbada Prasad's kankar was conveyed by the boatmen, and who gave evidence that Narbada Prasad's servant used to look after the work, and that Narbada Prasad himself used to come as well, and that he used to see the workmen at the house of Narbada Prasad. He also said that Narbada Prasad himself had told him that he had taken the contract.

(f) The evidence of Munni Lal, whose house was on the actual portion of road being remetalled, who said that Narbada had told him that he was going to take the contract for the road, and that Jagannath had told him he had been given a four anna share in it. He also saw the labourers at Narbada Prasad's house. He deposed that Jagannath was a man who could not possibly undertake the contract, as his financial means were very limited, and that previously to this contract Jagannath had been engaged by his brother-in-law at Rs. 15 a month.

(g) The evidence of the karpardaz of Mohammad Sharif and Gulab Chand, who had originally tendered for the said contract. He says that, after the obstacles which had been put in the way of Mohammad Sharif and Gulab Chand, and at the time when it appeared fairly obvious that the delay which they were subjected to was deliberate, Narbada Prasad one day told him on the road that :

"he wanted to take this theka in the name of Jagannath. How have you butted in ? You give up this or I will cause trouble and you will lose."

(h) The formal evidence as to the proof of the documents of the District Board.

(i) Police and search witnesses.

(j) And, lastly, the very important documentary evidence which was discovered in the search of the houses of Narbada Prasad and Jagannath. These documents consisted of muster rolls, in which names of the labourers

on the contract appear with the amounts which were paid to them, a cash book consisting of entries from 18th February 1927 down to 17th July 1927, setting out the payments made by Narbada Prasad for the purposes of the contract, and also debiting to the account in favour of Narbada Prasad a sum of Rs. 1,800, to which we will allude later. This cash book is of most vital importance and, in our view, it is impossible for any one having this evidence before him to come to any other conclusion but that Narbada Prasad was interested in the contract within the meaning of S. 34, District Boards Act. There was also a ledger account, which extracted from the cash book all the payments made by Narbada Prasad from February to July, amounting in all to Rs. 2,960-12-6, on account of this contract. (The contract price to be paid to Jagannath was Rs. 4,995). The cash book, ledger and muster roll were discovered at Jagannath's house. Jagannath admits that the writings in Muris and the cash book and ledger are his. At the house of Narbada Prrasad was discovered a diary in the handwriting of Narbada Prasad himself, in which there were entries which showed conclusively that Mahadeo Pandit and Sain who were employed on the contract, were his servants and that he was in the habit of paying small amounts to Jagannath himself. It was admitted that Mahadeo and Sain were the servants of Narbada Prasad, and it was proved that Mahadeo wrote a large part of the accounts. A receipt for the sum of Rs. 100, which was the deposit made on Jagannath Prasad's tender for this contract, was discovered in the pocket of Narbada Prasad.

With regard to the proceedings of the District Board previous to the giving of the contract in question to Jagannath in May 1928, it is unnecessary for us to set the evidence out in detail, as this is all given in the record; but there can be no doubt that every difficulty was put in the way of Mohammad Sharif and Gulab Chand, whose tender in January was lower than that of Jagannath. Orders were given to them by the Engineer to start work in expectation of the sanction of the Board in that month. An agreement for the contract was executed by these contractors in which they agreed to finish the road by the end of March 1927. They could not, however, get definite orders from the Board sanctioning the contract. Application after application was made by them to the Board for clear orders: see letter from Wazir Beg, dated 14th April 1927; but no definite reply could be obtained by them. Eventually, through disgust, and because the date by which they had agreed to finish the road had long since expired, these contractors wrote to the Board giving up the contract. With regard to this, an important letter was written by their agent Shahid Husain on 27th June 1927, one year before this prosecution was commenced to the Engineer of the District Board, in which he sets out their complaint and made the definite allegation that:

> "Pandit Narbada Prasad, Chairman, Sub-Committee, Mau having taken the contract in the name of his man, took possession of the entire material belonging to us."

The Engineer sent on this letter to the Chairman of the District Board with a note which dealt only with the amount of kankar in Mohammad Sharif's and Gulab Chand's bill and made no observation upon the very important allegation against Narbada Prasad and Jagannath. It is further to be noted that, although this letter was placed before the Chairman of the Board, no reply was received by these contractors, and no denial was made of the serious allegations contained in the letter. It appears to us that the only explanation of this can be that both the District Engineer and the Chairman knew the position very well and did not trouble to make a reply. On 10th May, Mohammad Sharif retired from the contract, and it is not unimportant to note that, although from January to May the sanction of the Board could not be obtained for Mohammad Sharif and Gulab Chand, in 24 hours the contract for Jagannath was sanctioned. It is also to be noted that, although security for completion of the contract had been taken from Mohammad Sharif, none was taken from Jagannath. We are satisfied that influences behind the scene were being used to prevent Mohammad Sharif and Gulab Chand doing the work, and to obtain the contract for Jagannath.

As to the evidence of the labourers on the road, their evidence was clear and was not shaken in cross-examination. It is to be noted that in one of two cases,

where these witnesses gave particularly strong evidence the Magistrate put a note at the bottom of the evidence of "unsatisfactory demeanour." The only suggestion in cross-examination against these witnesses was that they were either the tenants of Thakur Jaswant Singh or of Sheo Kunwar, against whom it was alleged by the defence that the prosecution was entirely due to their enmity. It is important to note as regards this allegation that Thakur Jaswant Singh and Sheo Kunwar are the big zamindars in the neighbourhood and it would be only natural that the majority of the labourers employed should be their tenants. The Magistrate dismisses this class of evidence on the ground that "they are men of absolutely no status," a wholly unsatisfactory and unjudicial reason.

As regards the cartmen, their evidence too was unshaken. The learned Magistrate dismisses this evidence on the ground that on the muster roll found in the house of Jagannath their names do not appear, and that they were "evidently tutored witnesses." As the muster roll apparently deals solely with the labourers engaged in the contract, one would hardly expect that independent carters would appear on this roll.

There is no reason to disbelieve the evidence of the boatmen.

As regards the evidence of Ram Kumar, the learned Magistrate rejects it on the ground that in some case, in which this man had given evidence, the Magistrate who heard the case, and whose judgment is exhibited in the record, commented adversely upon him as a man:

"who haunts the Court of the Special Magistrate (Thakur Jaswant Singh) and lives by either standing security to or by giving evidence for the parties in that Court."

It is to be noted that the Magistrate who made this comment does not give any clue in his judgment to the evidence on which he so found. Mr. Bobb dismissed this witness with the remark:

"He is evidently another hanger on in the Court of the Special Magistrate (Thakur Jaswant Singh)."

We will deal with the allegations against Thakur Jaswant Singh hereafter.

The evidence of Munni Lal appears to us to be important and reliable, and yet his evidence is discarded on the ground that "he is Thakur Jaswant Singh's man."

We are satisfied that the oral evidence alone is sufficient to bring home the charge to the accused.

With regard to the documentary evidence a preliminary objection has been taken by Dr. Katju that the account books Exs. G-18 and G-20 are not admissible in evidence for want of formal proof. It cannot be questioned that the Crown is entitled to rely upon any material evidence of an incriminatory character found in the house of an accused person as the result of house search. If Exs. G-18 and G-20 directly or indirectly connect Jagannath Prasad with the offence charged, the fact that those documents were found in the house of Jagannath is itself a circumstance which, if unexplained, may seriously tell against Jagannath Prasad. It has not been suggested in the case that any entries in these documents have been interpolated or fabricated.

Section 43, Act 2 of 1855, provided that:

"Books proved to have been regularly kept in the course of business shall be admissible as corroborative but not as independent proof of the facts stated therein."

Act. 2 of 1855 was repealed and was replaced by the Evidence Act (Act. 1 of 1872). S. 34 of this Act runs as follows:

"Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to enquire, but such statements shall not alone be sufficient to charge any person with liability."

From a comparison of the two sections referred to above, it is manifest that there is a material difference between the two and the change of expression in the later Act, is not a mere variant but amounts to a substantial alteration in the law. Under the former Act, books to be admissible had to be "proved to have been regularly kept in the course of business." In the later Act, the words "proved to have been" have dropped out. The legislature dispensed with the necessity of any formal proof that the books were kept up in the regular course of business. It was a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the course of business. It was held by West, J., *In re, Munchershe Bezonji* v. *New Dhurmsey Spinning & Weaving Co.* (1), that only

(1) [1879] 4 Bom. 576.

such books as are entered up as transactions take place that can be considered as books regularly kept in the course of business within the meaning of S. 34, Evidence Act. Their Lordships of the Privy Council did not approve of this ruling and held that it gave a much too limited meaning to the section: *Deputy Commissioner of Bara Banki* v. *Ram Prasad* (2).

The only limitation imposed by the statute is that the statement contained in the account books "shall not alone be sufficient to charge any one with liability." If the entries stood by alone, without any independent evidence such as has been produced in this case, the entries could not be treated as sufficient evidence to convict either Jagannath Prasad or Narbada Prasad.

Whether or not the books have been regularly kept in the course of business is a question of fact and this question may be solved by a reference to the entries in the books. We have examined these books of accounts. There are two columns on each page relating to the debits and credits. The entries are duly dated. The cash book begins on each date with the closing balance of the previous date. The entries on each side are totalled at the close of the day and the debits and the credits tally. There is a reference in the cash book to the corresponding entry in the ledger. The entries in the ledger on the debit and credit side agree with the entries in the cash book.

It is clear therefore that these documents are account books regularly kept in the course of business.

The value of the entries is corroborative and cannot be used as independent evidence to charge any person with liability. It was so held in *Dwarka Das* v. *Sant Bakhsh* (3).

An account book is not a document which is required by law to be attested and S. 68, Evidence Act, has no application. The prosecution do not allege that the documents have been wholly written or have been written in part by any particular person except as to the entry which has been marked as Ex. G. The prosecution have established that the said entry is in the handwriting of Narbada Prasad. As to the rest of the entries in the account books, S. 67, Evidence Act, does not apply.

We hold that the documents in question are admissible in evidence against Jagannath Prasad and Narbada Prasad without any formal proof.

It is to be noted that the documentary evidence completely upsets the evidence that the interest of Narbada Prasad in the contract was merely that of a financier in that he had merely lent money to Jagannath and had no interest in the contract itself. Mr. Bobb says that in this matter Narbada Prasad acted as a banker. No one looking at these accounts could honestly come to this conclusion. The cash book shows that not only did Narbada Prasad pay substantial amounts to Jagannath himself for payment of bills, but that he paid small amounts from one rupee upwards to various individuals on account of this contract, and, when he made these small payments, they were credited to him in the cash book. This cannot possibly be taken to be the action of a man who is simply lending money to the real contractor. It is important to note that Narbada Prasad does not produce any promissory note or other document which he would in all probability have if the transaction was one of an ordinary loan. It is alleged that the loans were merely oral, and that no document was required. This might be so if the sums advanced were one or two sums of, say, Rs. 1,000 or Rs. 2,000. It is an impossible suggestion where money was advanced daily in sums of one rupee upwards. Narbada Prasad must at least have kept some account himself to record the amount if he was only lending the money, and the account found was Jagannath's only. Narbada produces no such record. These accounts corroborate the statement of the workers that they were paid by Narbada Prasad. There is one other curious item in the cash book. On 30th July 1927, the District Council passed a resolution agreeing to pay Rs. 1,800 to Jagannath on account of the contract. This appears, according to the record, to have been paid by cheque on 1st August. There is an exact similarity between the amount paid by the District Board and the amount appearing in the cash book on 17th July. It has been contended by the prosecution, and de-

(2) [1900] 27 Cal. 118=26 I. A. 254=7 Sar. 586 (P.C.).
(3) [1896] 18 All. 92=(1896) A. W. N. 233.

nied by the defence, that this sum of Rs. 1,800 is the amount which was paid by the Board. It certainly was brought into the contract account, and although the dates, as we have set out above, do not coincide, it is probable, in view of the way in which the District Board carried on business, that this amount was indeed the sum received from the District Board. It may be that this amount was paid earlier than the documents show, and that subsequently the matter was put right. It is curious, as regards this sum, that it appears in two amounts Rs. 1,788 debited to Narbada Prasad as against the amounts that he had paid, and Rs. 12, which appears under the heading "Jagannath went to Banda for bringing money." If this really was merely a repayment to Narbada Prasad of a sum lent by him (he having no other connexion with the contract), it is a peculiar thing that a sum of Rs. 12 should be deducted by Jagannath for his expenses in getting the money.

As regards the ledger account, it was contended by Dr. Katju on behalf of Narbada Prasad that as a large proportion of the amount was paid or expended by Narbada Prasad from February to May, and that Jagannath did not obtain the contract until 13th May, therefore, the payments previous to May could not possibly have been on account of Jagannath's contract. It is to be noted that Jagannath had previously held one or two contracts from the Board. There are two observations which we have to make upon this contention of Dr. Katju. Firstly, that if, as we think, appears to be clear from the account, the payments from February to May were made on behalf of this contract, it conclusively proves that Narbada Prasad knew months before Jagannath obtained the contract that he was going to get it. Alternatively, if the earlier payments were not made on behalf of this contract, they were made on behalf of other contracts which Jagannath had from the Board, and therefore would show that Jagannath's previous contracts were also really the contracts of Narbada Prasad. There must have been later accounts kept by Jagannath relating to this contract showing how the final payments by the Board were dealt with. Such accounts would have been of great assistance to the defence if there was only a loan by Narbada. No later accounts were produced. The inference is obvious.

The receipt for the deposit on the tender of Jagannath was, as already stated, found upon Narbada Prasad, and it is important to note that when Jagannath made his statement before the Magistrate on 15th September 1928, he was asked this question:

"Had you deposited Rs. 100, the earnest money, along with tender, Ex. A-5?"

The reply was:

"As regards this, at this time I do not want to say anything."

Narbada Prasad admitted, in answer to a question before the Magistrate, that this receipt was found on his person; and, when asked if he wanted to state anything more, said, "No. I shall file a written statement." The answer of Jagannath to this question makes us think that he did not, in fact, pay the money and that it was paid by Narbada Prasad and that, therefore, he kept the receipt himself. We have no confidence in the defence evidence as regards this receipt. As regards the financial position of Jagannath, we are satisfied that he was not a man who could undertake a contract of this character. He himself, in a letter to the District Board, calls himself a poor man. There is the evidence of Muni Lal which describes his financial position and to which there was no cross-examination. Neither was Jagannath's brother-in-law called by the defence to deny Muni Lal's statement as to the pay given by him to Jagannath. There is not only the evidence of Narbada's diary of very small payments of one rupee and two rupees being made to Jagannath, but also that of a defence witness who says that he lent Jagannath money in small amounts.

The defence in this case consisted of the evidence of several servants of the District Board and one or two others, the gist of which was that, as far as they knew, there was no connexion between Narbada Prasad and Jagannath in the matter of this contract. It is clear that negative evidence of this sort cannot displace the positive evidence of the mass of witnesses who gave affirmative evidence conclusively proving the connexion between the two accused with regard to this contract.

The main defence was an allegation of enmity against R. B. Thakur Jaswant

Singh, a Special and Honorary Magistrate in Banda and a large zamindar, the ground of enmity being that some 13 years ago Narbada Prasad joined in a memorial to the local Government praying that Thakur Jaswant Singh should not be appointed an Honorary Magistrate. As to this, we have the evidence of a defence witness, Mr. Pearey Lal, in which he says that shortly before the contract in this case Thakur Jaswant Singh told him that Narbada Prasad was a "good man." There is no evidence that Thakur Jaswant Singh took the slightest notice of this memorial, so long ago, to the Local Government, or had the slightest enmity against Narbada. The reason of the memorial is clear from the evidence of another defence witness, who says that Thakur Jaswant Singh was a strict Magistrate. In a district like Banda, which produced such a District Board, it is not to be wondered that a Magistrate who did his duty would be unpopular with certain persons. It is admitted by Dr. Katju on behalf of Narbada Prasad that there is no evidence on the record of enmity or conspiracy on the part of Thakur Jaswant Singh on which he can rely. We agree entirely with Dr. Katju.

The other branch of the defence was that Thakur Jaswant Singh, together with one Sheo Kunwar, conspired to bring the charge in this case out of enmity. The reason of the enmity as regards Sheo Kunwar was alleged to be that Narbada Prasad was the reversioner of Sheo Kunwar, that Sheo Kunwar adopted the son of one Sheo Balak in order to defeat the claim of Narbada Prasad, and that from that date these conspirators were determined to do something to put Narbada Prasad out of the way. That this is an unfounded accusation is clear from the record itself. The defence evidence shows clearly that the adoption took place in June or July 1928, and that the investigation by Thakur Jaswant Singh ended in March 1928, and the Government sanctioned the prosecution of Narbada Prasad in July 1928. It is clear that the prosecution of Narbada Prasad was well on the way before the alleged cause of enmity ever arose. Further the reason of enmity alleged might cause Narbada to dislike Sheo Kunwar, but could hardly cause Sheo Kunwar to have enmity against Narbada.

It is clear from the above that the evidence for the prosecution in this case was overwhelming and that there was really no defence to the charge.

We have already made some comments upon the judgment of the learned Magistrate, but in addition he accepted as proved the enmity of Thakur Jaswant Singh and the conspiracy of Thakur Jaswant Singh with Sheo Kunwar on no real evidence. He, therefore, held that no evidence by any tenant of these two persons could be taken into consideration, although he omits to note that at least five of the prosecution witnesses were not tenants of either of them. He says that Munni Lal and Ram Kumar, ferry contractor, were hangers on in the Court of Thakur Jaswant Singh and therefore could not be believed, and further that the evidence of the mass of the prosecution witnesses was that of men of "absolutely no status". He mentions the evidence of Shahid Husain who gave evidence that Narbada told him that he wanted to take the theka in the name of Jagannath etc. This important evidence (which is not alleged to be tainted with enmity) is dismissed with the observation that Shahid did not mention this to any one. The Magistrate omits to mention the important letter of 27th June 1927, when the allegation that Narbada Prasad was the real contractor was made by this witness to the Engineer and forwarded by him to the Chairman himself long before this case was even contemplated.

On the other hand, the defence evidence, negative as it is, he takes to prove absolutely that there was no connexion between Narbada Prasad and Jagannath in respect of this contract. He hardly mentions the very important accounts exhibited in this case. He certainly never deals with the obvious inference to be drawn from them. He comes to the conclusion that the account found in Jagannath's house show:

> "that Jagannath was really the thekadar and Narbada Prasad was only helping him with money."

a perverse finding. He further says:

> "This fact (that Narbada Prasad was lending money) evidently gave rise to the rumours that he was the thekadar and gave a chance to his enemies to trump up a case against him."

From what we have said, and from the record, it is obvious that there was no evidence to establish the defence of

enmity or conspiracy, and therefore the whole basis of the Magistrate's judgment is swept away. The Magistrate says that there was no reason why the sanction of the Commissioner could not have been obtained if Narbada wanted the contract. We feel sure the Board knew well there was no likelihood that the Commissioner at that time would sanction the grant of a contract to a member of this Board. The Magistrate further says that Narbada knowing the law would never tell any one he was interested in the contract. He certainly did so, however, and the reason may well be that both he and others in Banda did not consider the breaking of this law as a serious matter. In some circles a man in the position of Narbada is considered foolish if he does not take advantage of his opportunities. We hope the result of this case will show that such conduct involves serious risk.

We find it impossible to believe that any Judge dealing honestly with the evidence before him, and being uninfluenced by considerations other than the evidence, could have come to the conclusion at which Mr. Bobb arrived. We consider that this aspect of the case is extremely serious, and we consider it to be our duty in the interest of the purity of the judicial service to direct that a copy of this judgment be sent to the District Magistrate of Allahabad for enquiry into the conduct of the Magistrate.

We allow the appeal of the Local Government, set aside the order of acquittal of the learned Magistrate, direct that Narbada Prasad and Jagannath Prasad be arrested and that, as regards Narbada Prasad, he serve three months' simple imprisonment and further pay a fine of Rs. 1,000. As regards Jagannath, we consider that he was merely a servant of Narbada Prasad in this matter and under his influence. We, therefore, sentence him to one month's simple imprisonment. With regard to the sentence on Narbada Prasad, we have given him a longer sentence and a larger fine than otherwise we would have done, had it not been for the nature of the defence. False allegations against innocent and respectable persons of criminal conspiracy to bring false charges, when used as a defence, aggravate greatly the original offence. This type of defence is much too common in India and it ought to be recognized that where a defence of this character is obviously false, that fact ought to be taken into consideration in awarding punishment.

R.M./R.K. *Appeal allowed.*

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YOUNG AND SEN, JJ.

Mt. Bakhtawari—Applicant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 577 of 1929, Decided on 9th September 1929, from order of Sess. Judge, Meerut, D/- 23rd May 1929.

(a) Penal Code S. 302—Mere pressing of mouth of deceased does not amount to murder when death is due to blows dealt beforehand by another person.

P attacked *H* with a lathi and hit him on his head. *P* then asked *B* to press *H's* mouth with a cloth. *B* did as she was asked. In the post mortem *H's* skull was found to be shattered into 14 pieces.

Upon medical examination it was found that death was due to injuries on the head caused by *P*. The blows were not struck in furtherance of common intention on the part of *P* and *B*. There was no evidence that death had been caused by strangulation.

Held: that *B* was not guilty of murder. [P 47 C 2]

(b) Penal Code, S. 201 — Accused must cause evidence to disappear in order to screen offender.

The essence of S. 201 is that the accused caused the evidence of the commission of the offence to disappear with the intention of screening the offender from legal punishment.

P murdered *H* and ordered *B* to help him carrying the corpse to a ditch and burying the wearing appeared.

Held: that the offence under S. 201 was not proved against *B*. *B* in helping to carry the corpse to the ditch was acting under orders of *P* and she appeared to have been bullied into doing the act. *B's* acts were not voluntary nor done with the intention of screening the offence from punishment. [P 48 C 2]

(c) Criminal Trial—Evidence — Appreciation of—Cases ought to be decided on tangible evidence whether positive or circumstantial.

Cases ought to be decided upon tangible evidence, be it positive or be it circumstantial. The Court is not justified in convicting an accused upon facts which are not borne out by the record, which militate against the medical evidence and which are the result of nothing but speculation. [P 48 C 2]

M. Waliullah—for the Crown.

Judgment. — Mt. Bakhtawari was committed to the Court of Sessions at Meerut to take her trial under Ss. 302 and 201 I. P. C.

The charge was that on 27th November 1928, she murdered one Harbans, chaukidar by throttling him ; and that having reason to believe that Harbans had been murdered, she caused the evidence of the crime to disappear by burying the corpse of Harbans and his clothes etc. in a field adjoining the Guldhar railway station.

The accused pleaded not guilty to both the charges.

The case was tried by Mr. Raghunath Prasad who held Mt. Bakhtawari guilty of both the charges and sentenced her to transportation for life under S. 302, I. P. C., and to one year's rigorous imprisonment under S. 201, I. P. C.

The central figure in the case is one Phool Singh, an Indian Christian, who with his wife Mt. Bhagwati and two children, one of whom is named Bendick alias Balwant lived in a house in mouza Dohai within the police circle of Ghaziabad. Bendick alias Balwant was his son by a deceased wife. Phool Singh was an abandoned profligate. He was indifferent to his wife and used to beat her. About six months before the occurrence, he brought Mt. Bakhtawari to his house. Mt. Bakhtawari is a chamar woman. Her husband is a resident of mouza Dhandhar and appears to have forsaken Mt. Bakhtawari. The latter was proceeding to her father's house in mouza Nandpur when she met Phool Singh at the canal distributary of Asalatpur. Phool Singh saw her, conceived a guilty passion for her and asked her to accompany him. She refused, but Phool Singh forcibly took her to his house and kept her there as his mistress. Upon her arrival, the wife, Petro Nila Bhagwati asked her how and why she came and she said that she had been forcibly brought by her husband. Phool Singh did not allow this woman to go away. The husband, who had never cared for his wife, became more indifferent to her after the arrival of the accused. The wife naturally did not like the continuance of Mt. Bakhtawari in the house. It is not difficult to visualise the bickerings and quarrels, which this unfortunate incident gave rise to.

The matter appears to have forced itself to the notice of the village people and became a subject of village gossip. One Sukhdeo informed Ganga Sahai, the village Mukhia that a "stolen woman" had come to the house of Phool Singh. The Mukhia asked Harbans chaukidar to take Phool Singh to the thana at Ghaziabad. Upon the chaukidar's enquiring, Phool Singh said that the accused was his sali. The chaukidar said that they must go to the thana. They started for the thana. The chaukidar had his uniform on. They proceeded on foot along the railway line and the cartage consisted of the chaukidar, Phool Singh, his wife Mt. Bhagwati, her two children, Balwant and the accused. When they had passed the Guldhar railway station, the chaukidar was asked by a man to release them as he had got no warrant. The chaukidar did not agree. A few paces ahead, they met the station master who had two men with him. The station master intervened and asked the chaukidar to release them but the latter was obdurate. Ralla Ram station master admits having met these people along the railway line towards the Ghaziabad side, two posts beyond the outer single. He says that the Isa asked him to get him released from the chaukidar, who was forcibly taking him off, but he refused to interfere. He is contradicted in this respect by Petro Nila Bhagwati. We prefer to accept her statement.

That the chaukidar under the direction of the Mukhia arrested Phool Singh and Mt. Bhagwati with his family proceeded towards the thana is a matter which is proved without any reasonable doubt and is admitted by the accused. All the witnesses for the prosecution namely Sunda, brother of Harbans, Bhagwati, Bendick alias Balwant and Bhagwan Sahai who is a thoroughly independent witness are agreed on this point.

By the time that the party had crossed the wirefencing, Phool Singh appears to have warmed himself up into a rage. The time and place were opportune. It was a lonely spot. The night had set in. Not a single man was visible in the field. Phool Singh started a quarrel with the chaukidar and said that night had come and he was not going any further. Phool Singh struck danda on the temple of chaukidar. The chaukidar fell down. Phool Singh gave him two or three more blows. Mt. Bhagwati states that Phool Singh sent for the accused and both he and the accused dragged the chaukidar three or four fields

away into another field. There he called his wife and asked her to make a ditch in which the chaukidar was to be buried. Mt. Bhagwati refused and said that he must do that work for himself. Phool Singh and Balwant made a ditch. After the hole had been dug he asked Mt. Bhagwati and the accused to help him

"in lifting the body of the chaukidar in such a manner so as not to leave any mark as would be otherwise caused if the body were to be dragged.

Mt. Bhagwati said that the chaukidar was still living and that he should not be buried alive. Phool Singh sat over the chest of the chaukidar and asked the accused to press his mouth which the latter did with a banian. Phool Singh, Mt. Bakhtawari and Balwant carried the corpse to the hole, stripped the chaukidar of his uniform and buried him in the hole. The clothes of the chaukidar were buried at different places. His chapras was buried in a field. Phool Singh took his dhoti and shoes and gave the shoes to Mt. Bakhtawari to wear. Mt. Bhagwati continues :

"During the time the accused was pressing the mouth of the chaukidar, my husband and my elder son had gone and further dug the place, which had been previously dug."

It is clear, therefore, that no witness other than Mt. Bhagwati was present at the time when the mouth of the deceased was pressed by the accused. Mt. Bhagwati moreover does not say that the accused tried to throttle Harbans by pressing his neck, nor does she describe how and in what way Mt. Bakhtawari pressed the mouth of the chaukidar.

Balwant substantially supports Mt. Bhagwati. He says that after the blows had been given, the chaukidar began to breath hard. Phool Singh asked Bakhtawari to drag him into a field. This was done accordingly. This statement does not agree with the version given by Mt. Bhagwati. The witness adds :

"At that place, my father got the accused to press the mouth of the chaukidar, while my father sat upon his chest. At the same time, my father pressed down the neck of the chaukidar. While the throat was being pressed, the woman was pressing the mouth of the chaukidar. The chaukidar then died ..... My father, myself and the accused took over the chaukidar and buried him in that hole.

The corpse of the chaukidar was discovered on 27th November 1928. Information was given to his brother Sunda who identified the corpse from certain peculiarity in the foot. The corpse had one leg and trunk. Two hands and one leg were missing. The corpse was found between the railway lines at a distance of one telegraph post from the railway guard-post, known as Sehani post, in the direction of Ghaziabad. The usual post mortem was held. The body had reached an advance stage of decomposition. The skull was found shattered into fourteen pieces and blood clots were found on a piece of the occipital bone at the base of the skull and on a piece of the right frontal bone and parietal bone. Brain and membranes were missing. There was a fracture of the breast bone at the junction of upper and middle third with fracture of the ribs."

The ribs second to sixth on the right side were fractured ; the ribs second to the fifth on the left side were decomposed. The left collar bone was also fractured. The liver was decomposed. A portion of the liver and the whole of the right kidney were missing and were probably eaten by animals. According to the Civil Surgeon, death was due to shock and hoemorrhage and apparently to the injury to the skull.

The post mortem was held by Col. O'niel, Civil Surgeon of Meerut. He gave his statement before the trying Magistrate.

Mt. Bakhtawari made a statement under S. 164, Criminal P. C., on 3rd December 1928. Her story appears to be consistent with the statements of the principal witnesses for the prosecution. She makes no attempt to minimise her share in the transaction. Three persons are said to have intervened and to have asked the chaukidar to leave Phool Singh but the chaukidar refused. After this Phool Singh offered the chaukidar a bribe of Rs. 10. The latter did not agree and used abusive language :

"Then Phool Singh hit the chaukidar with a lathi. The chaukidar uttered only one cry saying "O Balwant Singh" and then he fell down and became unconscious. He hit the lathi blow on the chaukidar's temple. He hit two or three more lathi blows after his falling down and then the chaukidar died. Phool Singh and his wife and I dragged him to a distance of over two or three fields. Phool Singh sat on him there and told both of us to dig a place for burying him. We said that we would not be able to do so. Thereupon, he, after making us sit there, went to dig the earth and told us to keep the chaukidar's mouth pressed. Thereupon the Munshiain (Mt. Bhagwati) and I both pressed the chaukidar's mouth. When he came after digging the earth, Munshiain, Phool Singh and I carried the chaukidar and threw him into the pit. Then Phool Singh removed the clothes of the chaukidar and all three of us buried them in the sand."

Upon the aforesaid evidence, it is not possible to uphold the conviction of Mt. Bakhtawari under S. 302, I. P. C. The

murder was committed by Phool Singh, who smashed the skull to pieces by his lathi blows. The assault was made with a design and executed with fury and tremendous violence. The blows were not struck in furtherance of a common intention on the part of Phool Singh and Mt. Bakhtawari. Judging from the medical evidence and considering the nature of the injuries on the mutilated corpse of Harbans, it is clear that death was the result of the blow upon the skull which smashed the skull to fourteen pieces. There is no evidence that the death was caused by throttling or strangulation. There is no evidence that Mt. Bakhtawari pressed the throat of Harbans chaukidar. She admits that she pressed the mouth of the chaukidar and Mt. Bhagwati says that she pressed his mouth with a banian. Phool Singh is proved in this case to be a thoroughbred ruffian. He had a hasty and violent temper. In the presence of Mt. Bakhtawari and of his wife, he had just committed a most brutal and violent murder. Mt. Bakhtawari must have been considerably afraid of him. He asked her to drag the corpse. She had no interest in doing so. It is Phool Singh who dug the trench and not Mt. Bakhtawari. It was Phool Singh, who buried the dead body and not Mt. Bakhtawari. When Phool Singh asked her to press the mouth she evidently acted order the influence of fear and compulsion and may well have made a pretence of pressing the mouth, without exerting such force as may cause suffocation. There is no evidence that the banian was inserted into the mouth of Harbans deceased.

The learned Sessions Judge appears to have realized that the evidence on the record was not sufficient to justify the conviction of Mt. Bakhtawari on a charge of murder. He examined Dr. A. N. Mukerji, Assistant Surgeon attached to the Meerut Hospital, who deposed that if the mouth and the nostrils of an injured person were effectually closed, it would take about ten minutes to bring about his death. And if the said person was gasping at the time and if somebody sat over his chest and another person closed his mouth, the death of that person would certainly be hastened. From this evidence the learned Judge concluded that the accused by closing the mouth of the deceased accelerated his death.

Cases ought to be decided upon tangible evidence, be it positive or be it circumstantial. But there was no warrant for the learned Sessions Judge in convicting the appellant of murder upon facts which are not borne out by the record, which militate against the medical evidence and which are the result of speculation and nothing but speculation on the part of the learned Sessions Judge. The conviction of Mt. Bakhtawari under S. 302, I. P. C., was therefore improper and unjust and must be set aside.

The essence of S. 201, I. P. C., is that the accused caused the evidence of the commission of the offence to disappear with the intention of screening the offender from legal punishment. Mt. Bakhtawari in helping to carry the corpse to the ditch or in burying the wearing apparel of the chaukidar was acting under the orders of Phool Singh. She appears to have been bullied into doing the act. Her acts were not voluntary nor done with the intention of screening the offender from punishment. The murder was committed by Phool Singh. He was interested in wiping off all evidence against himself. He was taking steps to prevent his wife and mistress from coming forward as witnesses against himself. With this object in view, he appears to have asked Mt. Bakhtawari and Mt. Bhagwati in lending a helping hand in either carrying or dragging the corpse and in burying the clothes. With the object of tightening the fetters, he appears to have given the shoes of the deceased to Mt. Bakhtawari to wear. He was anxious to secure a complete severance of connexion between himself and Mt. Bakhtawari and actually sold Mt. Bakhtawari to Bhagwana sweeper for thirty rupees and a coat. But this was not all. He stripped his wife Mt. Bhagwati of all her clothes, made her put on a light sheet and threw her into a canal to be drowned. Fortunately, the woman was not drowned ; she was rescued.

The offence under S. 201, I. P. C., is not proved against the accused.

We allow the appeal, set aside the convictions and sentence under Ss. 302 and 201, I. P. C., and direct that Mt. Bakhtawari be released at once.

R.M./R.K. *Appeal allowed.*

** A. I. R. 1930 Allahabad 49
Full Bench

BOYS, KENDALL AND YOUNG, JJ.

On difference between

MUKERJI AND NIAMATULLAH, JJ.

In the matter of, Lachhman Prosad Babu Ram of Cawnpore.

Miscellaneous Case No. 898 of 1928, Decided on 9th July 1929.

*** (a) Income-tax Act (1922), Ss. 23 (4), 22 (4) and 23 (3)—Person carrying on business at Cawnpore, Bombay and Calcutta—Head quarters at Cawnpore—Income-tax Officer Cawnpore issuing notice under S. 23 (2) to submit total income—Return submitted for Cawnpore and Bombay businesses—Return for Calcutta submitted to Calcutta officer—Notice under S. 23 (2) on 11th August 1927 combined with notice under S. 22 (4)—Accounts produced of Bombay and Cawnpore businesses — Accounts examined — Fresh notice under S. 22 (4) on 18th February 1928 to produce Cawnpore accounts—Further notice under S. 22 (4) on 22nd February 1928 for property accounts and trial balances of Calcutta shop—Letters written on 24th February 1928 to Calcutta Income-tax Officer to examine accounts at Calcutta and send report—Assessment under S. 23 (4) held not correct.**

The assessees carried on business at Cawnpore, Bombay and Calcutta with headquarters at Cawnpore. The Income-tax Officer, Cawnpore on 22nd April 1927 issued notice under S. 22 (2) requiring assessees to submit a return of their total income in the previous year. On different occasions the assessees submitted return for Cawnpore and Bombay. With regard to Calcutta business they submitted no return to officer at Cawnpore, but submitted one to the officer at Calcutta. On 11th August 1927. Income-tax Officer, Cawnpore, issued a combined notice under S. 23 (2) and S. 22 (4) requiring the assessees to produce the accounts and evidence relating to their income at Calcutta and other branch places of business. On 26th August 1927 accounts were produced for Cawnpore and Bombay businesses. After examining Bombay and Cawnpore books Income-tax Officer, Cawnpore, postponed case sine die pending receipt of a report of the Income-tax Officer, Calcutta, which was received on 17th February 1928 but this was not accompanied with certain documents thought necessary by the Income-tax Officer in Cawnpore. He, thereupon, issued another notice under S. 22 (4) on 18th February 1928 requiring assessees to produce accounts of the headquarters at Cawnpore. The Cawnpore accounts made him suspicious of the correctness of the report received from Calcutta. He accordingly served a notice on 22nd February 1928 under S. 22 (4) calling for the production of accounts of the Calcutta business. The general agent of the assessees on 14th March 1928 stated that Calcutta shop accounts could not be produced because the account books had already been produced in Calcutta to the officers there. The case was again postponed pending receipt of a further report from the Income-tax Officer at Calcutta which was asked for by a letter written by the Income-tax Officer of Cawnpore on 24th February 1928. On 30th March 1928 a report was received from Calcutta but without Profit and Loss accounts. The general agent was therefore asked to produce the accounts of the Calcutta business which the agent declined. The Income-tax Officer, therefore, purported to act under S. 23 (4),

Held: that under the circumstances the assessment was not rightly made under S. 23 (4). Both the combined notices had been waived and it would be extremely unfair on the part of the Income-tax Officer to turn round and say, without giving the assessee a fresh opportunity to produce the books, that their failure on previous occasions to produce accounts subjected them to a penalty of having a best judgment assessment made against them. [P 65 C 2]

**** (b) Income-tax Act (1922), S. 22 (2)—Person carrying on business at different places—Separate notices requiring separate returns of each branch not necessary.**

Where a person is carrying on business at different places, it is not incumbent on the Income-tax Officer of the principal place of business where an assessee is assessed to income-tax, to issue separate notices under S. 22 (2) requiring returns in respect of the income of each branch of the assessee's branches. [P 57 C 1]

(c) Income-tax Act (1922), S. 23 (2) and 22 (4) — Accounts denied — Income-tax Officer can still presume their existence.

Even when an assessee denies the existence of accounts or documents, the Income-tax Officer can presume the existence of such accounts or documents. [P 57 C 1]

**** (d) Income-tax Act (1922), S. 22 (2)—Person carrying on business at different places—Return submitted at branch place—Officer at principal place of business can compel assessee to produce a return of the accounts of that branch.**

An Income-tax Officer of an assessee's principal place of business has jurisdiction to compel such assessee to submit a return and produce accounts in respect of a branch business even though he has submitted a return, to produce accounts, and otherwise complied with all the requirements of the law before the Income-tax Officer of the place where he has such a branch business. [P 57 C 2]

**** (e) Income-tax Act (1922), S. 23 (4)—Officer at principal place of business is not bound to accept report of officer at a branch nor need the former ask for report from the other — Assessment can be made under S. 23 (4).**

An Income-tax Officer of the principal place of business is not bound to accept the report of the Income-tax Officer of a place where assessee is carrying on a branch business nor is he bound to refer the matter back to the latter officer for further enquiry. The former can assess the assessee according to his judgment under S. 23 (4). [P 57 C 2]

(f) Income-tax Act, S. 22 (4)—Notice at principal place of business to produce ac-

counts of all branches also — Notice is not illegal.

Notice under S. 22 (4) issued by the Income-tax Officer at the place where a person has a principal place of business is not invalid because it includes accounts and documents connected with the assessee's branch shop. [P 57 C 1]

**** (g) Income-tax Act (1922), Ss. 23 (4), 22 (4) and 23 (3)—(Per *Mukerji, J.*)—Enquiry under S. 23 (3)—Notice under S. 22 (4) cannot be issued** (*Niamatullah, J.*, contra) *obiter*.

Per *Mukerji, J.* — An Income-tax Officer has no jurisdiction to issue a notice under S. 22 (4), after the commencement of an enquiry under S. 23 (3)—*Niamatullah, J.*, contra: *A.I.R.* 1928 *Lah.* 219, *Rel. on.*; *A.I.R.* 1928 *All.* 283 ; *A. I. R.* 1928 *Cal.* 587 and *A. I. R.* 1928 *Pat.* 529, *Diss. from.* [P 57 C 1]

(h) Interpretation of Statutes — Words should be given plain meaning and should not be considered surplusage.

Per *Mukerji, J.* — Unless and until the language used in a statute makes the meaning entirely insensible every word used must be given its plain meaning especially in a fiscal Act. It cannot be said that any word might have been used unnecessarily as a mere tautology or as "harmless words." [P 53 C 1]

(i) Income-tax Act, Ss. 22 (4) and 23 (4) —Time limit is imposed on S. 22 (4) by S. 23 (4).

Section 22 (4), Income-tax Act, no doubt standing by itself is uncontrolled by any time limit. But a time limit is imposed by the four words "having made a return," as used in S. 23 (4). [P 53 C 1]

*** (j) Income-tax Act (1922), S. 23 (4)—Appeal is shut out not as punishment but as no materials to place appellate officer exist—Income-tax Act (1922), S. 30.**

Per *Mukherji, J.*—An appeal is shut out under S. 30 not by way of punishment to the assessee but it is shut out because there are no materials which can be properly placed before an appellate Income-tax Officer. On reading, therefore, the two Ss. 22 and 23 it is abundantly clear that a right to make an assessment to the best of the officer's judgment cannot be made after an enquiry has been started so as to shut out an appeal simply because at any time after the enquiry has been started the assessee fails to produce an account as asked for. [P 53 C 2 ; P 54 C 1 ; P 55 C 1]

(k) Income-tax Act (1922), S. 23 (4)—Interpretation.

Per *Mukherji, J.*—It is the ordinary privilege of a subject that he shall not be taxed on his income without a proper investigation. It is open to the assessee to prove what his income is before he is assessed on the income. If it had been the intention of the legislature that the mere word of the Taxing Officer should be final, one should find a clear indication of that in the language of the statute. [P 56 C 1]

(l) Interpretation of Statutes—Act should be read to avoid introducing thing not thought of by the legislature to do so.

Per *Niamatullah, J.*—It is one of the elementary construction of statute that it should be so read as to avoid introducing what the legislature has not thought fit to introduce, and that a construction which has got that effect should be finally rejected. [P 59 C 2]

(m) Interpretation of Statutes—Plain meaning cannot be departed from because meaning would be clear by a different location of some provisions.

Per *Niamatullah, J.*—The order in which the provisions occur may in some cases assist the Court in construing one of those provisions. But where the arrangement is consistent with a reading which gives effect to the entire language of that provision, its plain meaning cannot be departed from only because a different location of such provisions would have made that meaning clearer. [P 60 C 2]

Bajpai, Government Advocate—for the Crown.

Dr. Katju—for Assessee.

Mukerji, J.—This is a reference by the Commissioner of Income-tax, united Provinces, under S. 66 (2), Income-tax Act of 1922.

The case sent up for expression of opinion on the part of the High Court is fully stated in the "statement of the case," submitted to us and very briefly is as follows : The assessees, at whose instance the reference has been made, carry on business at Cawnpore, Bombay and Calcutta with headquarters at Cawnpore. Under S. 64, sub-S. (1), Income-tax Act, the Income-tax Officer of Cawnpore had the right and power of assessing the income-tax, because Cawnpore was within his jurisdiction. The Income-tax Officer of Cawnpore, on 22nd April 1927 issued a notice under S. 22 (2), Income-tax Act, requiring the assessees to submit a return of their total income in the "previous year." The previous year in this case was from Dewali 1925 to Dewali of 1926, as the account year of the assessees commenced on the first day after the Dewali festival of a Hindi year. On different occasions the assessees submitted returns for Cawnpore and Bombay. With regard to Calcutta business they submitted no return to the officer at Cawnpore but submitted one to the officer in Calcutta. On 11th August 1927, the Income-tax Officer of Cawnpore issued a combined notice under S. 23 (2) and S. 22 (4) of the Act requiring the assessees to produce, on 15th August their accounts and evidence relating to their income at Calcutta and other branch places of business. On 26th August 1927 accounts were produced for Cawnpore and Bombay business while with regard to the

Calcutta accounts, an application was presented to the effect that it would be detrimental to the Calcutta business to send the Calcutta accounts to Cawnpore and also to send the munib, who was conversant with them, to explain the accounts. It was stated that the munib was in the sole charge of the Calcutta business. After examining the Cawnpore and Bombay books the Income-tax Officer of Cawnpore postponed the case sine die pending receipt of a report of the Income-tax Officer of Calcutta which report, he had recently called for at assessee's request. He thought that if a complete report was received from Calcutta :

"there will be no need to insist on the production of the Caloutta accounts at Cawnpore."

The report from Calcutta was received on 17th February 1928. The Income-tax Officer in Cawnpore thought that it was not complete and it was not accompanied with certain documents which he thought were necessary for him to see in order to arrive at a proper estimate of the assessee's income. These were copies of profit and loss account. Thereupon the Cawnpore officer issued another notice under S. 22 (4) on 18th February 1928, requiring the assessees to produce on 22ndFebruary 1928the accounts of the headquarters business at Cawnpore. The Cawnpore accounts made him suspicious of the correctness of the report received from Calcutta. He also thought that he should have a statement of the account of house property at Cawnpore. He accordingly served a further notice again under S. 22 (4) calling for the production on 10th March 1928 of accounts of income from property (house property) for the Sambat years1981 to1982 and 1982 to 1983 and to trial balances of the Calcutta shop as on Dewali 1981, 1982 and 1983. On 14th March 1928 the assessees' mukhtar-i-am (general agent) Sheonath, appeared and stated that no account of income from house property at Cawnpore was kept and that the trial balances relating to Calcutta shop could not be produced because the account books had already been produced before the Income-tax Officer at Calcutta. On this statement, the case was again postponed since die pending receipt of a further report from the Income-tax Officer of Calcutta. On 30th March 1928 a report was received from the Income-tax Officer of Calcutta but there were no "trial balances" or profit and loss account or the balance sheet. On the same date the Income-tax Officer of Cawnpore asked the representative of the assessee to explain his doubts and to produce the accounts of the Calcutta shop. The representative declined to do so and asked the .Income-tax Officer to refer the matter .again to Calcutta. This the Cawnpore officer declined to do and as the financial year was closing he assessed a tax "to the best of his judgment" on the same date i. e. 30th March 1928. The Cawnpore officer purported to act under S. 23 (4) of the Act.

The assessees went up in appeal to the Assistant Commissioner of Income-tax. That officer held that no appeal lay to him, as the assessment had been rightly made under S. 23 (4) of the Act.

Thereupon the assessees asked the Commissioner to make this reference and the Commissioner accordingly sent up the following questions for the opinion of the High Court.

These are:

(1) Has an Income-tax Officer jurisdiction to issue a notice under S. 22 (4) after the commencement of an inquiry under S. 23 (3) ?

(2) Was the notice under S. 22 (4) issued by the Income-tax Officer, Cawnpore, on 22nd February 1928, invalid, because it included accounts and documents connected with the Calcutta shop ?

(3) Was the notice invalid ?

(a) because it was issued in form A, intended for use where a return had not been made, though modified so as to suit the assessees' case in which a return had been made ?

(b) because 25th April 1927 (the date mentioned in it) was that on which the notice under S. 22 (2) was returned after service, and not that on which it was actually served on the assessees, which was apparently 23rd April 1927 ?

(4) Is it incumbent on the Income-tax Officer of the principal place of business, where an assessee is assessed to income-tax, to issue separate notices under S. 22 (2) requiring returns in respect of the income of each branch of the assessees' business ?

(5) Was the Income-tax Officer entitled, in the face of the statement of

Pandit Sheo Nath Pandey, the assessees' mukhtar-i-am dated 14th March 1928, to hold that the notice under S. 22 (4), dated 22nd February 1928, had not been complied with?

(6) When an assessee denies the existence of accounts or documents may the Income-tax Officer presume the existence of such accounts or documents?

(7) Has the Income-tax Officer of an assessee's principal place of business jurisdiction to compel such assessee to submit a return and produce accounts in respect of a branch business when he has submitted a return, produced accounts, and otherwise complied with all the requirements of the law before the Income-tax Officer of the place where he has such branch business?

(8) Is the Income-tax Officer of the principal place of business bound to accept the report of the Income-tax Officer of a place where an assessee is carrying on a branch business? If not is he bound to refer the matter back to the latter officer for further enquiry and not to assess according to his judgment?

(9) In all the circumstances of this case, was the assessment rightly made under S. 23 (4)?

Before I proceed to answer the several questions, it will be necessary to find out the meaning and application of S. 22 (4) and S. 23 (4), Income-tax Act, for practically the whole controversy ranges over those two sections. I will refer to decisions of this Court and other Courts, later on, for I want, for the present, to examine, for myself, the language of the law independently of and untrammelled by any opinion of other Judges.

The controversy relates to the import of S. 23 (4). The question is in what cases an appeal is allowed and in what cases an appeal is not allowed? The assessees' sole grievance is that they had the right to lay their case before the Assistant Commissioner and they have been unjustly shut out from the exercise of such a right. The Income-tax Officer of Cawnpore purported to act, in making the assessment under S. 23 (4) "to the best of his judgment." Under S. 30 of the Act, no appeal lies where an Income-tax Officer is entitled to make and does make an assessment to the best of his judgment.

Section 23 (4) runs as follows:

"If . . . . any . . . . person fails to make a return under . . . . sub-S. 2, S. 22 . . . . or fails to comply with all the terms of a notice issued under sub-S. 4 of the same section, or having made a return, fails to comply with all the terms of a notice issued under sub-S. 2 of this section, the Income-tax Officer shall make the assessment to the best of his judgment."

A plain reading of sub-S. 4, S. 23, would suggest that there are three cases in which an Income-tax Officer is entitled to "make assessment to the best of his judgment." They are (I am not mentioning the case of a company:

(1) when a proposed assesssee fails to make a return under S. 22 (2);

(2) where he fails to comply with all the terms of a notice issued under sub-S. (4), S. 22; and

(3) fails to comply with all the terms of notice issued under sub-S. 2, S. 23."

These three occasions, it will be noticed, are enumerated in the same order in which the rules for asking for a return or compliance with a notice are enacted. The rule as to calling for a return comes first and is the first of the occasions mentioned in S. 23 (4). The issue of a notice under S. 22 (4) comes after the provision as to calling for a return and is the second occasion mentioned in S. 23 (4). The provision for issue of notice under S. 23 (2) comes last and is third occasion mentioned in S. 23 (4). Ordinarily it would be expected that the three occasions would come in order of time, the notice for return first, then the notice for accounts and documents and then the notice for production of evidence. If there were any doubt in the matter, these doubts are completely removed by the use of four words, "having made a return," to be found in S. 23 (4). Those words, if they have any meaning at all, indicate that the first two occasions for making an assessment to the best of the Income-tax Officer's judgment come before the third occasion may possibly appear.

The learned Government Advocate has argued that the words "having made a return" in S. 23 (4) have really no significance, and to quote the language of one of the cases cited before us, they are "harmless." In my opinion this is a method of construction which must not be allowed to prevail.

It is an established rule of construction of statute that where the meaning is plain, it is not open to any party to read the rule of law in any way other

than what is dictated by the plain meaning of the enactment: see p. 66 of Craies' Statute Law (1923). I shall have occasion to refer to this book more than once. It cannot be doubted that the words "having made a return" if allowed to remain where they are, suggest that the first two occasions for making an assessment to the best of judgment, come before the third occasion for the purpose comes. If that be so it will not do to say that those four words have been used unnecessarily as a mere tautology or as "harmless" words: Craies at p. 98 quotes the following from Lord Brougham:

"A statute is never supposed to use words without a meaning."

Then he quotes from Erle, C. J.:

"To reject words as insensible is the ultima ratio when an absurdity would follow from giving effect to tho words of an enactment as they stand (*ibid*)."

Again Lord Hord Holt is quoted as having said:

"I think we should be very bold men, when we are entrusted with the interpretation of Acts of Parliament, to reject any words that are sensible in an act."

It will be seen from the above quotations which are from very high authorities, that unless and until the language used in a statute makes the meaning entirely insensible, every word used must be given its plain meaning.

It has, however, been urged that the plain meaning of the words, "having made a return" cannot be given effect to for this reason, S. 22 (4) is worded in language without limit of time, and, therefore, it would not do to import into it a limit of time. In other words, it is urged that a notice under S. 22 (4) of the Act may be issued at any time, even after an an enquiry under S. 23 of the Act has started. I agree that if S. 22 (4) stood by itself, it would be uncontrolled by any time limit. But is not a time limit imposed by the four words, "having made a return" already quoted?

If there be any obscurity in an enactment, an apparent contradiction, the meaning of the Act has to be found within the four corners of the Act itself. Craies quotes from Coke the following (see p. 92):

"The office of a good expositor of an Act of Parliament is to make construction on all the parts together and not of one part only by itself. . . ."

and again at p. 93:

"It is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute for that best expresseth the meaning of the makers. . . ."

Again, at p. 93 the learned author quotes the following from a case decided by Sir John Nichall:

"The key to the opening of every law is the reason and spirit of the law; it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole."

Supposing, then that the rule in S. 22 (4) is unlimited by time and S. 23 (4) does impose a limit of time, let us assume there is a little obscurity. What are we to do? Are we to reject the express words of S. 23 (4) in order to hold that S. 22 (4) is uncontrolled by time limit? That would be sacrificing one part in order to read another part of the same enactment in a particular way. Would it not be a better method of reading the Act to make the whole consistent and to say that although there is no time-limit in S. 22 (4) a time limit is brought in by S. 23 (4).

Now let us see if there is any sense in putting a time limit on S. 22 (4) as in my opinion, S. 23 (4) does. What is the effect, after all, of S. 22 (4) being not complied with? It is that the assessee is shut off his right to appeal. There is no other consequence. Is the right to appeal taken away, as a matter of punishment or from some other motive? In an unreported Madras case read out to us by the learned Government-Advocate as a part of his argument, a learned Judge thought that it was by way of a penalty for non-compliance of the Income-tax Officer's order, that the appeal is shut out. With all respect, I find nothing in the Income-tax Act which says that the appeal is to be shut out as a matter of punishment. Unless an Income-tax Officer is actuated by malice or chagrin on account of the non-compliance with his order, he will, if he does his duty, assess a tax which, in his opinion, would be just and fair, "to the best of his judgment" does not imply any penal imposition of tax but what is only a fair and reasonable tax, having regard to all the information, as to circumstances. the Income-tax Officer may possess, without any formal enquiry. It must therefore, be taken that the rule shutting out an appeal was not meant for the punishment of the assessee. By way of ana-

logy, I may point out that under the Civil Procedure Code no appeal is allowed where a decree follows a compromise or a decree follows an award. Surely the parties do not commit any contempt of Court by coming to terms, nor do they commit any contempt of Court by entering into a reference to arbitration which is followed by an award.

Similarly, there is no appeal from the verdict of the jury, in a criminal case except as to punishment, with which the jury have nothing to do. The principle underlying the shutting out of an appeal, in all such cases is the same namely there is nothing which can be taken before a Court of appeal for the exercise of its judgment. Where the parties come to terms, no benefit can be reaped by an appeal. Where an award is made, the judgment is given by the chosen arbitrator of the parties and the Court of appeal cannot be called upon to exercise its own judgment. An arbitrator in coming to his decision is not fettered by rules of evidence. The result is, the appeal is shut out because there is no proper materials, on which the appellate Court may exercise its judgment. Similarly, in a jury trial, the jury do not give any reason for their verdict, nobody knows how they are influenced and how they discussed the matter among themselves. There is no room for any appellate Court to exercise its jurisdiction. Coming back then to the case before us, we find that the appeal has been shut out only where there are no materials which can be proplaced before an appellate Income-tax Officer. To start, where the proposed assessee makes no return of his income, there is no right of appeal. The reason is plain. What are the materials to be placed before the appellate officer to exercise his judgment on? The information on which the Income-tax Officer has assessed the proposed assessee is, so to say, "extra-judicial" and cannot be disclosed and cannot be made the subject matter of scrutiny by the appellate officer. Again, if the proposed assessee has not furnished the Income-tax Officer with the accounts and documents as required by the officer under S. 22 (4) of the Act, there is no material besides any private information that the Income-tax Officer may possess, for assessing the tax. Before the Income-tax Officer can examine, with any chance of accuracy, a return submitted by an assessee with whose antecedents he is not acquainted favourably, he might require the proposed assessee to submit his accounts and documents. Where an Income-tax Officer knows his assessee sufficiently well and has a favourable opinion about him, he would be content with simply asking for a return. Where the Income-tax Officer has not got a favourable opinion of his proposed assessee or has no definite opinion either way, i. e., either in his favour or against him, he might think it desirable to have the assessee's accounts and documents before him in order to decide whether he would accept the return or would hold an enquiry as to its correctness.

If the assessee fails to submit the accounts and the documents required, he does not put the Income-tax Officer in a position to form a definite judgment and the only thing that remains open to the officer is to act "to the best of his judgment," which means in plain words, to act on such information obtained privately as he may possess. In such a case, to allow an appeal would be meaningless. The appellate officer would have no materials on which to go. Again, where the Income-tax Officer is not satisfied with the return submitted by the assessee, possibly even after its scrutiny, with the aid of the assessee's accounts and documents, he would decide to hold an enquiry. Where he wants to hold an enquiry and the assessee does not help him with materials and evidence, here again there is nothing for the taxing officer, to go upon, except his own judgment which, again means unverified and unsubstantiated information. Here, again, there will be no sense in allowing an appeal; for the appellate officer would have no materials on which to form judgment. Apparently, the accounts and documents called for under S. 22 (4), would not be sufficient to satisfy the doubts of the taxing officer, for it must be taken that they have been examined and have been disbelieved. By themselves, then, those documents would not furnish any proper criteria for investigation. But where an enquiry has started and has been

conducted at least partially, there would be materials on the record which might fairly be submitted to the consideration of an appellate officer. It is in the last mentioned case alone that an appeal would be allowed with justification.

It is hardly conceivable that it was considered to be just that an appeal should be shut out in a case like the following. Suppose an enquiry has gone on, in the case of a large business, for ten days. On the eleventh day, the Income-tax Officer wants a particular book of the proposed assessee for some reason, good, bad or indifferent, the assessee fails to produce that book. If, at that stage, the Income-tax Officer says that he would make an assessment "to the best of his judgment," he would not be making the assessment on such information alone as he possessed before the enquiry began, but on information which were placed before him. The assessee may then fairly say that, having supplied materials for assessment he should be allowed to go before an officer of greater experience, for his judgment by way of appeal. As I have said, it is inconceivable that the legislature should have meant that a prolonged enquiry should come to nothing and should not be subjected to appellate judgment simply because the assessee at one moment failed to produce a certain document. On principle therefore, and on reading, as a whole, the two Ss. 22 and 23, it seems to be abundantly clear to me that a right to make an assessment to the best of the officer's judgment cannot be made after an enquiry has been started, so as to shut out an appeal, simply because at any time after the enquiry has been started, the assessee fails to produce a certain document or account.

It has been urged that S. 22 (4) is a very useful provision and it should be open to the Income-tax Officer to use it at all times, even in the case investigated by sub-Ss. 2 and 3, S. 23. There can be no doubt that an Income-tax Officer should have the power to call for documents and all information that he may require for a proper and just assessment. For this purpose he has been invested with the powers of a civil Court by S. 37, Income-tax Act itself. If he has all the powers of a civil Court trying a suit, why can he not ask the assessee, under those powers, to produce the very accounts and documents which he thinks are needed for a fair assessment? Surely, a civil Court can call upon a party to produce any document in his possession or power. The power of the Income-tax Officer to call for documents and accounts is not limited by the language of S. 23 (3), Income-tax Act, or even by sub-S. 4, S. 22. If S. 22 (4) was meant to be only a part of the power of an officer in holding an inquiry its proper place would have been in S. 37. The whole question is, in what cases an appeal has been allowed by the Act and in what cases they have not been allowed?

I need not repeat what I have already stated, namely an appeal has been shut out only when it would serve no useful purpose. That is to say, an appeal has been shut out where the appellate officer would have no material on which to decide a case. But where materials are on the record, whether sufficient or insufficient, an appeal has been allowed.

I may mention here that one of the main reasons which has actuated the learned Judges of different High Courts to hold that S. 22 (4) must be unlimited in its application, in point of time, is that it is a useful rule of law, which must be made use of by the Income-tax Officer, for the benefit of the assessee himself. Those learned Judges, with all respect to them, have overlooked, at least have not quoted in their judgment the provisions of S. 37, Income-tax Act, which confers on the Income-tax Officer all the powers of a civil Court, trying a suit. Certainly, it may happen that an order made in the course of the enquiry by the Income-tax Officer for the production of a document is disobeyed. Even in such a case, the Income-tax Officer will be entitled to draw such adverse inference, as he may, from the disobedience; but, nonetheless, his decision will be a decision on the merits of the case, on such materials as are before him, and in such a case, an appeal will be permitted under the Act. It will be noticed that even under the Civil Procedure Code, where a party is in contempt by non-production of documentary evidence in his possession or power or by not giving evidence, the Court is empowered to pronounce judgment against him, but such judgment is open to appeal: see O. 16, R. 20 and

O. 43, R. 1 (h), Civil P. C. It must not be forgotten that there are two distinct classes of cases. In one class there is no enquiry at all, owing to the proposed assessee's default. In such a case there will be no sense in granting an appeal and there is no appeal. In the other case, there is some material before the assessing officer plus some want of material owing to the assessee's default. In the latter case, an appeal would be granted, because after all, there is something on which the appellate officer may form his own judgment and may be disposed to modify the judgment of the Income-tax Officer.

Another principle bearing on the interpretation of statutes must not be overlooked in interpreting the Income-tax Act, which is a purely fiscal enactment. It is the ordinary privilege of a subject that he shall not be taxed on his income, without a proper investigation. It is but an elementary right of the subject that it should be open to him to prove what his income is before he is assessed on the income. If it had been the intention of the legislature that the mere word of the taxing officer should be final one should find a clear indication of that in the language of the statute. Craies in his invaluable book on Interpretation of Statute Law says at p. 195:

"Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes:

(1) imposition of tax . . . . . .

(2) Altering or excepting from the operation of clearly established principles of law . . . . ."

If the meaning of S. 22 (4) read with S. 23 (4) is this that the power of an Income-tax Officer should be allowed to hang, like the sword of Democles, on the head of the proposed assessee, to be applied at any time to shut out an enquiry by the appellate Court and for the acceptance, as final word, of the Income-tax Officer's assessment, we should expect the clearest language being employed for the purpose. As against the argument that sub-S. 4, S. 22 is a very useful rule and should not be limited in its operation by the four words, "having made a return" to be found in sub-R. 4, S. 23, the following may be usefully quoted from Craies' book at p. 106:

". . . . . if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

As I have already said, there is no necessity to press S. 22 (4) into the service of the Income-tax Officer holding an enquiry under S. 23. He has ample powers for the purpose of the enquiry, the same powers which a civil Court has got in trying a suit.

As for authority on the interpretation of S. 22 (4) and S. 23 (4) the majority of them are in favour of reading S. 23 (4) as if the words, "having made a return" did not exist in the section. The case of *Khushi Ram* v. *the Commr. of Income-tax* (*A. I. R.* 1921 *Lah.* 219) takes the same view as I have taken. All other cases, including a two Judge case of this Court, viz. *In the matter of Chandra Sen Jaini, Vaid, Etawah* (1), practically, take the view that the words "having made a return" have no force of their own, they are "harmless" or mere surplusage. These cases are, *In the matter of Harmukhrai Duli Chand* (2) and *Ram Kelawan Uyam Lal* v. *Commr. of Income-tax A. I. R.* 1928 *Pat.* 529. It would serve no useful purpose to take the arguments of the learned Judges one by one in the several cases and to attempt to dissect them. If, however, these cases are examined, it will be found that they have proceeded either on the view that the words "having made a return" are mere surplusage or that S. 22 (4) is a useful piece of rule and the Income-tax Officer should not be deprived of its use. It has indeed been pointed out that the use of the rule is for the benefit of the proposed assessee himself. I have already pointed out that we have no right to throw away the language of a statute, especially of a fiscal statute, as a mere surplusage. I have pointed out that clear and consistent meaning can be given to both S. 22 (4) and S. 23 (4) of the Act. I have pointed out that the Income-tax Officer has got ample power, in the course of an investigation held by him under S. 23 to call for any document or evidence or accounts from the assessee. Such being the case, with utmost respect, I am unable to agree with the view taken in this Court or in the Courts in Bombay, Madras and Calcutta. If the points, that have struck me as very very material and as

(1) A. I. R. 1928 All. 233 50 All. 589.
(2) A. I. R. 1928 All. 587 (S. B.).

fully answering the objections and arguments of the learned Judges had been considered by them, I would, certainly, have bowed to their decisions.

But as things stand, the arguments that weigh with me have not been considered, at least in their entirety, by the learned Judges and my inability to accept the views of so many eminent Judges I trust, is fully justified.

I would now come to the several questions put by the Commissioner of Income-tax and attempt to answer them. In view of a general discussion of the law given above, I will not discuss the reasons of the answers except where they are really necessary.

Question 1.—My answer is an emphatic no.

Question 2.—My answer is that the notice is invalid not because it included accounts and documents connected with the Calcutta shop, but because the issue of such a notice was illegal after an enquiry had commenced under S. 23(3).

Question 3 (a).—My answer is that the form used is immaterial. The invalidity lies in the issue of the notice after the enquiry had started.

Question 3 (b).—*Answer.*—The date was not material and does not affect the issue of the notice, if it was otherwise valid.

Question 4.—*Answer.*—S. 64 (1), Income-tax Act, authorizes the Income-tax Officer at Cawnpore to assess the income-tax at the headquarters for all the branches of the business wheresoever situated and there is nothing in S. 22 (2) which requires that separate notices should be issued for separate places of business.

Question 5.—*Answer.*—It was open to the Income-tax Officer to disbelieve Sheonath Pandey when he stated that no account book was kept and to hold that one was kept. It was also open to the Income-tax Officer to hold, as to the account sheets of Calcutta, that his order had not been complied with. This answer, however, is subject to the answer given to question 1, viz., the notice was illegal.

Question 6.—*Answer.*—It must depend entirely on the circumstances of the case. No general answer can be given which can be applied to every case. In this particular case, I have replied to question that the Income-tax Officer would be justified in holding that there was an account book showing the income from the house property at Cawnpore and that it has been intentionally withheld from him.

Question 7.—My answer to this question is that having regard to the language of S. 64 (1), Income-tax Act, the only officer who is responsible for a correct assessment for the entire business of the assessees is the Cawnpore officer and for the purpose of assessment he can call for any returns and accounts he likes, although an independent enquiry has been conducted by the Income-tax Officer exercising jurisdiction at the locations of the branch offices of the assessees. This was the opinion given by this Court in the matter of *Lachhman Prasad Bala Ram* (3). I would add the rider which was added in the case just quoted, viz., the powers of the authorities at the headquarters should never be exercised oppressively, so that persons willing to submit to an enquiry at the branch office should not, ordinarily, be compelled to bring their documents and officers all the way to the head office from distant places like Calcutta and Bombay. The Act should be administered as inoppressively as may be possible, always having an eye to the convenience of the subject whom it is proposed to tax.

Question 8. — *Answer.* — As already stated in answer to question 7, although the officer at Cawnpore was not an appellate officer to the officer in Calcutta, yet the Cawnpore officer was not bound by the report of the Calcutta officer and was not bound to refer the matter back to the Calcutta officer. As regards the assessment according to one's judgment, the assessment should always be on the merits, after an enquiry has started and not "according to judgment" (if that is meant to shut out an appeal.)

Question 9.—Answer : No.

The Income-tax Officer was bound to pronounce judgment, on the merits, so as to allow of an appeal.

Niamatullah, J.—This is a reference under S. 66 (2), Income-tax Act 1922 made by the Commissioner of Income-tax for decision of certain questions of law arising under the following circumstances :

(3) A.I.R. 1925 All. 385=47 All. 631.

Messrs. Lachman Das Babu Ram the assessees cary on business at three places, viz., Cawnpore, Bombay and Calcutta, the first named being the principal place of business where they have been assessed to income-tax to which the reference relates. They were required by a notice issued on 22nd April 1927 under S. 22 (2), Income-tax Act, to submit on or before 31st May 1927 a return of their total income in the previous year. On 2nd May 1927, the Income-tax Officer, who had issued the notice already mentioned, wrote to the Income tax Officers of Bombay and Calcutta asking for reports in regard to the assessees' profits at those places. On 1st August 1927, the assessees submitted a return in respect of their income derived from the Cawnpore concerns. Subsequently they submitted a similar return with regard to their income of the Bombay business. They did not make any return to the Income-tax Officer Cawnpore regarding their profits derived from Calcutta. On 11th August 1927, a combined notice under S. 22 (4) and S. 23 (2) requiring them to produce their accounts relating to the Calcutta branch and such evidence as they desired to adduce in support of their return. On 26th August 1927, accounts relating to their business at Cawnpore and Bombay were produced but not those relating to the Calcutta branch. On 17th February 1928, a report was received from the Income-tax Officer of Calcutta in respect of the assessees' income derived from the Calcutta business. This did not satisfy the Income-tax Officer of Cawnpore who obtained the production of the assessees' accounts maintained for the headquarters of their business, viz., Cawnpore. This led to certain discoveries and a notice under S. 23 (2) was issued on 22nd February 1928 calling upon the assessees to produce accounts relating to "property" and trial balances of receipts and disbursements in respect of the Calcutta concern for a certain period.

On 5th March 1928, it was stated on behalf of the assessees that no account was kept of the income of such property. The trial balances requisitioned were also not furnished. On 14th March 1928, certain proceedings were taken by the Income-tax Officer, Cawnpore, to whom Sheonath the general agent of the assessees definitely stated that no account was kept for the income of "property" and that the trial balances relating to the Calcutta shop could not be furnished as the accounts relating to that shop had already been produced before the Income-tax Officer, Calcutta. After some correspondence between the Income-tax Officer, Cawnpore and that of Calcutta an assessment was made on the 30th March 1928. The income of the Calcutta branch was assessed at Rs. 40,000 under S. 23 (4). The significance of assessment under S. 23 (4) is that it is based on the "best judgment" of the Income-tax Officer and that no appeal lies from such an assessment. An appeal was, however, preferred from this assessment on the ground that it could not in law be considered to be one under S. 23 (4) so as to deprive the assessees of the right of appeal. The Assistant Commissioner who heard the appeal in the first instance, ruled that S. 23 (4) applied and that the appeal was incompetent. A further appeal to the Commissioner led to the reference under consideration. The questions which emerge from this statement of facts and which we are called upon to decide are nine in number and are mentioned at pp. 5 and 6 of the statement of facts submitted by the Commissioner with his own opinion. The answers to these questions largely depend on a consideration of Ss. 22 (2) and (4) and 23 which are quoted below:

"22 (2) In the case of any person other than a company whose total fncome is, in the Income-tax Officer's opinion, of such an amount as to render such person liable to income-tax, the Income-tax Officer shall serve a notice upon him requiring him to furnish, within such period, not being less than thirty days, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income during the previous year."

"(4) The Income-tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under sub-S. (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax officer may require:

Provided that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

"23. (1) If the Income-tax Officer is satisfied that a return made under S. 22 is correct, and complete, he shall assess the total income of

the assessee, and shall determine the sum payable by him on the basis of such return."

"(2) If the Income-tax Officer has reason to believe that a return made under S. 22 is incorrect or incomplete, he shall serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend the Income-tax Officer's office or to produce, or to be caused to be produced, any evidence on which such person may rely in support of the return.

(3) On the day specified in the notice issued under sub-S. (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require on specified points shall, by an order in writing, assess the total income of the assessee and determine the sum payable by him on the basis of such assessment.

(4) If the principal officer of any company or any other person fails to make a return under sub-S. (1) or sub-S. (2), S. 22, as the case may be, or fails to comply with all the terms of a notice issued, under sub-S. (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-S. (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment."

The first question which calls for a decision of this Court has been stated in these terms :

"Has an Income-tax Officer jurisdiction to issue a notice under S. 22 (4) after the commencement of an enquiry under S. 23 (3) ?"

The contention before us has gone further and it has been argued that notice under S. 22 (4) cannot be issued after a return required by S. 22 (2) has been made. In this view S. 22 (4) applies only to cases where for some reason not easily conceivable the Income-tax Officer desires inspection of the assesses' accounts before he has any idea of the sources of their income, of the amount of their income and of the contigency of the accounts being needed to test the correctness of the figures to be mentioned in the return. S. 22 (4) clearly lays down that a notice under that section can be issued to :

"any person upon whom a notice has been served under sub-S. (2),"

i. e. to any person who has been previously called upon to furnish a return. The scope of the section is thus narrowed down to the absurd limits of the time after a notice for return has been served and before the return is made. It will be observed that notice under S. 22 (4) can be issued only to a person who has been previously required to furnish a return, and if the contention put forward on behalf of the assessees is sound, notice under S. 22 (4) cannot be issued after a return has been made.

I am unable to accept such a reading of S. 22 (4) otherwise quite general and unqualified as regards time, which leads to the result I have indicated and which can hardly serve any useful purpose in making an assessment. To give effect to the interpretation contended for on behalf of the assessees we have to insert some such words as "and who has not made the return" after the words "sub-S. (2)." It is one of the elementary rules of construction of statute that it should be so read as to avoid introducing what the legislature has not thought fit to introduce, and that a construction which has that effect should be rejected. S. 23 (1) which follows it makes it quite clear what the object of a notice under S. 22 (4) is. On receipt of a return the Income-tax Officer may either accept it forthwith or may if so advised verify its correctness with reference to the accounts for which a requisition may be made under S. 22 (4) at, that or any other stage.

There is likewise no reason to confine the scope of S. 23 (4) to the period before the commencement of an enquiry initiated by S. 23 (2). It is conceded that the section itself does not warrant such a restriction. It is true on the other hand that ordinarily the requisition contemplated by S. 22 (4) will be made on receipt of the return so as to avoid an enquiry if possible. In majority of cases the Income tax Officer will call for accounts on receipt of a return which is prima facie unsatisfactory and before an enquiry is decided on. But cases may occur in which after the commencement of such enquiry the necessity of examining the accounts may be felt. Cases are also conceivable where accounts are not expected to remove doubts altogether and yet they cannot be dispensed with.

In such cases the Income-tax Officer may consider it advisable to issue a notice under S. 22 (4) calling for accounts and another under S. 23 (2) requiring the assessee to produce such evidence as he desires to adduce in support of his return. It is to be observed that a notice under S. 23 (2) is in the interests of the assessee and must be issued; while one under S. 22 (4) may or may not be issued according as the Income-tax Officer may or may not deem it expedient having

regard to the circumstances of the case, but if issued must be obeyed. The plain language of the sections enables one to arrive at the result indicated above. It is, however, pointed out that S. 37, Income-tax Act, empowers the Income tax Officer to direct the production of documents by any person, assessee or otherwise, in the manner laid down by the Civil Procedure Code in relation to suits and proceedings before civil Courts, and it is argued that after an enquiry initiated by S. 23 (2) has commenced, the production of accounts is to be enforced not by a resort to a notice under S. 22 (4) but by the exercise of the power conferred by S. 37.

It may be that the law has provided more than one mode of securing evidence, but because an alternative method of achieving a certain object is available it does not follow that another if it is otherwise permissible should be denied. There is a difference between the provision contained in S. 22 (4) and that laid down in S. 37. The latter applies to assessees and others in a position to give evidence; while the former which is more drastic, is applicable only to assessees, who are to be visited with certain consequences in cases of failure to produce accounts.

Reliance has been placed on a case decided by a Division Bench of the Lahore High Court, reported in *A. I. R.* 1928 *Lahore* p. 219 *Khushi Ram Karam Chand* v. *Commissioner of Income-tax, Punjab.* It does support the contention of the assessees in the case before us. The reasons given by the learned Judges for not giving effect to the plain language of S. 22 (4) are thus stated by them :

"The words "having made a return" and the order in which the defaults are enumerated in S. 23 (4) indicate that a notice under S. 22 (4) precedes the notice and enquiry under S. 23. It is significant that sub-S. (4), S. 22 does not authorize a summary assessment in the case of a default under S. 23 (3)."

The learned Judges also observe that :

"It is true that the wording of S. 22 (4) is somewhat wide, but it must be construed with reference to the context. It is also a well established rule of the interpretation of fiscal enactments that, in case of doubt, an interpretation which is more favourable to the subject is to be preferred."

With great respect to the learned Judges I am unable to agree with this view. The order in which certain provisions occur may in some cases assist us in construing one of those provisions. But where the arrangement is consistent with a reading which gives effect to the entire language of that provision, its plain meaning cannot be departed from only because a different location of such provisions would have made that meaning clearer. The reason why the provision in question before us has been made sub-S. (4), S. 22 and placed before the enquiry provided for by S. 23 (2) is that ordinarily notice under the former will precede the notice contemplated by the latter. Assuming for a moment that the legislature intended to confer a power on the Income-tax Officer to issue a notice, non-compliance with which should attract the operation of S. 23 (4), whether such notice is issued before or after the commencement of the enquiry, where is the provision to be inserted ? If it be placed between sub-Ss. (2) and (3), S. 23, to make it plain that such notice can be issued after the commencement of the enquiry it would lead to the result, according to the reasoning based on the order of the provisions, that the Income-tax Officer has no power to issue such a notice before the commencement of the enquiry. It follows, therefore, that the arrangement of the provisions is not a safe guide in this particular instance. It is not disputed that the language of S. 22 (4) is wide enough to enable the Income-tax Officer to issue before the commencement of the enquiry a notice under S. 22 (4) which if disobeyed will entail the consequences mentioned in S. 23 (4).

The words "having made a return" occurring in S. 23 (4) founded on in the ruling referred to, do not in my opinion, support the conclusion arrived at in that case. These words may possibly make it arguable that notice under S. 22 (4) can be issued only where a return has not been made, an argument which I have already disposed of. The learned Judges who decided that case do not seem to be inclined to accept it, and on the contrary are of opinion that S. 22 (4) :

"is apparently intended to help the Income-tax Officer in deciding whether he will accept the return or proceed to make any enquiry."

It seems to me that the words "having made a return" in S. 23 (4) have been used because S. 23 (2) to which they relate presupposes that a return has been

made. In cases to which S. 22 (1) and (2) apply, return is out of question; while in cases to which S. 22 (4) applies return may or may not have been made. The object of introducing these words in relation to S. 23 (2) is to indicate what is certain to have happened, unlike the preceding two cases in which a return might or might not have been made. They cannot be so read as to imply that in the first two cases return could not have been made. I have already pointed out, one of the objections to such a construction, viz., that we, in effect insert some such words "and who has not made the return" after "sub-S. (2)" in S. 22 (4) which is more vicious than treating the words "having made the return" in S. 23 (4) somewhat lightly. The view taken by the learned Judges of the Lahore High Court is diametrically opposed to what has been held by at least three High Courts. In *Chandra Sen Jaini, Vaid, Etawah : In the matter of* (1). *In the matter of Messrs. Harmukhrai Dulichand* (2) and *Ram Khelawan Ugam Lal* v. *Commr. of Income tax, Behar and Orissa* : *A. I. R.* 1928 *Pat.* 529. It has been distinctly ruled that nctice under S. 22 (4) may be issued at any time before or after the commencement of an enquiry contemplated by S. 23 (2) and that the words "having made a return" occurring in S. 23 (4) do not signify anything which may affect the plain language of S. 22 (4). For the reasons detailed above, I answer the question in the affirmative.

The second question runs thus:

"(2) Was the notice under S. 22 (4) issued by the Income-tax Officer Cawnpore, on 22nd February 1928, invalid, because it included accounts and documents connected with the Calcutta shop?"

That the Income-tax Officer of Cawnpore had jurisdiction to assess tax on the income derived by the assessees from the Calcutta branch of their business is not disputed, and in view of the provisions of S. 64, Income-tax Act, such jurisdiction cannot be denied. This being so, it can scarcely be maintained that a notice issued under S. 22 (4) calling upon the assessees to produce or cause to be produced their accounts of the Calcutta branch is invalid. It was certainly open to the Income-tax Officer Canpore to require the Income-tax Officer Calcutta to send the account books which appear to have been produced before him by the assessees, who were for some reason of their own reluctant to have such accounts subjected to the scrutiny of the Income-tax Officer, Cawnpore. The latter preferred to make the assessees responsible for the production of these accounts and whether he was right or not in the exercise of his power to adopt the more drastic of the two courses open to him he cannot be said to have done what he had no jurisdiction to do. It has been contended that the Income-tax Officer, Cawnpore, having called for a report from the Income-tax Officer, Calcutta regarding the income of the assessees accruing there, he (the Income-tax Officer Cawnpore) ceased to have jurisdiction in regard to that matter. I cannot accede to this contention. It is only a departmental arrangement that one Income-tax Officer requires another to furnish information in matters supposed to be better known to him, but in doing so he does not divest himself of the powers which the law has conferred on him, so as to become functus officio. My answer to question 2 is in the negative.

The opinion of the Commissioner on questions 3 and 4 has not been challenged by the learned advocate for the assessees, and I think rightly. I answer them in the negative. Questions 5 and 6 have been argued together and may be so disposed of. They are as follows:

"(5) Was the Income tax Officer entitled in the face of the statement of Pandit Sheonath Pandey, the assessees mukhtar-i-am dated 14th March 1928, to hold that the notice under S. 22 (4) dated 22nd February 1928 had not been complied with?"

"(6) When an assessee denies the existence of accounts or documents, may the Income tax Officer presume the existence of such accounts or documents?

Where the Income-tax Officer has reason to believe that certain accounts and documents are in the possession or power assessee and calls upon him under S. 22 (4) to produce them, but the assessee denies the existence of such documents, the Income-tax Officer can arrive at his own conclusion in view of the circumstances of the case, and if he persists in his belief that such accounts and documents exist and ought to have been produced, he can proceed under S. 23 (4). The assessee has a remedy by challenging the finding of the Income-tax Officer, under S. 27, Income-tax Act, which provides that

"where an assessee within one month from the service of a notice of demand satisfies the Income-tax Officer that he did not receive the notice issued under sub-S. (4), S. 22, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the last mentioned notices, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of S. 23."

From the finding arrived at by the Income-tax Officer under S. 27 adversely to the assessee an appeal has been allowed by S. 30 of the Act, and if he satisfies the appellate authority that he was prevented from complying with the notice under S. 22 (4) because the accounts and documents to which it related did not exist, he will escape the consequences of disregarding that notice. It must be conceded that the procedure laid down for an assessee, who is believed to possess certain accounts and documents, to vindicate his denial in that respect, is clumsy and one sided, but such appears to be the law as it stands. I answer questions 5 and 6 in the affirmative.

Questions 7 and 8 may be disposed of together. They are as follows:

"(7) Has the Income-tax Officer of an assessee's principal place of business jurisdiction to compel such assessee to submit a return and produce accounts in respect of a branch business when he has submitted a return, produced accounts, and otherwise complied with all the requirements of the law before the Income-tax Officer of the place where he has such branch business?"

"(8) Is the Income-tax Officer of the principal place of business bound to accept the report of the Income-tax Officer of a place where an assessee is carrying on a branch business? If not, is he bound to refer the matter back to the latter officer for further enquiry and not to assess according to his judgment?"

My remarks in answering question 2 have bearing on the questions and should be referred to. As stated by me in that connexion the Income-tax Officer, Cawnpore, which is the principal place of the business of the assessees, had jurisdiction to assess the tax on their income from all sources. It follows that he could call for a return of their income from all sources including the Calcutta branch and to direct the production of accounts thereof. The assessees are not relieved of the obligation imposed on them by making a return of their income derived from a branch concern to the Income-tax Officer of the district where such branch concern is carried on and by producing accounts relating thereto before such officer. The law gives to the assessee no choice in this matter. I answer the seventh question in the affirmative and question 8 in the negative. Question 9 as it stands is too widely put. It runs thus:

"(9) In all the circumstances of this case, was the assessment rightly made under S. 23 (4)?"

Taking it as it stands the language would include the question whether the Income-tax Officer was right in the exercise of his discretion to proceed under S. 23 (4) or under S. 23 (3). But I think the learned Commissioner making the reference meant no more than to obtain a ruling of this Court on the question whether under the circumstances of this case the Income-tax Officer, Cawnpore, had jurisdiction to make an assessment under S. 23 (4). For the reasons which I have already stated in answering question 1, I would answer question 9 in the affirmative.

By the Court.—As we are not agreed as to our answer on question 1, we refer the "case" under S. 98, Civil P. C., and S. 66 (2), Income-tax Act 1922, to the Hon. the Chief Justice, for orders as to it being put before a single Judge or a Bench of Judges, as he may think fit. We, however, want to mention that the question is of utmost importance to the income-tax authorities and the public who pay the tax, that on the point, different High Courts have taken different views and that it might be desirable to require a Bench of three Judges to hear the point and decide it to avoid a further difference of opinion, and a second reference.

Question 1 is as follows:

Has an Income-tax Officer jurisdiction to issue a notice under S. 22 (4) after the commencement of an enquiry under S. 23 (3)?

Opinion.—This is a reference under S. 98, Civil P. C., made by a Division Bench of this Court in a matter arising under the Income-tax Act of 1922. Notice was served on Lachhman Das Babu Ram a firm with their headquarters at Cawnpore and branches in other places, under S. 22 (2), Income-tax Act, to make a return of their income. After certain proceedings, which it is unnecessary to detail, a combined notice was sent to the firm on 11th August 1927, in the

form known as form B, drafted apparently under the authority of the Board of Revenue but not incorporated in any way in the Income-tax Act. This so-called combined notice purports to be a notice under S. 22 (4) and also under S. 23 (2) of the Act. The nature of the notice that can be issued under those sections is clear on the face of the sections themselves and we need not detail it.

After many postponements and the receipt of many reports and the examination of certain accounts, next on 22nd February 1928, the Income-tax Officer felt that he had reason to ask for further particulars in regard to the purchase of a house, and issued what we are told was a notice under S. 23 (3) asking for particulars in regard to this house. In the statement of the case made by the Income-tax Officer this notice is referred to as having been one under S. 23 (2), but that is apparently a misprint, and this notice of 22nd February 1928, was presumably a notice asking for evidence on "specified points" in accordance with sub-S. (3), S. 23. On the same date 22nd February, he issued another notice under S. 22 (4) calling for certain Cawnpore headquarters accounts. On 14th March 1928, one Sheonath was examined on oath, and this appears to be the only occasion on which any "evidence" was heard. On 30th March, after certain reports had been received, the Income-tax Officer asked for further accounts. The representative of the firm asked for a further reference to the Calcutta branch, but this was refused as the day, 30th March, was the last day but one for the close of the financial year, and the Income-tax Officer proceeded to a summary assessment, purporting to act under S. 23 (4). Upon the assessee appealing to the Assistant Commissioner it was held that he had no right of appeal owing to the fact that the assessment had been made and properly made under S. 23 (4). The assessee thereupon required the Income-tax Officer to refer the case to this Court on certain points stated. A number of those points came up for consideration before a Bench of this Court consisting of Mukerji, J., and Niamatullah, J. On one point the learned Judges have differed, and the matter has come up before the present Bench of three Judges on the reference. The point referred to us is stated by the learned Judges as follows:

"Has an Income-tax Officer jurisdiction to issue a notice under S. 22 (4) after the commencement of an inquiry under S. 23 (3)."

We have had some difficulty in ascertaining the facts on the basis of which we are asked to decide this question. The following appears in the statement of the Income-tax Officer at p. 3:

"The assessees now desire that I should make a reference to the Honourable High Court on the following points of law (Appendix E) (as propounded by them):

(a) Whether the notice issued under S. 22 (4) on 22nd February 1928, was legally valid inasmuch as, it was issued after the commencement of proceedings under S. 23 (3), etc."

It does not appear, however, that we have to consider the effect of the notice on 22nd February 1928, at all. The notice under S. 22 (4), which we have really to consider, is referred to at p. 8 of the Income-tax Officer's statement, at para. 20, point 9. It is referred to us as follows:

"The assessees clearly failed to comply with the notice under S. 22 (4), issued on 11th August 1927, calling for the production of their Calcutta accounts. This default justifies the assessment under S. 23 (4)."

The Assistant Commissioner also said in his order dated 15th June 1928, which is printed as Appendix D to the Income-tax Officer's statement of the case:

"and there was the failure to produce the Calcutta accounts for which a notice was issued on 11th August 1927.

These circumstances clearly reduce the assessment to one under S. 23 (4).

A consideration of the facts chronologically set out at the commencement of this judgment will show that no inquiry under S. 23 (3) commenced until the date of 14th March 1928, when the evidence of the one witness Sheonath was heard on oath. It is manifest, therefore, that neither the notice issued on 11th August 1927, nor that issued on 22nd February 1928, was issued after the commencement of the inquiry under S. 23 (3). The question, therefore, which has been referred to us does not appear to us to arise on the facts of the case. We may add that Mr. Bajpai, the Government advocate who has represented the case here for the Crown has had the advantage of the presence of the Income-tax Officer in Court assisting him in the case, and Mr. Bajpai himself, after having consulted the Income-tax Officer agrees that no inquiry under S. 23 (3)

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can be said to have commenced until 14th March 1928. Even if it could be be said to have commenced on 22nd February 1928, the date on which a notice was issued under S. 23 (3) to produce evidence as regards the specified point of the purchase of a house, a point which we have not to decide it is manifest that that the notice under S. 22 (4) of 11th August 1927, was long prior to that date.

We therefore, direct that this case be returned to the Bench that referred it to us, with the expression of our opinion that the point referred to us does not on the facts of the case arise.

(On return of the case the original Bench delivered the following judgments.)

Mukerji, J.—By an order of this Bench dated 22nd February 1929 we directed that the matter in difference between the Judges composing this Bench might be referred to a single Judge or a Bench of three Judges. The Hon'ble the Chief Justice was pleased to appoint a Bench of three Judges. The matter was considered by the learned Judges to whom the matter in difference between us was referred. The learned Judges came to the conclusion that in the circumstances of the case, the question referred to, namely question 1 of the nine questions referred to the High Court by the Commissioner of Income-tax, did not arise. This Bench thought that the learned Judges who expressed the opinion quoted above were not authorised under the provision of law under which the reference was made, to say that the question did not arise. This Bench accordingly addressed the learned Chief Justice again proposing that the said question 1 might again be referred to other Judges. The learned Chief Justice thereupon called a meeting of the Judges of the Court and the majority of the Judges decide that it was open to the three Judges, to whom the question had been referred, to say that the question did not at all arise and that such opinion would be binding on the Division Bench which referred the question.

The matter was again placed before us. We have heard the counsel for the parties. Dr. Katju has argued that on the judgment delivered by the three learned Judges mentioned above, the answer to question 9 as recorded by us previously should be reconsidered. He has argued and in my opinion quite correctly that question 9 and question 1 are not identical. Question 1 is :

"Has an Income-tax Officer jurisdiction to issue a notice under S. 22 (4) after the commencement of enquiry under S. 23 (3).

Question 9 runs as follows :

"In the circumstances of this case, was the assessment rightly made under S. 23 (4)."

Question 1 is a pure question of law and on this point my brother Niamatullah, J., and I are at a difference. Dr. Katju argues that in spite of this difference, we ought to say in answer to question 9 that having regard to the facts of the present case, the assessment was not rightly made under S. 23 (4).

Let us examine the contention of Dr. Katju. He has pointed out that when the Income-tax Officer at Cawnpore started his enquiry, he asked for the account books from all the places of business from the assessee, namely, from Cawnpore, from Bombay and from Calcutta. The Bombay and Cawnpore accounts were produced but the Calcutta accounts were not produced before the Officer at Cawnpore. The Income-tax Officer at Cawnpore issued a notice, on on 11th August 1927, which was a combined notice under S. 23 (2) and 22 (4) of the Income-tax Act, to produce the Calcutta accounts on 15th August. To this order the assesses demurred and requested the Income-tax Officer at Cawnpore not to press his order but to allow them to produce their accounts before the Income-tax Officer at Calcutta. To this request the officer at Cawnpore acceded and wrote to the Officer in Calcutta as follows: see p. 9 Appendix A:

"It is, therefore, the Calcutta shop account which is the most important. I would request you to examine these books again and obtain copies . . . . I would have taken all this trouble on myself, but the assessse is unwilling to show the Calcutta shop accounts to me. The case is important and requires your personal attention. I have fixed the case for 6th March 1928, and shall be extremely obliged to have your reply before that date."

This letter was written as late as on 24th February 1928, and evidently after some other correspondence had passed. Dr. Katju urges, and in my opinion rightly, that by agreeing to accept the report of the Income-tax Officer, Calcutta, provided same was satisfactory, the Officer in Cawnpore, waived, so to say, the effect of his order dated 11th August 1927. That order, argues Dr.

Katju, could not be revived after seven months in March 1928, and could not be made the basis of an order under S. 23 (4), Income-tax Act, namely an assessment to the best of the judgment.

It will be remembered that there were two notices issued against the assessee, both purporting to be combined notices under S. 22 (4) and S. 23 (3), one was dated 11th August 1927 and the other was dated 22nd February 1928. It was on account of the failure to comply with both these notices, that the Income-tax Officer purported to act udder S. 23 (4), Income-tax Act. When the assessees questioned the propriety of this assessment " to the best of judgment " they questioned the validity of the notice of 22nd February 1928: see point (a) at p. 3 of the statement of the case. The learned Commissioner is required by law to give his own opinion on the points referred to the High Court for its opinion. In answering question 9: see p. 8 of the statement of the case, the learned Commissioner did not rely on the notice issued on 22nd February 1928, but relied on the notice of 11th August 1927 only. For this reason the Bench consisting of three learned Judges of this Court expressed the opinion that the notice of 22nd February 1928 might very well be ignored. The learned Judges then considered the circumstances under which the notice of 11th August 1927 had been issued and came to the conclusion that it had been issued before any enquiry was started. From this finding of fact it followed that the question of law on which there was a difference of opinion between myself and my learned brother did not arise. Dr. Katju has argued that if we are bound by the opinion of those three learned Judges, as the majority of the Judges of the Court have held in an English Meeting, we must ignore the notice of 22nd February 1928, as being a document of no relevancy in the case.

In my opinion, this view contended for, ought to be accepted and for the reasons already given. Further, however, there is good reason why the notice of 22nd February 1928 should be ignored as waived or as being never intended to be operative. I have already pointed out that the letter addressed by the Income-tax Officer of Cawnpore to the Income-tax Officer at Calcutta is dated 24th February 1928: see Appendix A. and was, therefore, written two days after the notice dated 22nd February 1928 had been issued. From the portion of the letter quoted above it will be seen that the Income-tax Officer at Cawnpore was perfectly willing to accept the report of the Calcutta Officer and it was not his intention to enforce either the notice of 11th August 1927 or that of 22nd February 1928.

Whether we accept the opinion of the Full Bench or whether we decide on our own initiative, there can be no doubt that both the combined notices had been waived so to say, and it would be extremely unfair on the part of the Income-tax Officer to turn round and say, without giving the assessee a fresh opportunity to produce the books, that their failure on previous occasions to produce accounts subjected them to the penalty of having a best judgment assessment made against them.

In view of this fresh argument and in view of the opinion expressed by the Full Bench, I am clearly of opinion that the answer to question No. 9 should be in the negative.

I may point out that this answer entirely makes it unnecessary to return any answer to question 1 and as already stated in the opinion of the Full Bench, question 1 does not arise.

I would therefore direct that, in substitution of my answer to question 9 as recorded on 22nd February 1929, the detailed answer which is also in the negative recorded above be returned to the Commissioner of Income-Tax.

I note that Mr. Bajpai the learned Government Advocate has argued in Court for 4½ days and that he is entitled to a fee of Rs. 1100. He should get this fee from the Government. As regards the costs of this reference, I would direct that the Government should pay the costs of the assessees.

Niamatullah, J. — In my order of 22nd February 1929, I answered question No. 9 in the affirmative, because, in my view, disregard of a notice under S. 23 (2) of the Income-tax Act entitles the Income-tax Officer to proceed under S. 23 (4) and if he does so, the assessee has no right of appeal. Whether the Income-Tax Officer could do so under the circumstances of the present case depended on the effect of two notices

issued by him (1) on 11th August 1927, and (2) on 22nd February 1928. It had been contended on behalf of the assessees that the first notice had been waived. I did not deal with this argument, because if it be accepted with regard to the first, the second notice, which in my opinion cannot be said to have been waived as the result of a letter, dated 24th February 1928, could not be got over. I would have respectfully differed from my learned colleague on this part of the case, had the question been open to discussion; but the view taken by the Full Bench as regards the second notice relieves me of the responsibility of dealing with it. The Full Bench have placed their own construction on the statement of facts submitted by the Income-tax Commissioner, according to which the effect of the notice dated 22nd February 1928, is not to be considered. They observed, after considering the statement of the case, that:

"It does not appear, however, that we have to consider the effect of the notice on 22nd February 1928, at all."

As regards the first notice they ruled that it was issued before the commencement of the enquiry, in which case, according to the view both of my brother Mukerji, J. and myself, the Income-tax Officer had jurisdiction to proceed under S. 23 (4), unless he is otherwise debarred from taking that course. On receipt of the finding of the Full Bench, the assessees pressed for the consideration of the question that the first notice (of 11th August 1927) had been waived. The second notice (of 22nd February 1928) being ignored, as we must ignore in view of the ruling of the Full Bench, I must now consider the effect of the former. I have had the advantage of reading the judgment of my learned colleague, and find myself in agreement with him in holding that, under the circumstances of the case stated by him, it was waived with the result that it loses its legal effect altogether.

In accordance with the view expressed by the Full Bench and for the reasons stated above, I have to answer question 9 in the negative, which I accordingly do.

By the Court.—Let the following answers to the questions put by the Commissioner of Income-tax be returned as the answers of the Court. Along with the answers will be sent copies of all the judgments of the Judges forming this Bench and to which the question 1 was referred for an answer.

Question 1.—In the view expressed by the Bench of three Judges, this question does not arise.

Question	2	Answer	No
Question	3(a)	"	No
"	3(b)	"	No
"	4	"	No
"	5	"	Yes
"	6	"	Yes
"	7	"	Yes
"	8	"	No
"	9	"	No

With reference to the costs we declare that the Government Advocate having worked for more than 4 days is entitled to a fee of Rs. 1100. As the assessee has substantially succeeded in the reference, we direct that he shall get his costs from the opposite party.

R.K. *Reference answered.*

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MEARS, C. J., AND SEN, J.

Reoti Lal and *another*—Applicants.

v.

Shiam Lal and *others*—Opposite Parties.

Appln. in First Appeal No. 136 of 1929, Decided on 10th July 1929.

(a) Guardians and Wards Act (1890), Ss. 43, 47 (1)—Authorising guardian to celebrate marriage amounts to regulation of conduct and appeal lies from such order.

One of the duties of a guardian of a minor girl is to provide a suitable bridegroom. Whatever he does in relation to that is either conduct or proceedings within the meaning of S. 43. Where a Court authorizes the guardian to celebrate the marriage of the girl, his act is a regulation of conduct or proceeding on the part of the guardian. The appellate Court has therefore the right to hear appeal from such an order under the provisions of S. 47 (1) read with S 43. [P 67 C 1]

(b) Specific Relief Act, S. 53—Court should grant injunction against marriage arranged by guardian with person whose father suffers from hereditary disease.

Where a marriage of a girl is arranged by her guardian with a person whose father has on medical examination been found to be suffering from leucoderma but there is no evidence as to whether the proposed bridegroom or his brother betray an indication of the disease of being in incipient state or being actually visible, it is the duty of the Court to step in and pass an injunction restraining the guardian from taking any further steps in connexion with the marriage, until the proposed bridegroom is proved to be a fit person. [P 68 C 1, 2]

U. S. Bajpai and *G. S. Pathak*—for Applicants.

Kailas Nath Katju—for Opposite Parties.

Judgment.—On Mr. U. S. Bajpai's application for the admission of this appeal Dr. Katju was present, and though he had no locus standi to intervene, this Court premitted him to do so in order that this matter, which is one of extreme urgency, could be discussed by both parties. The application for admission is to set aside an order passed by Mr. Plowden, wherein he permitted the marriage of Ram Piari to take place tomorrow, 11th July. Dr. Katju's point is that from such an order there is no appeal. He called our attention to S. 47 (i), Guardians and Wards Act (Act 8 of 1890) and he, having read that section, pointed out that it was only in respect of those matters specifically mentioned in S. 47 in which there was a right of appeal, and he said that a perusal of S. 47 would disclose that none of these subsections were applicable to the appeal before the Court. Our attention was drawn by Mr. U. S. Bajpai to S. 47 (i), which refers back to S. 43, which states that an appeal shall lie to the High Court from an order made by the District Judge when, under S. 43, he is regulating the conduct or proceedings of a guardian. Now the question at once arises on the reading of S. 43, whether what the District Judge was doing, when he authorised the guardian to celebrate the marriage, was a regulation of conduct or proceedings on the part of the guardian To our minds, it is perfectly clear what is meant. One of the duties of a guardian is to provide a suitable bridegroom. Whatever he does in relation to that is either conduct or proceedings. If he interviews fathers, if he interviews prospective bridegrooms, or if he makes any decision on any matter in relation to the marriage, all of those things are part of his proceedings as a guardian. If he, for reasons which cannot be approved, endeavours to force upon his ward a man unsuitable, obviously, when he is doing that, he is conducting himself in the affair, and in common language if a guardian succeeded in bringing off a marriage of that kind, it would be spoken of as "bad conduct" on his part. Therefore, it is clear to us that this Court has the right to hear this appeal under the provisions of S. 47 (i) read with S. 43. We, therefore, hold that there is no force in the preliminary point which we have permitted Dr. Katju to take, and we now propose to admit the appeal.

Another very curious, and indeed serious, position has arisen in this matter. Mt. Ram Piari was the daughter of one Bhola Nath, who died in the year 1915. She had two sisters. Sambati and Bhagwati. Sambati married one Lakshmi Chand and Bhagwati married one Ram Sarup. Sambati and Bhagwati are both dead, and Ram Pirai at this moment is a young woman, who has property which is spoken of as in the neighbourhood of Rs. 60,000/- ; it may in fact be more. When Bhola Nath died in 1915, the property of Mt. Ram Piari was looked after by Rai Bahadur Lala Debi Das, and Ram Piari began to live with her elder sister, Mt. Sambati, who was married to Lakshmi Chand. In the year 1921, the time had arrived when the question of this young girl's marriage should at least be considered. She was then about 8 years of age, and on 3rd August 1921, the District Judge appointed Sia Ram to be the guardian of the person of Mt. Ram Piari, and Ram Sarup, who had married her sister Bhagwati, to be the guardian of her property. Sia Ram is the father of Lakshmi Chand, who had married Sambati. There were various applicants for the hand of this young girl some of whom may perhaps be thought to have been attracted by her money, and they were Ram Sarup, who had married Bhagwati and who is a widower, one Mandhata and Lakshmi Chand, also a widower, the son of Sia Ram. On 25th November 1928, a committee of five persons was appointed, consisting of Debi Das, Janki Prasad, Shiv Lal, Thakur Das and Mool Chand, and the District Judge was prepared to accept their decision as final subject to an overriding right on his part to object to any candidate on moral, material or medical grounds. That was a sensible order. The committee did not come to a unanimous decision, three being in favour of Mandhata, one in favour of Ram Sarup and the fifth member of the Committee, Janki Prasad, was neutral in the matter. In these circumstances and having regard to a very strong order and very proper order, which had been passed on 6th September 1927, with re-

gard to the physical condition of Mandhata by reason of his father having leucoderma, the District Judge said that he could not receive any help from this committee, and he directed Sia Ram, the guardian, to ascertain what proposals he could get for a reasonably good marriage for this relatively wealthy young girl. Sia Ram has produced Shiam Lal, and that has aroused considerable opposition. The matter came before the District Judge to approve of the marriage of Ram Piari with Shiam Lal and it was stated that Shiam Lal's father, by name Param Sukh, was suffering from leprosy. Thereupon, on 11th June 1929, Param Sukh submitted himself to the medical examination of Mr. Gurha then acting as Civil Surgeon of Sitapur. He gave a certificate stating that Param Sukh was suffering from leucoderma, which was not contagious or infectious, and that to the best of his knowledge this disease was not hereditary.

This medical certificate is open to objection on very many grounds. He does not state the extent of the disease from which Param Sukh is suffering, whether it is a matter of one or two spots or whether it has spread practically over the whole of the body. He does not set out the period of time during which Param Sukh has been a victim of this disease, and most important of all and what is much wanted is evidence whether any of the other brothers of Shiam Lal or Shiam Lal himself betray any indication of the disease being in an incipient state or being actually visible. That was the only evidence which Mr. Plowden had before him, and Mr. Gurha did not go into the witness-box. The appellants today apply for an injunction to restrain this marriage which is fixed for tomorrow. The opposition is simply and solely on the ground of health, and the appellants do not accept the suggestion that is implied in the statement of the Civil Surgeon, namely that this young girl will not be subject to any risk of contracting this disease if she marries Shiam Lal. They want that matter put to the test. We are of opinion that in view of the matters that have been mentioned to us by Mr. Bajpai particularly in relation to a brother of Shiam Lal, it is our absolute duty to step in at this stage and to pass an injunction restraining Shiam Lal from entering into any ceremony of marriage with Ram Piari on 11th July or at any other date, until this order is dissolved, and further to pass an injunction restraining Sia Ram, the guardian, from taking any further steps in connexion with the said marriage or in any way prosecuting or advancing the same or permitting it or conniving at it We have explained to Shiam Lal, who is a lawyer, what would be the immediate consequence of any breach of this injunction on his part and he is quite sensible about the matter and realises that this marriage cannot take place until after proper enquiries have been made. Now what we propose to do is this. Shiam Lal is well able to appreciate the position exactly. We have a duty towards this young girl and it is a duty of protection. Shiam Lal is to decide within ten days and to communicate that decision of his to the Registrar whether he will abandon all thoughts of this marriage or whether he is prepared to assist at an enquiry which this Court will hold. The assertion of the appellants is that Shiam Lal on medical grounds is not a fit bridegroom for this young girl. Shiam Lal is at perfect liberty to contest this point, and it will be contested if Shiam Lal says that he wishes it to be contested. The procedure, if Shiam Lal wants this matter decided, will be as follows. Param Sukh has five sons, Bansidhar, Bulaqi, Ram Lal, Shiam Lal and Sri Ram. Param Sukh with his five sons must come to Allahabad at a date to be fixed and Param Sukh and his five sons must submit themselves to be medically examined by two doctors whom this Court will nominate at the appropriate time, and those doctors, having made a sufficient medical examination, will then go into the witness box and each give his experiences and his views of the medical history of Param Sukh and the degree of health of all of the five brothers, and generally inform the Court as to the nature of leucoderma.

It appears that Shiam Lal has seen Ram Piari, and it may be necessary, as she is a girl of fifteen years of age, for the Court to invite some lady to see her and ascertain her views. This may be necessary, because Sia Ram has apparently obtained a letter from her

under circumstances which Mr. Uma Shankar Bajpai would like to be examined into a little further. However, for the moment the matter that is before Shiam Lal is this. An injunction has been passed restraining him from marrying Ram Piari, either on 11th July or on any future date, until further order, and now he has got ten days within which to consult his brothers and father in order to see whether they are willing to submit themselves to the test which we think alone will give a satisfactory result. We have mentioned two doctors, but we may not indeed limit it to two and may have to choose three. Let notice of this injunction be personally served on Sia Ram, the guardian. A notice of this injunction must also, of course, be served personally upon Shiam Lal, but he has taken notice of it, having been in Court throughout the whole of its delivery and is, indeed, at this moment present in the Court. Let a copy of this be sent to the District Judge as well.

R.M./R.K. *Order accordingly.*

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Full Bench

SULAIMAN, AG. C. J., MUKERJI AND KING, JJ.

(*Sahu*) *Radha Krishna* — Plaintiff—Appellant.

v.

Tej Saroop and *others*—Defendants—Respondents.

Second Appeal No. 2176 of 1926, Decided on 28th October 1929, from decision of Dist. Judge, Moradabad, D/- 28th June 1927.

(a) Civil P. C., O. 34, R. 6—Personal remedy asked for — Stage for deciding limitation is after sale proceeds are actually found insufficient.

The proper stage for deciding whether the personal remedy of the plaintiff mortgagee is barred, is after the net proceeds of the sale have been found to be insufficient to pay the decretal amount; so long as this has not been ascertained no question for the passing of the personal decree really arises. [P 71 C 1]

*** * (b) Civil P. C., O. 34, R. 6 — Personal remedy—Deed registered—Limitation is six years—Limitation Act, Art. 116.**

The personal remedy can be enforced on the basis of a registered deed within six years under Art. 116, Lim. Act: *A. I. R.* 1923 *All.* 1 (*F.B.*): *A. I. R.* 1929 *Mad.* 53 (*F. B.*) and *A. I. R.* 1928 *Oudh* 465, *Ref.*; *A. I. R.* 1926 *P. C.* 56, *held to be no direct authority for contrary view.* [P 72 C 1]

(c) Interpretation of Statutes — Decisions holding one view under an Act—Act substituted by another Act with identical language—Old view is presumed to be accepted.

Where the High Courts hold a particular view as to the interpretation of a section in an Act and the Act is substituted by another Act, which reproduces the language of that section, it is a fair presumption that the correctness of the old view is accepted. [P 71 C 2]

Order of Reference

Boys, J.—I agree in holding that this case is appropriate for consideration by a Full Bench. I would only add that I am inclined to think that the question of whether the plaintiff is or may be entitled to have a personal decree has been prematurely decided. Plaintiff had to proceed in the first place against the property. Under O. 34, R. 4 there is no question of a personal decree. In fact plaintiff has not in so many words asked for a personal decree. He has asked that he:

"may be authorised to apply for the preparation of a decree against the person and other properties,"

if the mortgaged property prove insufficient.

Even treating this request, however, a prayer for an immediate personal decree for a balance, if any, to be ascertained, and granting that such a prayer may be desirable to save the period of limitation running out, no such decree could be immediately prepared for the event might show that the whole debt was discharged by the sale of the property and no Court should pass unnecessarily a decree that might well be infructuous. Treating the request, then, in this case as a prayer for a personal decree, it appears to me at least arguable that the proper course would be to defer passing any order on the prayer until the proceeds of the sale had been found to be insufficient and then and then only would be the time to determine whether the balance is legally recoverable otherwise than out of the property, one consideration governing the answer being whether the right to a personal decree was barred by limitation.

But as in the present case the right of the plaintiff to a personal decree at any time has in fact been finally determined and the question is of far-reaching importance I think for the reasons given by my brother that it should be considered by a Full Bench.

Pullan, J.—This second appeal arises from a suit brought by a mortgagee on the basis of a mortgage-bond dated

25th February 1921. The suit was instituted on 12th February 1927, and the plaintiff claimed relief against the mortgaged property and he also prayed that in case the mortgaged property be insufficient and any amount remains due to the plaintiff, the plaintiff may be authorized to apply for the preparation of a decree against the person and other properties of the principal defendants. The Courts below have given a decree against the property but they have refused a decree for a personal remedy on the ground that the suit is for this purpose beyond time. The Courts below considered that by a recent decision of their Lordships of the Privy Council reported in *Ganesh Lal* v. *Khetro Mohan Mahapatra* (1), it has been finally ruled that a suit to enforce a personal covenant in a mortgage-deed is barred by Art. 66, Lim. Act, unless it is made within a period of three years from the date when the debt became payable.

In appeal we have been asked to consider that the interpretation placed by the lower Courts on this decision of their Lordships of the Judicial Committee is incorrect. It has been pointed out to us that the decision itself appears to be in conflict with previous decisions not only of the High Courts in India but also of their Lordships of the Judicial Committee. These decisions go back to a decision of the Judicial Committee quoted in *Ramdin* v. *Kalka Pershad* (2), and a decision of the Calcutta High Court, *Miller* v. *Runganath Mullick* (3), which was based thereon. It has been pointed out to us that these rulings have never been held to be authority for the proposition that Art. 66 applies to a case of this kind. But on the other hand it has been generally held that a period of six years is allowed for filing a suit to obtain a personal decree against a mortgagor. The general view appears to have been that these cases are governed not by Art. 66, Lim. Act but by Art. 116. In the judgment of their Lordships of the Judicial Committee in *Ganesh Lal* v. *Khetro Mohan Mahapatra* (1), no reference is made to Art. 116 and the suit in that case was brought after more than ten years; hence it is immaterial whether a six year or a three year period of limitation applied to the suit. This ruling has already been considered by a Bench of the Oudh Court reported in *Jai Indra Bahadur Singh* v. *Kairati Lal* (4), and by a Full Bench of the Madras High Court reported in *Ratnasabapathy Chettiar* v. *Devasigamony Pillai* (5). Both these Courts have, in spite of the decision of the Privy Council, found that Art. 116 applies to a case like the present and not Art. 66, and the Madras High Court in particular has pointed out that in the case of *Ganesh Lal* v. *Khetro Mohan Mahapatra* (1) there must have been a reason why Art. 116 could not be applied, and the view was taken that the observations of their Lordships should be regarded as obiter dictum. In my opinion a matter of this importance should be referred to a larger Bench. I myself would not be prepared to hold that in view of the observations of Lord Sumner in the case of *Tricomdas Cooverji Bhoja* v. *Gopinath Jia Thakur* (6) at p. 69 *of* 44 *I.A.* Art. 116, Lim. Act cannot apply to the case before us, and in view of the apparent conflict between the ruling in that and the ruling in *Ganesh Lal* v. *Khetro Mohan Mahapatra* (1) I consider that this appeal should be referred to a Full Bench.

Opinion of the Full Bench

Sulaiman, Ag. C. J.—This is a plaintiff's appeal arising out of a suit for sale on the basis of a mortgage deed, dated 25th February 1921. The suit was instituted on 12th February 1927, i. e., more than three years after the mortgage but within six years of it. In the plaint the plaintiff claimed a further relief that in case the mortgaged property be insufficient and any amount remains due to the plaintiff the plaintiff may be authorised to apply for the preparation of a decree against the person and other properties of the principal defendants. The first Court held that the personal remedy was barred, as the suit had been brought more than three years after the bond and relied on certain remarks in *Ganesh Lal*

(1) A.I.R. 1926 P.C. 56=5 Pat. 585=53 I.A. 134 (P.C.).
(2) [1886] 7 All. 502=12 I.A. 12=4 Sar. 619 (P.C.).
(3) [1886] 12 Cal. 389.
(4) A.I.R. 1928 Oudh 465.
(5) A.I.R. 1929 Mad. 53=52 Mad. 105 (F.B.).
(6) A.I.R. 1916 P.C. 182=44 Cal. 759=44 I.A 65 (P.C.).

v. *Khetra Mohan Mahapatra* (1). The plaintiff preferred an appeal challenging the finding that a personal decree was barred. He also urged that the lower Court should not have decided that question at that stage. The learned District Judge has repelled both these contentions holding that the question was decided, because the plaintiff himself had asked for a personal decree, and that such personal decree was barred by the three years' rule.

It seems to me that the proper stage for deciding such a point is after the net proceeds of the sale have been found to be insufficient to pay the decretal amount. O. 34, R. 6, provides that where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, the Court may pass a decree for such amount if the balance is legally recoverable. The words "found to be" have been newly added in this rule and did not find a place in S. 90, Transfer of Property Act. Old rulings are to my mind not now applicable. So long as it has not been ascertained that the sale proceeds are insufficient, no question for the passing of a personal decree really arises. This matter is made clear still further by Appendix A, No. 45 which suggests a form for the plaint in a suit for sale and allows the plaintiff to ask for further relief that in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance. Similarly Appx. D, form No. 4 relating to a preliminary decree for sale shows that a direction that the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance is to be entered in it. The occasion for applying of course comes later on when the proceeds are found to be insufficient. It is then that a personal decree can be passed.

As, however, the question has been distinctly decided by the Courts below, it is convenient to dispose of the plea of limitation. It cannot be doubted that under the old Limitation Act the great preponderance of opinion in all the High Courts had been that Art. 116, Lim. Act, applied to suits for recovery of money on a registered document. The earliest Full Bench case of this Court was that of *Husain Ali Khan* v. *Hafiz Ali Khan* (7). In the leading case of *Ram Din* v. *Kalka Pershad* (2), their Lordships of the Privy Council laid down that the Art. 132, Lim. Act, provided the period of limitation of twelve years as against the mortgaged property, but that period did not apply to the personal remedy which the instrument carried. The headnote appears to be slightly misleading as in the body of the judgment their Lordships did not lay down that the rule of three years applied to registered security also. They referred to three years rule for simple money demands and single bonds etc. and to six years rule as regards foreign judgments and compound registered securities. This case was followed by the Calcutta High Court in *Miller* v. *Ranga Nath Moulick* (3) where it was remarked that a period of six years was applicable to the personal remedy on the basis of a registered mortgage deed.

The applicability of Art. 116, to claims under registered bonds was accepted by all the High Courts with the exception of one solitary case of this Court, *Ram Narain* v. *Kalta Singh* (8). The new Limitation Act was passed in 1908 and the legislature reproduced the language of Art. 116 and of the other relevant Articles. It is, therefore, a fair presumption that the correctness of the old view was accepted.

The weighty pronouncement of their Lordships of the Privy Council in *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (6) in which *Ram Narain's* case (8) was expressly disapproved, removed any doubt that there might have existed. Although Art. 110 was in terms applicable to suits for arrears of rent, their Lordships ruled that the document being a registered one, Art. 116 was the article to be applied. Since then the view has uniformly prevailed in the Indian Courts that the personal remedy can be enforced on the basis of a registered deed within six years under Art. 116. I may refer to a recent Full Bench case of this Court *Shib Dayal* v. *Meharban* (9), at pp. 41 to 42 *of* 45 *All.*

The Courts below, however, have thought that the remarks of their Lordships in the case of *Ganesh Lal Pandit*

(7) [1831] 3 All. 600 (F. B.).
(8) [1901] 26 All. 133.
(9) A. I. R. 1923 All. 1=45 All. 27 (F. B.).

v. *Khetramohan Mahapatra* (1) overrule the previous decisions. In that case the suit was brought more than ten years after the date of the mortgage and it was immaterial whether the three years' rule or the six years' rule applied. In either view the personal claim was barred by time. Furthermore, there is a passage in the middle of p. 136 which might suggest that the principal mortgage purporting to have been executed by the lady was not executed in compliance with the provisions of the law so as to make it binding on her. If there was any defect of registration the three years rule would at once become applicable. Their Lordships quoted passages from the leading case of *Ram Din* v. *Kalka Pershad* (2) and also referred with approval to the Calcutta case of *Miller* v. *Ranga Nath Moulick* (3) and then remarked that the claim for the enforcement of the personal covenant had become barred under Art. 66. As the point did not arise directly in the case and indeed the question was immaterial no previous authorities appear to have been cited before their Lordships.

This case has been considered by a Full Bench of the Madras High Court in the case of *Ratnasabhapathy Chettiar* v. *Devasigamony Pillai* (5) and by the Oudh Chief Court in the case of *Jai Indra Bahadur Singh* v. *Lala Khairati Lal* (4). The learned Judges have come to the conclusion that the case of *Ganesh Lal Pandit* (1) cannot be taken to have overruled the previous decisions and is not a direct authority for the view that the claim on even a registered document is governed by the three years' rule. I fully agree with the view expressed in these cases. Until there is a clear pronouncement of their Lordships of the Privy Council, I cannot hold that the view expressed by the Indian High Courts in a long series of cases has been definitely overruled. The claim for the personal remedy in the present case is, therefore, not barred by limitation.

Mukerji, J.—I agree.

King, J.—I also agree and have nothing to add.

By the Court.—Our answer is that the claim for the personal remedy in the present case is not barred by limitation, though this question need not have been decided at this stage.

R.K. *Reference answered.*

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SULAIMAN, Ag. C. J. AND SEN, J.

Md. Abdul Rahim—Appellant.

v.

Mt. Izzatunnissa Bai—Respondent.

First Appeal No. 263 of 1929, Decided on 23rd October 1929.

Civil P. C., S. 35—Suit for accounts—Successful party can get costs even in preliminary decree.

There is nothing in principle which precludes a Court from assessing costs and passing a decree for costs in favour of the successful party in a suit for accounts in the course of preliminary decree. [P 72 C 2]

N. P. Asthana and *Benod Behare Lal*—for Appellant.

Judgment.—This is an appeal by the defendant in a suit for account. This suit was resisted upon every ground which was possible to human ingenuity. The Court of first instance overruled the plea of limitation raised by the defendant and came to the conclusion that the defendant in his capacity as manager of the property belonging to the family was liable to render an account of his stewardship. A preliminary decree was accordingly passed in favour of the plaintiff and the defendant was saddled with her costs. In the present appeal which relates only to costs it has been contended that the Court below ought no to have passed a decree for costs in plaintiff's favour in the preliminary decree but ought to have stayed its hands till the time of the passing of the final decree. It is also pointed out that the plaintiff had overvalued her claim.

We are of opinion that the plaintiff as the successful party in the suit was entitled to a decree for costs and it makes no difference that the costs were allowed in the preliminary decree. There is nothing in principle which precludee the Court from assessing costs and passing a decree for costs in favour of the successful party in a suit for accounts in the course of the preliminary decree. In a suit for accounts the relief cannot be valued with meticulous precision. The plaintiff could only make a rough estimate of the value of the claim and that is what appears to have been done in the suit. We think that the costs were rightly assessed and the decree passed by the Court below does not call for any interference. We dismiss the appeal under O. 41, R. 11, Civil P. C.

V.B./R.K. *Appeal dismissed.*

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SULAIMAN AND PULLAN, JJ.

Ram Prasad—Defendant—Appellant.

v.

Kanhaiya Lal and *others* — Plaintiff and Defendants — Respondents.

First Appeal No. 35 of 1928, Decided on 17th July 1929, against decree of Sub-Judge, Agra, D/- 20th December 1927.

Hindu Law — Alienation by father — If transaction is good and so authorized it is binding on joint family property even though father does not describe himself as manager.

In a case of alienation by a father if the transaction itself is good, i. e., there is legal necessity and is such as would be authorised and would be binding on the joint family, the mere fact that the father does not describe himself as manager of the joint Hindu family would not make it unauthorized. It is not necessary to scrutinize all the details of sale consideration if the Court is satisfied that the transaction itself is for legal necessity : *A.I.R.* 1916 *P.C.* 220 ; *A.I.R.* 1924 *P.C.* 50 and 34 *All.* 296, *Rej.* [P 74 C 2 ; P 75 C 1]

B. E. O'Conor, *Tej Bahadur Sapru*, *Kailas Nath Katju*, and *M. L. Chaturvedi*—for Appellant.

N. P. Asthana and *G. Agarwala*—for Respondents.

Judgment.—First Appeal No. 35 of 1928 and First Appeal No. 97 of 1928 are cross-appeals by the defendant and the plaintiff respectively and arise out of the same suit.

It appears that one Ganeshi Lal had given authority to his wife to adopt a son and in pursuance of that authority she adopted Har Bilas and executed a deed of adoption on 5th May 1892. This Har Bilas subsequently adopted Ram Bahadur in 1902. For the purposes of this suit it has been admitted by the defendant-appellant that this adoption may be accepted as valid. In 1917 Har Bilas and his adopted son Raj Bahadur constituted a joint Hindu family. On 5th December 1917 Har Bilas executed a sale deed in favour of Ram Prasad, son of Lala Ballu Mal, the present appellant. This deed is printed on p. 37 of the paper-book and was for Rs. 34,000. Har Bilas described himself as the absolute owner in possession of the property transferred and also alleged that he had no partner or cosharer who might stand in the way of the transfer. But he did not expressly refer to his adopted son Raj Bahadur nor did he attempt to repudiate the alleged adoption.

The plaintiff Kanhaiya Lal obtained a simple money decree for Rs. 5,000 in 1916 against Lala Har Bilas and Raj Bahadur and in execution of that decree attempted to attach the property covered by the sale deed of 5th December 1917. The transferee Ram Prasad raised objections in the execution proceedings which were allowed and the property was released from the attachment on the ground that the property had been previously transferred to Ram Prasad. Kanhaiya Lal has, therefore, instituted the suit for a declaration that the said property is attachable and saleable in execution of his money decree and that the defendant transferee has no rights or interests in this property. In the plaint no specific case was put forward that the transfer was good to the extent of a half share and was invalid to the extent of the remaining half.

The contesting defendant Ram Prasad took several pleas the principal ones out of which were that the plaintiff has no right to maintain the suit and that the sale in his favour was for family necessity and valid and binding. The learned Subordinate Judge has found the issue relating to legal necessity in favour of the defendant but has decreed the claim in respect of the half interest of Raj Bahadur in the property on the sole ground that Har Bilas when he executed the sale deed represented himself as the absolute owner of the property transferred and was not acting in his capacity as a Hindu father or a manager of a joint family property.

The learned Subordinate Judge has considered that the earlier mortgage-deed of 8th June 1917, taken with the sale deed of 5th December 1917, goes to show that Har Bilas was representing himself as absolute owner of the transferred property and was expressly denying the existence of any son to him. Both the mortgage deed and the sale deed are in favour of Ram Prasad but the two transferees are different persons. The mortgagee was Ram Prasad son of Lala Bansi Dhar whereas the vendee is Ram Prasad son of Lala Ballumal. It is possible that the learned Subordinate Judge has confused the two names and has thought that the vendee himself had previously taken the mortgage. So far as the sale deed is concerned there is no express denial of the existence of

any son. As a matter of fact there is no reference to any son at all. The deed is in a stereotyped form which is quite common. It may, however, be said by implication that Har Bilas was alleging that he was the absolute owner and had no cosharer with him, i. e., he was not admitting the existence of any member of his family.

The learned Judge has relied mainly on the authority of *Balwant Singh* v. *R. Clancy* (1). In that case the mortgage was executed by the elder brother Sheo Raj Singh to which the younger brother Maharaj Singh had also joined. It was expressly stated in the deed that Maharaj Singh had no interest in the property at all and Sheo Raj Singh alone was the sole proprietor. This claim was put forward on an alleged impartibility of the estate. The debt to pay off which this deed was executed was due from their deceased father but the High Court found and that finding was accepted by their Lordships of the Privy Council that the debt had been contracted by him for the purposes of immorality. Thus it was not a good antecedent debt which would be binding on the family estate at all. The elder brother had never professed to be the manager of the joint Hindu family, and their Lordships on p. 303 remarked :

"in face of that deed it could not be contended that the Bank lent the money to Sheo Raj Singh as manager of the joint Hindu family which consisted of himself and Maharaj Singh."

On the same page their Lordships pointed out that

"Sheo Raj Singh was not an ancestor or a predecessor of Maharaj Singh."

He was on the date of the mortgage merely a cosharer and executed the deed in his assumed position as the absolute owner of an impartible estate. Maharaj Singh had been joined in the deed in order to show that he had consented to the transaction and was admitting the absolute proprietary interest of his elder brother. It was found in the case that Maharaj Singh at that time was a minor. It does not appear that the position taken up on behalf of Maharaj Singh was that the whole transaction was a nullity and the whole suit ought to be dismissed. It is noteworthy that Maharaj Singh was pleading that the mortgage-deed was not binding on him and did not affect his interest in the estate. The High Court held that Maharaj Singh's interest in the estate was not affected by the mortgage and that decree was upheld by their Lordships. It is obvious that even as a Hindu manager Sheo Raj Singh had no authority to transfer the property in payment of the immoral debts of his deceased father. The fact cannot also be lost sight of that Sheo Raj Singh's position was not that of a Hindu father, whose debts it is the pious duty of his son to discharge. A Hindu father has undoubtedly authority to transfer the family property in order to discharge his own antecedent debts provided they are not tainted with illegality or immorality. A mere omission to assert in the deed that he was a Hindu father or that he was a manager of a Hindu family cannot necessarily be fatal and deprive him of the authority which under the Hindu law he possesses. So long as the family is a joint Hindu family no coparcener has a separate and defined share in the family property and is not entitled to transfer or charge his separate share. Either the whole interest passed and the transfer is good or the whole transaction falls to the ground. We may in this connexion refer to the leading case of *Sripat Singh Dugar* v. *Prodyat Kumar* (2), decided by their Lordships of the Privy Council where in spite of the fact that the transfer had taken place of the rights and interests of the judgment-debtor, who was in that case the father their Lordships held that the whole interest in the family property had passed. In the leading case of *Brij Narain Rai* v. *Mangala Prasad* (3) their Lordships have laid down that

"if the manager is the father and the reversioneries are the sons he may by incurring debt so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt."

It therefore seems to us that if the transaction itself was good and was such as would be authorised and would be binding on the joint family property, the mere fact that Har Bilas did not

(1) [1912] 34 All. 296=14 I. C. 620=39 I. A. 109 (P.C.).

(2) A. I. R. 1916 P.C. 220=44 Cal. 524 = 44 I. A. 1 (P.C.).

(3) A. I. R. 1924 P. C. 50=46 All. 95=51 I. A. 129 (P.C.).

describe himself as the manager of the joint Hindu family would not make it unauthorized. The learned Subordinate Judge has taken too technical a view and if such a view were accepted the result would depend entirely on the language used in the deed depending more or less on the skill of the petition-writer or the scribe.

It is therefore necessary to consider whether the transaction itself was such as would bind the family. The sale consideration of Rs. 34,000 consisted of Rs. 1,000 paid as earnest money (there appears to be a mistake in the certified copy filed) a few days earlier and Rs. 25,000 were left for payment of the previous possessory mortgage of 8th June 1917. The balance of Rs. 8,000 was paid at the time of the registration.

It is not incumbent on the defendant to establish that the previous mortgage-deed of 8th June 1917, which was an entirely independent and separate transaction, antecedent both in reality and in fact, was supported by legal necessity. The debt constituted an antecedent debt for the payment of which the father was entitled to transfer his family property. That must be upheld as a good debt. As regards the balance of Rs. 8,000 the evidence is all one sided. In the deed there is a clear recital that Har Bilas, who was the proprietor of a firm known as Ganeshi Lal Harbilas wanted to sell the property in order to pay up the previous mortgage debt and the surplus money was required by him for carrying on his business which was expected to be beneficial to him. Ram Prasad the vendee has gone into the witness-box and has positively stated that the sale deed was executed for business needs and for paying up the previous mortgage and that money was required by Har Bilas for his business needs and for repairing his residential house. There is no evidence to the contrary. The learned Subordinate Judge has found the issue as to the existence of legal necessity in favour of the defendant and has held that the entire sale consideration was for family necessity.

We may further note that in view of the recent pronouncement of their Lordships of the Privy Council it is not necessary to scrutinize all the details of the sale consideration if we are satisfied that the transaction itself was for legal necessity. We have no hesitation in accepting the learned Subordinate Judge's view on this point, and we accordingly hold that there was legal necessity for the sale inasmuch as the bulk of the consideration was required for payment of an antecedent debt and the rest for other necessities. It cannot be contended that a father is not entitled to borrow money for the purpose of carrying on an existing business.

The other objection taken on behalf of the defendant was as to the plaintiff's right to challenge the alienation in favour of the defendant. The plaintiff is a mere attaching creditor who has failed in the execution department. He has not yet purchased the property which he asserts has not passed to Ram Prasad. Had he been a purchaser, we would have been bound by the decision in the Full Bench case of *Muhammad Muzammil-ullah Khan* v. *Mithu Lal* (4) to hold that he had the locus standi to challenge the alienation in favour of the defendant-appellant. There is, however, no clear authority which has been brought to our notice which extends that principle to the case of a mere attaching creditor. If the transfer by a Hindu father were merely voidable so that the property would pass for the time being and an option would remain with the other members of the family to avoid it, it would be doubtful whether there is any attachable interest of the other members of the family left which can be seized by a simple money creditor. On the other hand if the transfer were absolutely void ab initio the property would remain vested in the family and the other coparceners and the creditor might well be able to attach his interest. In the view which we have taken of this case on the main question we do not think it necessary to go into this further question.

We accordingly dismiss First Appeal No. 97 of 1928 and allow First Appeal No. 35 of 1928 and modifying the decree of the Court below dismiss the suit in toto with costs in both Courts.

R.M./R.K. *Order accordingly.*

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(4) [1911] 33 All. 783=11 I. C. 220=8 A.L.J. 901.

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SEN AND NIAMATULLAH, JJ.

Babu Ram—Plaintiff—Appellant.

v.

Jograj Singh and *another*—Defendants—Respondents.

Second Appeal No. 561 of 1926, Decided on 1st July 1929, against decree of Dist. Judge, Shahjahanpur, D/- 6th December 1925.

(a) Usurious Loans Act, S. 3 (2) (a)—Rate exceeding reasonable rate—Creditor running no risk and having ample security—Rate is excessive.

Where there is absolutely no evidence that the creditor expected to run any unusual risk in advancing money on the security of the property which the debtor is willing to hypothecate and does hypothecate, and the security is ample, the rate of interest is excessive if it is in excess of that which is deemed reasonable by the Court. [P 76 C 2]

(b) Usurious Loans Act, S. (2) (d)—To consider whether transaction is unfair circumstances should be taken into account—Interest itself may be material evidence—Creditor must show justifying circumstances, else transaction would be inferred to be unreasonable.

In deciding whether a transaction was substantially unfair or not the Court should take into account all the circumstances materially affecting the relations of the parties at the time of the loan. The interest may of itself be sufficient evidence that the transaction was unfair. It is open to the creditor to show that the high rate of interest was justified in view of the risk to which he was exposed and that the transaction was a fair one. But in absence of such proof the inference in case of excessive interest would be that the transaction was substantially unfair. [P 76 C 2 P 77 C 1]

Shiva Prasad Sinha—for Appellant.

Judgment.—The finding of the lower appellate Court on the issue remitted by our order of remand, dated 11th February 1929, is that the interest stipulated for in the mortgage deed sued on by the appellant, namely, Rs. 2-12-0 per cent. per month compoundable every half year, is not excessive and unfair as between the parties. It is based on certified copies of two mortgage deeds produced before the lower appellate Court by the appellant. No other evidence of any kind, oral or documentary, was adduced by either party. We are unable to accept the finding, inasmuch as, the evidence, on which it is based, is wholly inadmissible. The original mortgage deeds have not been accounted for, nor has the execution of any of them been proved by anything in the nature of formal evidence. The respondents did not enter appearance before the lower appellate Court, and the appeal before us has been heard ex parte. It cannot, therefore, be assumed that the genuineness of the deeds is admitted by him. The circumstances under which they were executed by the parties to them when they entered into the transactions carrying interest at the high rates mentioned in the deeds are matters of pure speculation. Such rates cannot be accepted as any guide for the determination of the question whether considerations enjoined by the Usurious Loans Act do or do not hold good in the case before us. We cannot, therefore, act upon the finding that has been returned by the lower appellate Court.

In the absence of any finding of fact binding upon this Court on the issue remitted by our order of remand, we have now to decide it for ourselves on such materials as are obtainable from the record before us. The rate of interest which is insisted on by the appellant, is on the face of it excessive. S. 3 (2) (a), Usurious Loans Act explains excessive interest to mean interest :

"which is in excess of that which the Court deems to be reasonable, having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan."

There is absolutely no evidence in the case suggesting that the creditor expected to run any unusual risk in advancing the money on the security of the property which the debtor was willing to hypothecate and did hypothecate. That the security is ample is apparent from the anxiety of the appellant to obtain a decree for the whole amount of mortgage money, including interest and compound interest at the stipulated rate. The rate of interest awarded by the Court of first instance namely 24 % per annum simple, did not satisfy him, and he has considered it worth his while to carry the matter before two Courts of appeal. It follows that the appellant himself regards the security to be ample for the accumulated amount of principal and interest which he now claims. It must have been regarded by him as amply sufficient on 1st March 1919, when the mortgage deed in suit was executed.

As to whether the transaction was "substantially unfair." S. 3 (2) (d), Usurious Loans Act provides that the Court shall

take into account all the circumstances materially affecting the relations of the parties at the time of the loan. An explanation is added to the effect that interest may of itself be sufficient evidence that a transaction was substantially unfair. Having regard to the abnormally high rate of interest which the debtor agreed to pay, we are of opinion that the provision above referred to makes it permissible, under the circumstances of this case, to infer that the transaction was substantially unfair. It is true that the high rate of interest is not necessarily to be regarded as excessive or substantially unfair. It is open to the creditor to adduce evidence of circumstances tending to show that the prevailing rate of interest in the locality from where the parties come is the same or nearly the same as has been agreed to in the particular case, or that, under the circumstances in which the loan was advanced, the high rate of interest was justified in view of the risk to which the creditor was exposed, making the transaction a substantially fair one. We afforded an apportunity to the appellant by our order of remand to establish exceptional circumstances of the kind we have illustrated. He has failed to adduce any evidence justifying the excessive rate of interest and showing that the transaction was a fair one between the parties at the date of the transaction.

For the reasons stated above, we are of opinion that the case calls for no interference with the decree passed by the Court below. This appeal is, therefore, dismissed. The respondent not having put in appearance, we make no order as to costs of this appeal. The orders of the Courts below as regards costs incurred before them will stand.

R.M./R.K. *Appeal dismissed.*

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SULAIMAN AND PULLAN, JJ.

Punjab Sugar Mills, Co., Ltd.—Defendant—Appellant.

v.

Lachhman Prasad and *others*—Respondents.

First Appeal No. 455 of 1926, Decided on 28th June 1929.

(a) Agra Pre-emption Act, S. 8 (c)—Purchase of land for sowing sugarcane crops to be used as raw material for sugar factory does not come within the meaning of S. 8 (c).

Sugarcane plantation is an agricultural pursuit quite separate and independent from the industry of manufacturing sugar. No doubt it is raw material which is required by a sugar factory but production of such raw material is not a purpose of manufacturing industry though undoubtedly it is of help. S. 8 (c) cannot apply to a case where raw material is to be produced by cultivation on a large scale in order that it may be utilized by the company. [P 78 C 2]

(b) Agra Pre-emption Act, S. 8 (c)—Express recital of purpose in sale-deed is not necessary.

Section 8 (c) undoubtedly contemplates transfers of immovable property of less than Rs.100 which can be purchased without any instrument at all, delivery of possession being sufficient, S. 8 (c) would apply where the land is not used for the purpose for which it was ostensibly purchased. As there might be no document in such a case the recital in deed of sale cannot be an indispensable requisite. [P 79 C 1]

(c) Pre-emption — Refusal to pre-empt creates no estoppel when particulars of sale have changed.

Where a certain portion of property is excluded and the price is reduced and the purchaser is a new person, the person having right of pre-emption should be approached afresh and his refusal obtained. Circumstances having changed the pre-emptor is not estopped from asserting his right of pre-emption. [P 80 C 1]

Tej Bahadur Sapru, P. N. Sapru and *U. S. Bajpai*—for Appellant.

Pearey Lal Banerji, K. N. Katju and *Sankar Saran*—for Respondents.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for pre-emption of shares sold in two mahals. The plaintiff is admittedly a cosharer in the mahals and the defendant company which is the vendee is a stranger. The plaintiff alleged the existence of a custom of pre-emption and a right under the Pre-emption Act, and also asserted that the ostensible consideration of Rs. 24,000 was not the true consideration but only Rs. 19,333-5-3 were paid. The defendant originally contested the claim on the ground that there was no custom of pre-emption, that the consideration mentioned in the sale-deed was the true consideration and that the deed had been executed with the knowledge and consent and after the refusal of the plaintiff. Some days later the written statement was amended and a further plea was added that the share in question had been purchased for the cultivation of sugarcane for the factory which was a manufacturing industry and the plain-

tiff was, therefore, not entitled to pre-empt the same.

The learned Subordinate Judge has found that the plaintiff has the right of pre-emption under the Act and that the defendant is not entitled to protection on account of the purchase having been made for their factory. His view is that the acquisition of land for the purpose of sowing sugarcane crops is for the purpose of a manufacturing industry within the meaning of S. 8, sub-Cl. (c) of the Act, but he has held that inasmuch as there was no recital of the alleged purpose in the sale-deed the defendant cannot take advantage of it. As regards the plea of estoppel his finding is that there was no refusal by the plaintiff. On the question of consideration he has found in favour of the defendant and has held that the entire sum of Rs.24,000 passed.

The defendant has appealed and the plaintiff has filed a cross appeal. There can be no doubt that the manufacture of sugar whether it be the extraction of sugar juice from sugarcane or the refinement of sugar is a manufacturing industry but the question is whether the defendant is entitled to the protection given to him by the section.

On the question of fact the learned Subordinate Judge has found that the property in question was really purchased for sowing improved sugarcane for the factory and also for obtaining cheap labour for the factory. Speaking personally for myself I have some doubt as to whether the actual form in which the defence was raised was not an afterthought. The property acquired was not a complete village consisting of only khudkast lands. Only a fractional share of about ten annas in the rupee was acquired, so that the defendant became a mere cosharer in the mahals. That will not entitle the company to turn out all the tenants and convert the entire land into khudkast land so as to enable it to carry on sugarcane plantation on a large scale. Nor was it legally possible for the company to turn out occupancy tenants against their will or to compel them to sow sugarcane crops or for the matter of that to sell their crops to the company and to nobody else. On the other hand the purchase of a big zemindari share in a neighbouring village would undoubtedly facilitate the work of the company and increase their influence in procuring raw materials and labour easily. I, therefore, have some doubt as to whether the actual purpose for which the fractional share in the village was acquired was really cultivation by the company of the sugarcane crops. It may be noted that no such purpose is recited either in the original agreement which was executed several months earlier or in the sale-deed. Nor was it mentioned when the written statement was first filed. It is admitted that only obout 50 bighas of land are *sir* and khudkast lands appertaining to the share, out of which a small area has already been brought under cultivation. The rest of the land is neither *sir* nor khudkast and has not automatically come under the direct cultivation of the vendee by virtue of the sale-deed.

Assuming, however, that the purpose of the acquisition was to sow sugarcane crops in order that sugarcane may be used as raw material for the consumption of the factory it still remains to consider whether such a purpose comes within the scope of S. 8, sub-Cl. (c). There is no doubt that the object of the legislature in excepting sales for purposes of manufacturing industry from pre-emption claims was the encouragement of manufacturing industries not necessarily the encouragement of agriculture. It seems to me that sugar plantation or the cultivation of the sugarcane crops is an agricultural pursuit quite separate and independent from the industry of manufacturing sugar. Sugarcane crops are year to year crops sown during one season of the year and sugarcane can be had in the open market. No doubt it is raw material which is required by a sugar factory but the production of such raw material is not a purpose of manufacturing industry though undoubtedly it is of help. Although the section cannot be construed in a narrow sense so as to apply exclusively to acquisitions of land for the purpose of assisting the actual process of manufacture it seems to me that it cannot apply to a case where raw material is to be produced by cultivation on a large scale in order that it may be utilized by the company. I would, therefore, hold that the purchase of land for such purposes does not come within the meaning of the section.

Having regard to the fact that S. 8, sub-Cl. (c) used the word "land," whereas some sections like Ss. 9 and 11 use the words "interest in the land" and other sections like Ss. 22 and 24 use the word "property" I would have been inclined to think that the intention of the legislature was to give protection to manufacturing industries when plots of land as distinct from fractional shares in a zamindari are acquired. I find, however, that the word "land" is used loosely for an interest in land at least in another section, viz: S. 14. On this ground I refrain from expressing any definite opinion that the word "land" is not applicable to shares in a zemindari.

I further do not agree with the view expressed by the learned Subordinate Judge that in order that benefit may be taken of the section there ought to be a clear and express recital of the purpose in the sale-deed. No doubt the difficulties pointed out by him when a contrary interpretation is put on a section are somewhat serious. If the purpose is not recited in the sale-deed it is difficult to see how the pre-emptor can judge whether the land is being used for the purpose for which it was ostensibly purchased. It is also clear that if there is no such recital the vendee can after the expiry of one year turn the land to some other use. In spite of these difficulties it is our duty to interpret the section as it stands, and I see no ground for interpolating the words "as mentioned in the sale-deed" into the section. That these words cannot be understood is also clear from the following circumstances. Under S. 54, T. P. Act, immovable property of less than Rs. 100 can be purchased without any instrument at all, the delivery of possession alone being sufficient. S. 8, sub-Cl. (c) undoubtedly contemplates such a transfer and would apply where the land is not used for the purpose for which it was ostensibly purchased. As there might be no document in such a case the recital in a deed of sale cannot be an indispensible requisite. I, therefore, hold that the omission of the recital in the sale-deed is not a fatal defect to the suit.

On the question of the refusal of the plaintiff the finding of the Court below must be affirmed. The case as put forward in the written statement was that the sale deed in question had taken place with the consent of and after the refusal of the plaintiff. The oral evidence which was led on behalf of the defendant company, however, was to the effect that some seven or eight months previously the company's manager Kesar Ram, who was a friend of the plaintiff consulted the latter who advised him to take the sale. The plaintiff went with Kesar Ram in a motor car to show the land to him and told him to take it. Kesar Ram in the witness box admits that at that time he was negotiating for the purchase of the entire 16 annas and that an agreement was entered into in his name personally for Rs. 29,000 though he adds that it was meant for the company. He stated that he took it in his name because till then he had not obtained the sanction of the directors. The agreement which was executed originally (p. 31) also shows that it was in favour of Lala Kesar Ram who was not described as the manager of the defendant company. This contract fell through because the company declined to take the entire property which included the share of a minor coparcener. Ultimately the interest of the two adult proprietors was purchased and the consideration was reduced to Rs. 24,000. Kesar Ram admits that he had no subsequent talk with the plaintiff about the sale in question. On 10th June 1926 the counsel for the defendant had stated that Kesar Ram had entered into the contract in his name but with the intention to give the same in the end to the company in case of the approval of its proprietors. The plaintiff stoutly denies having had any such talk with Kesar Ram. The learned Subordinate Judge, however, has preferred the statement of Kesar Ram to that of the plaintiff and we may therefore assume that some such talk did take place. Kesar Ram, however, does not state that he informed the plaintiff that the purchase was going to be made on behalf of the Punjab Sugar Mills Co. On the other hand at p. 11 he stated that he had consulted the plaintiff as his friend and as the zemindar of the land on which the factory stood and he had consulted him if he should purchase the land or not. The plaintiff said that the land was very good and that he should take it.

The defendant cannot obviously bring his case within the scope of S. 14, Pre-emption Act, which requires the notice

to describe the property to be sold, stating the name of the vendee and the price settled. In the present case the original agreement about which there might have been a talk with the plaintiff was with Kesar Ram for the sale of the entire 16 annas in consideration for Rs. 29,000. The sale has actually taken place of about 10 annas share in favour of the Punjab Sugar Mills Company for a sum of Rs. 24,000. Thus all the three material particulars are different.

It may be conceded that Ss. 14 and 15 do not lay down the law of estoppel in pre-emption suits exhaustively and that the case though not falling under those sections may come within the purview of S. 115, Evidence Act, but there are no materials on the record which would show that the plaintiff intended to convey to Kesar Ram the idea that if the circumstances were changed he would not assert his right of pre-emption. The learned Subordinate Judge has pointed out that the purchase of the entire share was risky inasmuch as the share of a minor proprietor was also involved. Furthermore, the price also was a little higher. The plaintiff might well have been reluctant to purchase the share of the minor proprietor and take the risk or he might not have had ready money to pay Rs. 29,000. When the share of the minor was excluded and the price was reduced the plaintiff, if it was intended to estop him, should have been approached afresh and his refusal obtained. In the absence of such a course I am unable to hold that the plaintiff is estopped from asserting his right of pre-emption.

The finding as regards the amount of consideration which is challenged in the cross appeal must also be accepted. The plaintiff bases his case mainly on the ground that the original contract was for the sale of the entire share for Rs. 29,000 and therefore infers that the 2/3rds of the property must have been sold for 2/3rds of that amount. The learned Subordinate Judge, however, has pointed out that there were several circumstances which might very well have altered the situation. In the first place there was considerable delay and the previous contract fell through. In the second place the company was not prepared to take the share of the minor proprietor and wanted to safeguard itself and to take the shares of the adult proprietors only. The rateable apportionment on the basis of the former agreement is therefore not a safe criterion. The defendant has proved by the entries in the company's account book that the amount due on the pronotes to the plaintiff had really been paid. The entire consideration has been admitted before the Sub-Registrar, and a refund of any part of it has not been proved. I would therefore affirm the finding of the Court below on this point and dismiss both the appeal and the cross-objection.

Pullan, J.— As I am in general agreement with the judgment just pronounced I only think it necessary to add a few observations as to the interpretation of S. 8, sub-Cl. (c), Agra Pre-emption Act. One of the questions which has to be decided in this appeal is what is the meaning of the words "purposes of a manufacturing industry?" The lower Court and the learned counsel for the appellant consider that the growing of sugarcane is one of the purposes of the industry of making sugar. In my opinion it is not. Sugarcane growing is an ancillary industry of an entirely different nature carried on by agriculturists and not by manufacturers. The manufacturer of sugar is obliged in common with all other manufacturers to use raw material, but it is no part of his business as a manufacturer to grow that material any more than it is the part of the cotton miller to grow cotton or the flour miller to grow grain. The purpose of a manufacturing industry is the object which the industry sets out to attain. It has no reference to the materials which may be used in some form or another for the accomplishment of that result. This is particularly so in a case such as this where the raw materials are of an agricultural nature.

A second question which arises is the meaning to be given to the word "ostensible" in the last line of the clause. I agree with my learned brother in holding that it is not necessary that the intention with which land is purchased should be entered in the sale deed, but if the word "ostensibly" is to have any meaning it would appear to me that the purchaser is bound in some way to let it be known why he intends to purchase

the land, if he intends to take advantage of S. 8, sub-Cl. (c). If the purchaser has no means of knowing that the land is being purchased for the purposes of a manufacturing industry he is severely handicapped. Beyond this I am not prepared to go, as in the present case no doubt it may be reasonably said that where an absentee firm of sugar manufacturer buys land close to the factory, they have probably done so for some purpose connected with the factory.

R.M./R.K. *Appeal dismissed.*

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SULAIMAN AND NIAMATULLAH, JJ.

Nasrullah Khan—Applicant.

v.

Wajid Ali and *another*—Opposite Parties.

Civil Revn. No. 170 of 1928, Decided on 24th July 1929, from an order of Dist. Judge, Moradabad, D/- 19th April 1928.

Mussalman Waqf Act (42 of 1923)—Court cannot pass order that mutwali should file statement of account—It can only punish him for not filing it.

The sections of the Act as they stand do not confer any authority on the Court to pass an order that a mutwali should file a statement of accounts. The only procedure provided is to punish him for not filing it. [P 82 C 1]

A. M. Khwaja—for Applicant.

M. A. Aziz—for Opposite Parties.

Judgment.—This is a civil revision from an order dated 19th April 1928, passed by the District Judge of Moradabad. After the passing of Act 42 of 1923, the appellant mutwali filed accounts of certain waqf property in his possession. In this way he fulfilled the requirement of S. 2 of the Act ; but on 14th July 1925, he filed a fresh application praying that he be exempted from the filing of the accounts. This application was rejected on 4th September 1925. Subsequently an application was filed under S. 3, Charitable or Religious Trust Act (Act 14 of 1920) and on 19th June 1926, another District Judge rejected the application. It is unnecessary to say in this case whether the rejection of the subsequent application under the Act of 1920 had the effect of superseding the previous order under the Act of 1923. After this the mutwali omitted to file the statement of accounts as required by S. 5. The present application was filed against him with a view to compel him to file the account. The mutwali objected that the waqf was not one to which Act 42 of 1923 applied. The learned District Judge has ordered the mutwali to "file the account required by the applicants." The learned Judge has not taken proceedings under S. 10 of the Act. Under that section he has undoubtedly the power to punish a mutwali if without any reasonable cause, the burden of proving which shall lie upon him, he fails to furnish statement of particulars, documents, or statements of accounts. But that is purely a penal proceeding in the course of which the learned Judge may enquire as to whether the waqf is one to which the Act is applicable. But till that stage arrives we find it difficult to hold that the Judge can hold any such enquiry and compel a mutwali, who is not admitting the applicability of the Act, to file accounts. Barring S. 10 which appears wide enough to cover an enquiry, none of the preceding sections imply an investigation where the waqf itself is disputed or where the applicability of the Act to the waqf is questioned. Under S. 4 further particulars or documents can be ordered to be filed when particulars have been previously filed under S. 3. Under sub-Cl. (2) S. 4 the Court can order further particulars or documents to be filed in order to enquire into the origin, nature or the objects of the waqf or the condition or management of the waqf property. Past accounts can be required in order to ascertain the nature or objects of the waqf, but they would be filed merely as particulars and not as a statement of account.

Section 5 does not by itself contemplate the intervention of other persons for compelling the mutwali to file his accounts except possibly as a mere reminder to the Judge that the accounts have not been filed, with a view to induce the Judge to take proceedings under S. 10.

In an enquiry under S. 10 the learned Judge has jurisdiction to find that the Act applies to the waqf and even if he does not on account of good reason impose a fine on the mutwali on that occasion for failure to file accounts such a course may justify punishment if the failure again occurs in a sub-

sequent year. But as the sections of the Act stand, unfortunately there appears to be no authority in the District Judge to pass an order that the mutwali should file a statement of accounts. The only procedure provided is to punish him for not filing it.

The proceedings before the Dtstrict Judge were undoubtedly of a civil nature and we have jurisdiction to entertain the revision and cancel the order for filing the account which was without jurisdiction. This would not prejudice any further proceedings that the District Judge may deem fit to take under the Act. We express no opinion as to whether the waqf is one to which the Act applies.

We accordingly allow this revision and setting aside the order of the District Judge dated 19th April 1928, dismiss the application with costs in both Courts.

R.M/R.K. *Revision allowed.*

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MEARS, C. J., AND SEN, J.

Balmukund Dube, In the goods of.

Testamentary Case No. 14 f 1929, Decided on 5th June 1929.

(a) Company—Company cannot lay down condition in contravention of statutory enactments—Administration.

It is not within the legal competence of any company or companies, incorporated or otherwise to lay down any condition regulating the grant of Letters of Administration in contravention of any statutory enactment relating thereto. [P 83 C 1]

(b) Probate and Administration Act (1881), S. 4—Property of joint Hindu family passing by survivorship does not vest in executor or administrator—Succession Act (1925), S. 212 (2).

Where the property belongs to a joint Hindu family, a person claiming by survivorship is not entitled to a grant of the Letters of Administration to any portion of such property. The reason for the rule is obvious. There is no estate or assets which descended from the deceased. The rule is applicable to cases where the property is admittedly joint and applies even where the property consists of shares of a company acquired by members of a joint Hindu family with joint funds : 6 *C. W. N.* 345 ; 11 *O. C.* 101 ; *A. I. R.* 1923 *Pat.* 96 ; *A. I. R.* 1924 *Rang.* 329 and 3 *Bom.* 431, *Rel. on*, 33 *Mad.* 93 *Diss. from* 24; *Bom.* 350 and *A. I. R.* 1925 *Cal.* 1201, *Dist.* [P 83 C 1]

(c) Interpretation of Statutes—Reproduction of section forming subject of judicial interpretation in a consolidating Act is clear indication of their acceptance by legislature.

Where the section of an Act which has formed the subject of judicial interpretation in a number of cases has been reproduced in a consolidating Act of a later date without any modification, this must be taken to be a clear indication that the judicial interpretations have been accepted by the legislature. [P 84 C 2]

(d) Precedents—Judicial decision is authority for proposition actually decided therein—Rules of logic or of anology should not be taken recourse to.

A judicial decision is an authority for the proposition which was actually decided in the case. To find out the actual decision should be fastened to the point or points in issue which emerge from the pleadings and to the findings of the Court upon such point. It is undesirable and unsafe to extend the frontier by having recourse to rules of analogy or to rules of logic. [P 85 C 2]

O. M. Chiene—for Petitioner.

Judgment.—This is an application for the grant of Letters of Administration to the estate and effects of General Balmukund Dube, who died at Indore on 7th of September 1918. He left no will. The application is limited to two items of property consisting of 17 shares of Port Canning and Land Improvement Company and five shares in Messrs. Harvey & Sabapathy Company, Madras. (both with the Imperial Bank of Cawnpore) of the aggregate value of Rs. 15,450. General Balmukund Dube at the time of his death was a member of a joint Hindu family with his five sons including the applicant. The petition states that he left real property over which there is no dispute :

"But besides the real property the deceased held as part of the joint Hindu family property certain shares in two limited liability companies amounting to about Rs. 15,450 as exhibited in annexure-A."

This application was made on 20th April 1929 and is supported by an affidavit of Mr. A. P. Dube in which it has been averred that the property set out in the annexure aforesaid is a part of the property belonging to a joint Hindu family. The reason for the application is that the two limited liability companies are not desirous of transferring any shares without any Letters of Administration from a Court of competent jurisdiction. Para. 7 of the petition which deals with this matter is not very happily worded and ought to have been clearer and more specific. The Articles of Association of either of the two companies are not before us; nor

have any portions of the said Articles been reproduced in the application. We are informed by the learned advocate for the applicant that the Articles of Association of the companies provide that the executors or administrators of a deceased shareholder are the only persons who are recognised by the companies as having a title to the shares.

It is not within the legal competence of any company or companies, incorporated or otherwise to lay down any condition regulating the grant of Letters of Administration in contravention of any statutory enactments relating thereto.

Where the property belongs to a joint family, a person, claiming by survivorship, is not entitled to a grant of the Letters of Administration to any portion of such property. The reason for the rule is obvious. There is no estate or assets which descended from the deceased.

In the Probate and Administration Act of 1881 (Act 5 of 1881) "Administrator" has been defined to mean a person appointed to administer the estate of a deceased person when there is no executor. S. 4 of this Act provided as follows :

"The executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vest in him as such . . . . . But nothing herein contained shall vest in executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person."

The rule of law could not have been expressed in clearer terms and the provision is emphatic that the property of a joint Hindu family which passes by survivorship does not and cannot vest in an executor or administrator. This rule is applicable to cases where the property is admittedly joint. If the application, however, stated that the property was separate, the Court will not enquire into the question of its being joint or separate. *Raghunath Misser* v. *Mt. Pate Kuer*, (1). The grant of a Letters of Administration is not conclusive on the question of a disputed title. The prima facie value of the grant is no more than this that if the deceased had left any separate property, the applicant was entitled to it. In *Ajudhya* v. *Mt. Ramdaiya* (2) Chamier and Evans, JJ., referred to S. 4, Probate and Administration Act, and held that it was clear from that provision that it was not the intention of the legislature that Letters of Administration should be granted in respect of joint family property. The same view was taken by Das and Adami JJ. in *Kali Kumar* v. *Mt. Munabati, Kumari* *A. I. R.* 1923, *Pat.* 96. The same question was considered by Beasley, J., in *Rama Giri* v. *Govindammah*, *A. I. R.* 1924 *Rang.* 329. This was not a case of an intestate succession. It was held in this case that a coparcener cannot make a will of his undivided share in a joint Hindu family and when he dies he cannot be said to have died intestate. An application under S. 23, Probate and Administration Act, was therefore held to be incompetent. In *Gura Charya* v. *Svamiray Acharya* (3) it was held that the property about which administration was sought being the undivided property of Gura Charya and his deceased son Ana Charya, an administrator could not be legally appointed to have charge of the undivided shares of Ana Charya's sons in the family property.

The trend of authorities is therefore against the grant of a Letters of Administration to a coparcener emhracing the joint family estate in whole or in part.

Act 5 of 1881 was amended by the Succession Act of 1925 (Act 39 of 1925). It is important to note that the last mentioned Act was an Act to consolidate the law applicable to intestate and testamentary succession, in British India. The definition of "Administrator" as given in Act 5 of 1881 has been maintained. His duty is to administer the estate of a deceased person. In a joint Hindu family, where upon the death of a deceased person, the entire estate vests in other members of the family by rule of survivorship, it is obvious that there is no estate belonging to the deceased, which calls for administration.

Section 211 (2), Act 39 of 1925 enacts as follows :

" When the deceased was a Hindu . . . . . , ... , nothing herein contained shall vest in an executor or administrator any property

(1) [1902] 6 C. W. N. 345.

(2) [1908] 11 O. C. 101.

(3) [1878] 3 Bom. 431.

of the deceased which would otherwise have passed by survivorship to some other person."

It has further been provided that S. 212 shall not apply in the case of the intestacy of a Hindu. To allow the grant of a letters of administration in the case of property which has vested in a joint family by rule of survivorship will be subversive of the scheme and policy underlying the entire Act. S. 250 provides that :

"Where a person dies leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest, on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf."

The karta of a joint family does not hold any property acquired by him in his own name with joint family funds as the sole and surviving trustee of the said property. Such a notion is entirely repugnant to the constitution of a joint Hindu family which is governed by the Mitakshara. It is eqally impossible to maintain that the joint family property is divisible into a legal estate and an equitable estate, or that the legal estate with reference to such property vests in the karta or that the beneficial estate vests in the members of the joint family or that on the death of the karta, letters of administration may be applied for and obtained with reference to any supposed legal estate in the property. Ss. 217 and 218 of the aforesaid Act are conclusive on the point. The law requires that the administration of the assets of the deceased in cases of intestate succession shall be made or carried out in accordance with the provision of part 9 of the Act and it has been imperatively laid down that the deceased should have left some assets. S. 218 provides for the grant of the administration of the estate to a person who according to the rules for the distribution of the estate applicable in the case of such deceased would be entitled to the whole or any part of such deceased's estate. A comparison of the texts of the two Acts of 1881 and 1925 makes it abundantly clear that the legislature has maintained in its integrity all the essentials of the old Act relating to the grant of the letters of administration in case of intestacy. The legislature must have been cognizant of the existence of decisions based upon S. 4 of the Act of 1881, in which it had been held that no letters of administration could be granted with reference to joint family property. These decisions applied equally to ancestral property and to property acquired by a member of the family with joint family funds. Where the section of an Act which has formed the subject of judicial interpretation in a number of cases has been reproduced in a consolidating Act of a later date without any modification, this must be taken to be a clear indication that the judicial interpretations have been accepted by the legislature.

Section 4, Act 5 of 1881, is in certain respect pari passu with S. 4, Succession Certificate Act (Act 7 of 1889). The latter section has been incorporated into the Succession Act of 1925 and has found a place in part 10 as S. 370. In *Mathura Prasad* v. *Durgawati* (4) where an applicant stated in his application that he was a member of a joint Hindu family with the deceased to whose estate he had succeeded by survivorship, it was held that no succession certificate could be granted and the application must fail.

The applicant contends that there is no legal bar to the grant of the letters of administration where property consists of shares of a company acquired by a member of a joint Hindu family with joint family funds. The applicant has not been able to refer to us to any Act of the legislature in support of his contention. He has cited a number of cases but these cases appear to us to be entirely beside the mark. *Bank of Bombay* v. *Ambalal Sarabhai* (5) contains a special rule of law founded upon a construction of Ss. 20, 22 and 23, Presidency Banks Act (Act 11 of 1876). It was observed by Jenkins, C. J. :

"For the purpose of the Act, the share was the execlusive property of the deceased holder on his death the legal title did not survive, but it devolved on his legal representative, so that S. 23 of the Act applies."

A special title appears to have been created by force of a special statute which prevailed within a circumscribed area. In *the matter of Dasu Manavala Chetty* (6) the main question was whe-

(4) [1914] 36 All. 380=24 I. C. 182=12 A.L.J. 525.
(5) [1900] 24 Bom. 360=2 Bom. L. R. 467.
(6) [1910] 33 Mad. 93=4 I. C. 1064 = 19 M. L. J. 591.

ther or not the property was subject to the payment of a particular duty under the Court-fees Act. Incidentally, the question was raised as to whether or not the coparcener was the person who might apply for letters of administration with reference to the undivided share of a deceased coparcener. Miller, J., answers the question in the affirmative :

"I have no doubt that the appellant is a person to whom letters of administration may be granted under S. 23, Probate and Administration Act. He is a person who would be entitled to the whole or part of the estate of the deceased. He would take his father's property if his father died intestate leaving property."

We entirely dissent from this view. A coparcener cannot deal with his undivided share in the joint family property without the concurrence of the other members of the family. If he dies, during the continuance of the coparcenary, his estate vanishes and no property descends to the other members of the family from him either as his assets or his estate. If in the Presidency of Madras the undivided estate of a coparcener descends to his heirs as his separate property giving the heirs a right to a distributive portion in the same, all that we need say is that such a state of things is not in accord with the constitution of a joint family in northern India wherever the authority of the Mitakshara prevails.

The question now in controversy did not arise *In the goods of Bhubaneshwar Trigunait* (7). Bhubaneshwar Trigunait who was the karta of a Mitakshara joint family died intestate leaving him surviving a brother and two sons. He had to his credit a large sum of money in the floating account with the Calcutta Branch of the Allahabad Bank. The Bank having refused to pay the money to the survivors unless they produced letters of administration or a succession certificate, the brother and one of the sons applied for the grant of a letters of administration. The applicants claimed that the deceased was the sole trustee and no sum was payable under Art. 11, Sch. 1, Court-fees Act. All that was decided in this case was that the question was purely a question of procedure, that the report of the Taxing Officer upon the point was final and conclusive and that the applicants were not liable to pay any duty. This case is, therefore, no authority on the question in controversy. A judicial decision is an authority for the proposition which was actually decided in the case. To find out the actual decision we have to fasten our attention to the point or points in issue which emerge from the pleadings and to the findings of the Court upon such point. It is undesirable and unsafe to extend the frontier by having recourse to rules of analogy or to rules of logic. It the last mentioned case, the entire decision proceeds upon the assumption that an application for letters of administration could be made by a coparcener with reference to joint family property. The point was not raised in the case nor decided by the Court. The case is, therefore, no authority on the question in issue before this Court.

We are clearly of opinion that the present application is incompetent and should be dismissed.

The two companies referred to in the annexure cannot insist upon the applicant obtaining a letters of administration regarding property which was not the separate estate of General Balmukund Dube. At the same time, the companies may be justified in refusing to recognize the claim of the applicant and his brothers in the absence of satisfactory evidence to prove that they were members of a joint Hindu family with their father, that the shares had been acquired by the father with joint family funds and that the father had died during the continuance of the joint family. If the companies dispute or deny the title of the sons without any just cause, they may expose themselves to the risk, trouble and expense of a declaratory suit by the sons. This aspect of the matter need not be further discussed. We are not called on to decide and we do not decide what remedy is available to the applicant. The only point we decide is that the application made to this Court is misconceived and should be rejected.

We dismiss this application.

R.M./R.K. *Application dismissed.*

(7) A. I. R. 1925 Cal. 1201=52 Cal. 871.

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MEARS, C. J., AND SEN, J.

Abdul Rahman—Appellant.

v.

Jagannath Pandey—Respondent.

First Appeal No. 83 of 1929. Decided on 22nd July 1929, from order of Sub-Judge, Jaunpur, D/- 25th April 1929.

Guardian and Ward—Children of Hindu after their widowed mother's conversion brought up as Mahommedans for four years demanded to be brought up as Hindus—What is best in interest of children should be considered—Children were allowed in their mother's custody.

A Hindu died leaving behind a widow and minor children. The widow embraced Mahomedanism and took her children to live with her and they lived with her for a period of nearly four years. Subsequently a Hindu on behalf of the Hindu Mahasabha demanded them to be brought up as Hindus.

Held : that it was the duty of people interested to intervene at once and to go to the Court and to ask that the Court should protect the minor children from being converted to Mahomedanism. But as nearly four years had been allowed to pass without any application, the application on behalf of the Mahasabha could not be granted. The right view in such a case must be what was best in the interests of the children. Where the children had for a long time remained as Mahomedans and were happy and well-looked after, no order changing their mode of life could be made. [P 87, C 1]

Shah Zamir Alam—for Appellant.

S. N. Verma and *Kedar Nath Sinha*—for Respondent.

Judgment.—This is an appeal asking that an order of Mr. Hari Har Prasad of 25th April 1929, may be set aside. The position is this, that in November 1924, there was a family living in a village in the District of Jaunpur, the husband by name being Anup Kahar and his wife being Mt. Jhapatta. They had at that time undoubtedly a son named Behari, a daughter named Mt. Hinni, another named Mt. Gunni and a third named Mt. Hubraji. There is no evidence on which we can act that at that date there were any other members of this family. Anup Kahar died in November 1924 and thereupon within a very few days the widow and the daughters and the son migrated to Jaunpur and at that place, there was a sudden conversion of Mt. Jhapatta to Mahomedanism, she assuming the name of Mt. Ala Bandi. That name she has borne ever since. At the same time it is said that the three minor children whose names we have given were converted to Mahomedanism, Mt. Hinni's name being changed to Mt. Sakina, Mt. Gunni's name being changed to Mt. Zainab and Mt. Hubraji's name being changed to Mt. Salima. There also comes into this story a brother of the husband of Mt. Jhapatta by name Dhanai who was also won over to Islam and became by name Abdul Rahman. He is the appellant in the present appeal. Nobody took any interest whatsoever in this event until a question arose with regard to thealleged marriage of Mt. Sakina. She was said to have been married to a son of a prostitute and there was a controversy before the District Judge of Benares, it being contended on the one side that Abdul Rahman had brought about this marriage and on the other it was asserted that the mother of the girl had not been properly watchful about the children in her charge. The application by the mother of the girl that she might be made the guardian of Mt. Sakina was refused and the District Judge being of opinion that a neutral person would be more advantageous to the girl ordered her to be taken over by the Mahommedan Orphanage of Lucknow.

Dr. Ansari, the Secretary of that association said that he would accept the child and she has remained from the 3rd March 1926, until to-day in the custody of the Mahommedan Orphanage of Lucknow or in the custody of Dr. Ansari and has been treated there with kindness and is receiving education. On 20th August 1928, a legal practitioner by name Pandit Jagannath Pande woke up to the fact that there was an opportunity to get hold of these three girls and he made an application which may, in the first instance have gone to the District Judge but by him was sent to the Sessions and Subordinate Judge, and this was probably the reason why the Sessions and Subordinate Judge was assuming jurisdiction. The applicant simply asked that they being children born of Hindu parents, they might be handed over to the Hindu Sabha to be taken care of and instructed in the tenets of the Hindu religion. Pandit Jagannath Pande went into the witness-box and gave evidence and first of all he made no attempt to explain the great delay between December 1924 and August 1928 and secondly, no one could

have been more designedly vague about the Orphanage where these children were sought to be consigned. There was the suggestion that there was one child at the Orphanage and some other women. There is not one word about the sort of place the Orphanage is, the number of children that have passed through the care of the Orphanage, nothing to show that it has any substantial funds behind it or that it has ever imparted education to any children whatever. Pandit Jagannath Pande does not himself say what particular qualifications he possesses to be the guardian of these three children. The learned Sessions and Subordinate Judge never considered this matter from what, in our opinion, was the right view ; the right view must be what is best in the interests of the children.

Now it might very well be that when Mt. Jhapatta changed her name to Ala Bandi having embraced Mahomedanism, it should have been the duty of people interested in these matters to intervene at once and to go to the Court to ask that the Court would protect her minor children from being converted to Mahomedanism and if anybody had then come forward and made that application and satisfied the Court that they had the capacity to educate and bring up these children as Hindus and the honest intention to do so, the Court might very well have passed the order taking them out of the possession of the mother. But as we have pointed out, nearly four years have been allowed to elapse without any application ever having been made. The position as regards Mt. Sakina is that she has been for four years and four of the most impressionable years of her child's life in an institution where she states that she is happy and well looked after. The institution is prepared to continue to maintain her and in the ordinary course if we make no order to the contrary the child will remain there until she attains the age of puberty and then the question will arise whether she will accept or repudiate the marriage which is said to have taken place between her and the son of a prostitute. As regards the other two children the position is not so clear. On the one hand, the Orphanage represented by Pandit Jagannath Pande says that these two children are not married. The appellant contends that they both are married and even goes to the length of saying that both of them are living with their husbands. We cannot decide that matter but we treat the welfare of these two children on the same lines as we consider that of Mt. Sakina and, that is, that they having been with their mother all their lives, it is not desirable at this late stage, if they are not married, they are certainly approaching the time of marriage, to interfere in any way with their mode of life. This therefore disposes of this appeal and we set aside the order of Mr. Hari Har Prasad and direct that Mt. Sakina is to remain with Dr. Ansari in the future as she has remained in the past until such time as some further order may have to be made putting an end to the guardianship. We also make no order restricting in any way the personal liberty of Mt. Sakina and Mt. Zainab. We allow the appeal and direct that the costs of the application in the lower Court and of this appeal be paid by Pandit Jagannath Pande. No order is necessary on the two connected applications.

R.M./R.K. *Appeal allowed.*

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YOUNG AND BENNET, JJ.

Mata Din Kandu—Applicant.

v.

Ram Lakhan Ahir and *another*—Decree-holder and Judgment-debtor—Opposite Parties.

Civil Revn. No. 260 of 1928, Decided on 18th July 1929, from an order of Small Cause Court Judge, Azamgarh, D/- 21st July 1928.

(a) Provincial Small Cause Courts Act, S. 25—Court, in revision should interfere only where substantial injustice is caused.

Section 25 is not intended to give in fact a right of appeal in all Small Cause Court cases and the revisional powers given by that section are only exercisable where it appears that some substantial injustice to a party to a litigation has directly resulted from a material misapplication or misapprehension of law, or from a material error in procedure.

A applied to set aside an ex party decree and in accordance with rules filed a security bond with two sureties *B* and *C*. *B* applied to withdraw his name and *A* deposited into the Court Rs. 335 sufficient to represent *B's* suretyship. Subsequently the decree-holder objected to the bond on the ground that *C* being a Hindu and having two sons, his surety was worth nothing. The Small Cause Court Judge accepted this

S. N. Das
Advocate High Court
Jammu & Kashmir

contention and dismissed *A's* application. On appeal it was contended that the Court sitting in revision was not entitled to interfere in the case on the ground that a proposition of law was incorrect.

Held : that there was a very substantial injustice, for *A* had been deprived of all opportunity of having his case heard on restoration and that therefore the Court in revision was entitled to consider the correctness of the proposition of law decided by the Small Cause Court Judge : (1890) *A. W. N.* 121 and 13 *All.* 277, *Rel. on.* [P 88 C 2]

(b) **Hindu law—Mortgage by father of ancestral estate for suretyship is binding on his sons.**

Sons in a joint Hindu family are liable for the due fulfilment of a hypothecation bond entered into by their father as surety.

Where a Hindu father, having two sons, entered into a hypothecation bond as surety in respect of joint and ancestral property in the Court of Small Causes and where objection was taken that the bond was worth nothing,

Held : that the bond tendered was a valid hypothecation bond and the mere fact that the executant had sons did not make it invalid : 26 *All.* 611, *Foll.*; *A. I. R.* 1924 *P. C.* 50, *Expl.* and *Dist.* [P 89 C 1, 2]

A. P. Pandey—for Applicant.

Sankar Saran—for Opposite Party.

Judgment.—This is an application in revision from an order of a Small Cause Court Judge. It appears that the plaintiff before the Small Cause Court obtained a decree for Rs. 533-13-0 ex parte against the defendant on 12th November 1927. On 12th April 1928, the defendant obtained knowledge of ahe decree. On 22nd April 1928, he applied to set aside the decree, and in rccordance with the rules filed a security bond with two sureties. On 27th April 1928, Balgovind applied to withdraw his name as surety. On 30th April 1928, the defendant paid into Court a sum of Rs. 335 which be thought was a sufficient sum to represent the suretyship of Balgovind. On 21st July 1928, the decree-holder objected to the security bond on the ground that the other surety Gopi Tewari being a Hindu and having two sons, his suretyship was worth nothing. It is to be observed that the security given was a hypothecation bond by Gopi Tewari in respect of joint and ancestral property. The Small Cause Court Judge decided this matter very briefly, and he says :

"The decree-holder says that his security is not enough, that Gopinath has sons, and as other security has not been filed, the application is dismissed."

It is apparent from this order that the security was rejected on the ground that Gopinath, a Hindu father, had two sons and that the property mortgaged was ancestral and joint. The Small Cause Court Judge considered that it was not possible for a Hindu father to pledge his estate for the purpose of being a surety. The appellant raises the question in his first ground of appeal that this statement of law is incorrect.

A preliminary question was raised on behalf of the respondent as to whether under S. 25, Small Cause Courts Act, this Court sitting in revision was entitled to interfere in this case on the ground that a proposition of law was incorrect. Reference was made by the learned counsel for the respondent to *Muhammad Nizamuddin Khan* v. *Hira Lal* (1) in which Mahmud, J. had laid down at p. 122 that he was of opinion that the action of a Court of Small Causes was not questionable in revision unless it had caused at least such substantial injustice affecting the merits of the case or the jurisdiction of the Court as S. 578, Civil P. C., (now S. 115) contemplated. That decision was followed in *Mohammad Baqar* v. *Bahal Singh* (2) in which it was laid down that S. 25, Provincial Small Cause Courts Act, was not intended to give in effect a right of appeal in all Small Cause Court cases and the revisional powers given by that section are only exerciseable where it appears that some substantial injustice to a party to a litigation has directly resulted from a material misapplication or misapprehension of law, or from a material error in procedure. Following these rulings we find that in the present case there was a very substantial injustice to the appellant, if we hold that the proposition of law on which the lower appellate Court acted was wrong, for the appellant has been deprived of any opportunity of having his case heard on restoration. For these reasons we hold that this is a case in which we should consider whether the proposition of law is correct or incorrect. For the appellant reliance was placed on *Maharaja of Benares* v. *Ram Kumar Misir* (3). In this case it was held that

(1) [1890] A. W. N. 121.
(2) [1891] 13 All. 277=(1891) A. W. N. 31.
(3) [1904] 26 All. 611=1 A. L. J. 330,

the sons in a joint Hindu family are liable for the due fulfilment of a hypothecation bond entered into by their father as surety. No authority to the contrary has been shown to us but the learned counsel for the respondent based his argument on this point of law on the Privy Council case reported at 104 (*of* 46 *All.*) *Brij Narain* v. *Mangal Prasad* (4). That was a case in which the question before their Lordships was whether two prior mortgages constituted a sufficient antecedent debt for a subsequent mortgage executed by a father of a joint Hindu family. Their Lordships held in the affirmative and at p. 104 laid down as the result of the authorities examined in that case five propositions. It must be admitted that the present case of a hypothecation bond as surety does not come under any of the propositions laid down by their Lordships indicating actions which may be taken legally by the father of a joint Hindu family. For the respondent it was argued that proposition 3 would apply to the present class of security. This proposition is as follows :

"It he purports to burden the estate by mortgage, then unless that mortgage is to discharge an entecedent debt, it would not bind the estate."

There is of course no antecedent debt for a surety bond and accordingly if this proposition was intended by their Lordships to cover a surety bond then such a surety bond would not bind the estate.

But we are of opinion that in laying down these five propositions their Lordships of the Privy Council had no intention to apply the propositions to a case like the present which is a case of a hypothecation bond of suretyship. There was no mention at all in the judgment of their Lordships of any such question having been raised before them. We consider that if their Lordships had intended to lay down the proposition that a Hindu father could not bind the estate of the joint family by hypothecating the estate for the purpose of suretyship, that that proposition would have been clearly stated in the judgment of their Lordships. We consider that a proposition of such an importance as that in the present case would not have been laid down by their Lordships merely by implication but would have received separate treatment and consideration. Accordingly as we consider that this ruling of their Lordships is not intended to apply to the circumstances of the present case, we consider that we ought to follow the ruling in *Maharaja of Benares* v. *Ram Kumar* (3). We accordingly hold that the hypothecation bond in the present case tendered to the Small Cause Court Judge was a valid hypothecation bond and that the mere fact that the executant had sons did not make it invalid.

There is another aspect of the case which is as follows : When this hypothecation bond was tendered to the Court no objection was taken to it by the respondent on the ground that it was invalid. It was only after the other surety had withdrawn from his suretyship and the appellant had deposited a sum in cash to meet the default of that other surety, that the respondent took objection to this surety bond on this legal point. We consider that if the Small Cause Court Judge held that the bond was invalid on this legal ground, he should have given an opportunity to the appellant to furnish fresh security or deposit a further sum of money to meet the deficiency. Accordingly we direct the Small Cause Court Judge to re-admit this application for the tender of security to his file and to dispose of it in accordance with the directions which we have given on the point of law. It is open to the Small Cause Court Judge to consider the sufficiency of this security on other grounds, and it is open to the appellant, if he has withdrawn the deposit of Rs. 335, to re-deposit it within a period to be determined by the Small Cause Court Judge. Costs so far as incurred in this Court and in the lower appellate Court will be costs in the case.

K.N/R.K. *Revision allowed.*

(4) A. I. R. 1924 P. C. 50=46 All. 95=51 I. A. 129 (P. C.).

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BOYS, J.

Farhatullah—Appellant.

v.

Mohammad and *others*—Respondents.

Second Appeal No. 1090 of 1924, Decided on 3rd February 1927, against decision of Sub-Judge, Bulandshahr, D/-8th April 1924.

Landlord and Tenant—Tenant may build without landlord's consent house or well on land appurtenant to and adjoining his house provided such construction is not detrimental to landlord.

A tenant may build without landlord's consent either a house or a well inside his house or on land actually appurtenant to and adjoining his house, which forms part of the site on a portion of which his house stands provided that such construction is not detrimental to the other interests of the zamindar : 35 *All.* 292; *A.I.R.* 1925 *All.* 341; 4 *O.L.J.* 454 and 6 *O. L. J.* 281, *Rel. on.*; 25 *I. C.* 59; *A. I. R.* 1924 *All.* 723 and 10 *I. C.*, 281, *Dist.* [P 92 C 2]

Kailash Chandra Mital — for Appellant.

M. A. Aziz—for Respondent.

Judgment.—This and the connected S. A. No. 1091 of 1924 relate to certain construction in the nature of houses and to the digging of a well on plot 82 inside a village abadi. The zamindar sued for the demolition of the houses and the filling up of the well. The facts of these cases very rarely appear with precision. But as I appreciate the facts in this case it has been found that there is plot 72 in the village; that on a portion of that plot there is the house of the defendant tenant; that the whole of the plot has been recorded as in his exclusive possession ever since 1903; that no portion whatever of the plot is "uftada." The tenant has now added to his house and has dug a well somewhere on this plot 72.

The various circumstances under which these constructions are made and in which land or houses come into the possession of individuals are very often very obscure, unless the matter has already at some time been the subject of litigation. This frequently results in the pleadings being proportionately ill-informed. In this case the tenant set up that the constructions complained of were of very old standing, and as regards the well, that it had been dug with the consent of the zamindar. It has been found that the constructions in the nature of houses are new and that the well was not constructed with the consent of the zamindar. But it has been also held that the consent of the zamindar was not necessary, with the result that the whole suit has been dismissed by the lower appellate Court. The trial Court had partly decreed and partly dismissed and hence there were two appeals before the lower appellate Court, and the plaintiff's case being wholly dismissed by the lower appellate Court has resulted in the two present appeals. It has been urged first that the suits were dismissed on a ground which was never set up by the defendant tenant. This is a perfectly fair criticizm, but for the reasons that I have given above I am not prepared to hold the defendant too strictly bound to his pleading.

The second point taken is that the tenant had no power to make these constructions without the consent of the zamindar. I have had a number of rulings quoted to me on this disputed point by counsel for either party. In *Chhatarpal* v. *Gajadhar* (1), there is nothing to show that the land was in any way appurtenant to the house. It is merely described as having been near the house. It may have been wholly separate. In *Mohammad Taqi* v. *Dori*, *A. I. R.* 1924 *All.* 723, and in *Jagannath* v. *Gurdyal* (2), it would appear that the land on which the constructions were built was not in the exclusive possession of the tenant. On the other hand through a series of cases what, if I may say so appears to me to be the practical and sensible proposition has crystallised, that a tenant may build either a house or a well inside his house or on land actually appurtenant to and adjoining his house, which forms part of the site on a portion of which his house stands provided at any rate that such construction is not detrimental to the other interests of the zamindar : see *Bhagwan Das* v. *Mohammad Yahia* (3); *Mahadeo Rai* v. *Jan Mohammad* (4); *Mahabal Kurmi* v. *Sarju* (5) and *Sheo Sahai* v. *Rajeshwari* (6). The result is that in my opinion both appeals must fail and they are dismissed accordingly with costs.

S.N./R.K. *Appeals dismissed.*

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(1) [1914] 25 I. C. 59.
(2) 1911] 10 I. C. 284.
(3) [1913] 35 All. 292=18 I.C. 928=11 A.L.J. 301.
(4) A. I. R. 1925 All. 341=47 All. 541.
(5) [1917] 4 O.L.J. 454=42 I.C. 51.
(6) [1919] 6 O. L. J. 281=51 I. C. 1006.

A. I. R. 1930 Allahabad 91 (1)

SULAIMAN AND KENDALL, JJ.

An Advocate, In Re :

Civil Misc. Case No. 663 of 1929, Decided on 15th October 1929.

(a) Bar Council Rules Allahabad R. 1—"High Court" means Chartered High Court.

"High Court" referred to in Bar Council R. 1 is a Chartered High Court. [P 91 C 1]

(b) Bar Council Rules Allahabad R. 1—Benares State Chief Court is neither High Court nor Court subordinate to Allahabad High Court.

Benares State Chief Court is neither High Court within the meaning of Bar Council R. 1, nor is it subordinate to the Allahabad High Court, and hence a legal practitioner who enrols himself as a pleader in Allahabad District Court and practises in the Benares State Courts cannot be treated as having practised in any High Court or a Court subordinate to Allahabad High Court and as such he is not entitled to be enrolled as an advocate of Allahabad High Court. [P 91 C 1]

Judgment.—Mr. *A* who was enrolled as a pleader in the Allahabad District Court for the year 1923 has been practising since then in the Courts of the Benares State and now applies to be enrolled as an advocate of this High Court. His ground is that the Benares State Chief Court is almost equivalent to a High Court.

The Bar Council has raised an objection on the ground that the Chief Court of the Benares State is not a High Court and Mr. *A* cannot be treated as having practised in any High Court and is therefore not entitled to be enrolled as an advocate of this High Court.

In our opinion the objection raised is sound. Under Bar Council R. 1 an applicant must either have practised in one or more of the Courts subordinate to this High Court for a period of not less than one year or undergone training in the chambers of a senior member whose name appears on a list approved by this High Court or he must be an advocate of any other "High Court" of not less than two years standing. It is quite clear that Mr. Anandi Prasad has not been practising in any Court subordinate to this High Court nor has he undergone the requisite training. It is equally clear that the Benares State Chief Court cannot be recognized as a Chartered High Court which is referred to in the rules and his practice in such Court cannot be counted. The application is accordingly rejected.

V.B./R.K. *Application rejected.*

A. I. R. 1930 Allahabad 91 (2)

DALAL, J.

Brijraj Saran Sing—Plaintiff — Appellant.

v.

Sisram—Defendant—Respondent.

Second Appeal No. 1850 of 1928, Decided on 15th November 1929, against decree of Dist. Judge, Bulandshahr, D/- 19th July 1928.

Agra Tenancy Act (3 of 1926), S. 249—No second appeal lies from order in execution.

An order of a revenue Court passed in execution of an order is not an order appealable under S. 249. [P 92 C 1]

M. N. Raina—for Appellant.

B. Malik—for Respondent.

Judgment.—Mr. Malik on behalf of the respondent Sisram tenant judgment-debtor has objected that no second appeal lies to this Court. The decree-holder desired to execute his decree for arrears of rent by ejectment of Sisram. Sisram objected that the decree-holder's property had at present vested in a receiver and that, therefore, the decree-holder could not execute a decree for possession relating to property which was no longer in his possession. This defence was not accepted by the trial Court of the Assistant Collector who by an order dismissed the objection and directed execution to proceed by ejectment of Sisram. This was certainly an order in the execution department and not a decree as defined by S. 2 (14), Agra Tenancy Act. According to that definition "decree" means any order which so far as the revenue Court is concerned finally disposes of a suit. The direction of the Assistant Collector did not dispose of any suit and so did not amount to a decree. From that order an appeal is permitted to the District Judge under S. 248 (3), but from the order of the District Judge no second appeal is permitted. A second appeal is barred under the provisions of S. 249 of the Act. Confusion arises by reason of different meanings being assigned to a decree in the Code of Civil Procedure and in the Agra Tenancy Act. A decree as defined in the Code of Civil Procedure

S. 2 (2) includes the determination of any question within S. 47, Civil P. C. According to that definition the Assistant Collector's adjudication would amount to a decree. Mr. Raina argued with some plausibility that the order of the appellate Court of the District Judge was a decree and that he had come here from the appellate decree of a District Judge. If this view were accepted, there would be no meaning in the prohibition disallowing a second appeal from an order. I think the correct view would be that where there is an order and not a decree of the revenue Court there can be only one appeal, and not a second appeal to this Court. For this reason I disallow the appeal and dismiss it with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 92

SEN, J.

Hukum Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 447 of 1929, Decided on 13th August 1929, from order of Sess. Judge, Etah, D/- 12th June 1929.

(a) Criminal P. C., S. 403—Where two indictments are essentially different and relate to independent transactions acquittal under one does not bar complaint with reference to other.

To set up the plea of autre fois acquit it is essential that there must have been a previous trial of the offence terminating in the order of acquittal. It must be established that the offences were substantially the same and grew out of same facts. Where the two indictments are essentially different and relate to separate and independent transactions affecting distinct individuals it cannot be held that acquittal with reference to complaint of the one is a bar to entertainment of the second complaint. It is not necessary that both complaints should be before the same person but before the presiding officer of the same Court. [P 95 C 2]

B and *C* instituted a joint complaint against *H*. Transactions out of which the complaints arose were different and independent, and separate complaints ought to have been presented. *B* and *H* compounded the case with the result that *C's* case was no longer subject of judicial inquiry. *C* filed a fresh complaint. *H* contended that he had been acquitted of all charges in the original complaint and no fresh complaint could be entertained under S. 403.

Held: that the effect of acquittal with reference to *B's* complaint was no bar to the entertainment of the complaint by *C*. No order for acquittal had been passed with reference to *C's* complaint and *H* was not ordered to be discharged on the same: 9 *All.* 52; (1895) *A. W. N.* 86; 5 *A. L. J.* 137; 29 *All.* 7 and 36 *All.* 129, *Ref.*; 4 *C. W. N.* 242; 34 *Mad.* 253 and 41 *Mad.* 685, *Dist.* [P 93 C 2]

(b) Criminal P. C., S. 345 (6)—Joint complaint — Composition operates as acquittal with reference only to particular offence compounded.

Where in a joint complaint with reference to distinct and independent transactions there is composition with respect to one transaction the effect of such composition is acquittal with respect to charges brought under the particular transaction. The composition does not operate as acquittal with reference to the offence committed in the other transaction. [P 93 C 2]

A. M. Khwaja—for Applicant.

M. Waliullah—for the Crown.

Judgment.—The facts of the case which have given rise to this application for revision are that, on 7th August 1928, Mt. Champavati and one Bahori Lal instituted a complaint under Ss. 417 and 406, I. P. C., in the Court of a Special Magistrate with second class powers. The District Magistrate of Etah transferred the case to the Sub-Divisional Magistrate of Kasganj. The latter, in his turn, transferred the case to Mr. Sayed Ghayoor Ahmad, Magistrate, First Class.

Mt. Champavati is the widow of a predeceased brother of Bahori Lal. Both her husband and Bahori Lal were in the railway service. After the death of her husband, Mt. Champavati received a considerable sum of money from the railway authorities on account of the provident fund of her deceased husband. Bahori Lal also received a large sum of money from the railway on his own account as his share of the provident fund. It is common ground that Mt. Champavati and Bahori Lal occupied the same house and Bahori Lal may well be taken to be the natural protector of Mt. Champavati and her minor son. It was alleged that by trickery and by a pretence of friendship, Hukam Singh, the applicant, insinuated himself into the confidence of Mt. Champavati and Bahori Lal in various ways. Hukam Singh persuaded Mt. Champavati to believe that there was a danger of her cash and jewellery being appropriated by Bahori Lal and that it would be safer and more prudent if she allowed Hukam Singh to take charge of her cash and jewellery and keep them in deposit for her. The unsuspecting widow believed Hukam Singh and put him into possession of ornaments, worth Rs. 350 and cash Rs. 1,100. The complaint of Mt. Champavati against Hukam Singh was limited to these two items which

concerned her and which had nothing to do with Bahori Lal. She charged Hukam Singh with cheating and criminal breach of trust with reference to the two items indicated above.

In the same petition of complaint, dated 7th August 1928, Bahori Lal charged Hukam Singh with cheating and criminal breach of trust with reference to large sums of money aggregating to Rs. 2,500. The money belonged to Bahori Lal. Mt. Champavati had no share in this money. The person who had been imposed upon with reference to this was Bahori Lal and not Mt. Champavati. The transactions which formed the basis of the complaint of Mt. Champavati were essentially different from those which afforded a cause of action to Bahori Lal.

It was unfortunate and inexpedient to address a joint complaint to the Magistrate with reference to two independent transactions affecting two individuals separately and which did not present any common feature excepting in so far that two persons were alleged to have been victimized by the wily machination of the same individual. The Magistrate ought to have insisted upon two complaints being presented before him, one by Mt. Champavati and the other by Bahori Lal. It would have been reasonable and more businesslike to do so, to avoid any future complications or embarrassment in the trial of the cases and would have limited the scope of the issue which emerged for decision in each case separately.

On 16th November 1928, it had dawned upon the two complainants that it was not right that the offences committed against them should be heard and disposed of in the course of a joint trial; and that on that date, they addressed a petition to the Magistrate that the trial of the case should be limited to such items only as affected Bahori Lal. The only order passed by the Magistrate on this application was "file." He, however, confined his enquiry to such items only as had been alleged to have been obtained from Bahori Lal either by cheating or by criminal breach of trust. He committed Hukam Singh to the Court of Sessions, alternatively under Ss. 406 and 420, I. P. C.

The charges on the aforesaid sections constitute a warrant case under the Criminal Procedure Code, but they are compoundable under S. 345, Criminal P. C., with the permission of the Court before which any prosecution for such offence is pending. Hukam Singh appears to have persuaded Bahori Lal to agree to have the dispute referred to the arbitration of one Babu Gulzari Lal. The parties applied to the Court of Sessions for leave to compound the case. The Court granted the permission and the case was compounded on 23rd February 1929.

The effect of the petition dated 16th November 1928, was that the original complaint of Mt. Champavati was no longer the subject of a judicial enquiry. There was no non-appearance of Mt. Champavati within the meaning of S. 247, Criminal P. C., and the Magistrate passed no order acquitting the accused on the complaint of Mt. Champavati. It is abundantly clear that Mt. Champavati's complaint has never so far been the subject of a judicial investigation. No evidence had been recorded and the truth or falsity of the complaint had not been tested on the merits. Hukam Singh has not been ordered to be discharged on the complaint of Mt. Champavati.

The effect of the composition with Bahori Lal was that Hukam Singh was acquitted of the charges brought by Bahori Lal against him. S. 345 (6), Criminal P. C., is clear on the point :

"The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded."

The offence which has been compounded was an offence against Bahori Lal and not against Mt. Champavati. The composition of that offence by Bahori Lal could not operate as an acquittal with reference to the offence committed against Mt. Champavati.

After the disposal of the Sessions case, a change had taken place in the personnel of the officer presiding in the Court of the Deputy Magistrate who had committed the case to the Court of Sessions. Mr. Sayed Ghayoor Ahmad was transferred and his place was taken by B. Jwala Prasad, Magistrate First Class.

On 5th April 1929, Mt. Champavati filed a fresh complaint in the Court of Babu Jwala Prasad against Hukam Singh charging him with the commission of offences punishable under Ss. 417 and 420, I. P. C. In this petition, Mt. Champavati rehearsed the same facts, on which

the complaint, dated 7th August 1928, was founded.

Upon notice being issued to Hukam Singh, he contended that the effect of the order passed on the petition of Mt. Champavati, dated 16th November 1928, was that he was discharged by the Court and that the said discharge could not be set aside by another Magistrate of co-ordinate jurisdiction. It was further argued that the effect of the acquittal by the Court of Sessions upon the composition of the offence by Bahori Lal was that Hukam Singh was acquitted of all charges which were set out in the original complaint dated 7th August 1928, preferred jointly by Mt. Champavati and Bahori Lal, and that having regard to the provision of S. 403, Criminal P. C., it was beyond the competence of the Magistrate to entertain a fresh complaint on the same facts against Hukam Singh.

These contentions were repelled by the Magistrate, who by his order dated 1st June 1929, directed that the case of Mt. Champavati must proceed against the accused. Hukam Singh applied to the learned Additional Sessions Judge, who held that the order of the lower Court was correct in law and dismissed the application.

Hukam Singh comes up before this Court in revision.

The learned Additional Sessions Judge was of opinion that the complaint of Mt. Champavati had not been disposed of by the Magistrate in any shape or form ; that, at the outset, the order of the Magistrate on the application of Mt. Champavati dated 16th November 1928, and his subsequent order of commitment amounted to a discharge of Hukam Singh ; and that under the law the Magistrate was not precluded from rehearing the complaint or from entertaining a fresh complaint based upon the same facts.

The learned counsel for the applicant has cited certain authorities in traverse of the view taken by the learned Additional Sessions Judge. In *Moul Singh* v. *Mahabir Singh* (1) all that was held was that it was not proper for a District Magistrate to direct proceedings to be taken on a police report with reference to a matter which had come up before a Sub-Divisional Magistrate and in which the said Magistrate had made an order that it was not necessary to proceed against certain accused persons, unless the District Magistrate had withdrawn the whole matter from the Court of such Subordinate Magistrate. In the matter of *Guggilapu Paddayya of Palakot* (2) it was held that the effect of S. 247, Criminal P. C., was that the order amounted to an acquittal and that the non-mention of S. 247 in the explanation to S. 403, Criminal P. C., was indicative of the fact that the latter section was not intended in any way to limit the effect of an order of acquittal under S. 247. In the present case, no order was passed on the complaint of Mt. Champavati either under S. 247 or under S. 403, Criminal P. C. This ruling, therefore, is not helpful to the applicant. It has been held in *Kumarswami Chetty* v. *Kuppuswami Chetty* (3) that :

"an offence is complete when the acts, constituting it, have been committed apart from whether any complaint or charge has been laid before the Court or not and that the compounding of offences mentioned in para. 1, S. 345, Criminal P. C., is lawful even if it takes place before any complaint is filed in respect thereof."

In the present case, no composition had been arrived at between Mt. Champavati and Hukam Singh either before the Court or outside the Court and therefore there was no composition in existence which could operate as an acquittal.

The case of *Queen Empress* v. *Adam Khan* (4) was strongly relied on. It was ruled in this case by Blair and Burkitt, JJ., that when a competent tribunal had dismissed a complaint, another tribunal of exactly the same powers cannot reopen the same matter on a complaint made to it :

"We think it utterly contrary to sound principles that one Magistrate of co-ordinate jurisdiction should, in effect and substance, deal with, as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority."

This ruling has no application to the facts of the present case because the complaint of Mt. Champavati had not been dismissed by a competent tribunal. Moreover, the aforesaid view does not

(1) [1900] 4 C. W. N. 242.

(2) [1911] 34 Mad. 253=9 I. C. 253=12 Cr. L. J. 41.

(3) [1918] 41 Mad. 685=34 M. L. J. 217=44 I. C. 583=(1918) M. W. N. 493.

(4) [1899] 22 All. 106=(1899) A. W. N. 211.

appear to have been adopted or agreed to by some of the learned Judges of this Court. In an earlier decision in *re*, *Queen Empess* v. *Chotu* (5) a divergent view appears to have been taken. In *Queen Empress* v. *Umedam* (6) it was held by Knox and Aikman, JJ., that :

"a Magistrate, who had passed an order dismissing a complaint. may at the instance of the complainant, and without direction from any superior authority take cognizance of the same offence or of any other offence constituted by the same facts upon a second proper complaint being laid before him.

In *Bhagwan Din* v. *Dibba* (7) it was held :

"that the same Court was not precluded from entertaining a second complaint in pari materia."

The case law on the subject was considered by Richards, J., in *re*, *Emperor* v. *Meharban Husain* (8), and the learned Judge is reported to have observed as follows :

"I can find nothing in the Criminal Procedure Code which prevents the Magistrate from entertaining a second complaint made against the same person, even though the second complaint may be connected with a previous complaint which has already been dismissed under the provisions of S. 203."

In *Ram Bharos* v. *Bahan* (9) the 'second complaint was instituted before the same tribunal although the incumbent was a different individual, and it was ruled that :

"where the question is as to the competence of a Magistrate to entertain a second complaint in pari materia with a former complaint which has been dismissed under S. 203, Criminal P. C., it was not necessary that both complaints should be before the same person but before the presiding officer of the same Court."

Both, in principle and in view of the weight of authority, there was nothing to preclude Babu Jwala Prasad from taking cognizance of the second complaint instituted by Mt. Champavati.

In construing S. 403, Criminal P. C. the explanation appended to the section ought not to be lost sight of:

"Dismissal of a complaint, the stopping of proceedings under S. 249, the discharge of the accused or any entry made upon a charge under S. 273, is not an acquittal for the purposes of this rection."

A verdict of acquittal is immune from challenge and the applicant is entitled to its full benefit; but the applicant has not produced a certified copy of the record or proceedings of an acquittal to show that he has been acquitted of the offence of which he has been arraigned or that he might have on his former trial in the Court of Sessions been convicted of the offence of which he is now sought to be arraigned. To set up the plea of autrefois acquit, it is essential that there must have been a previous trial of the offence charged, terminating in an order of acquittal. The explanation appended to the section places this matter with the greatest clearness and in fact beyond the realm of controversy. There is an order of acquittal in favour of Hukam Singh but to sustain the plea now advanced Hukam Singh had to establish that the offences were substantially the same and grew out of the same facts. One of the tests for determining the identity of the offences is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. In view of the circumstances of this case, it is impossible to hold that the evidence, which had a direct relation to Bahori Lal's case, could have any bearing upon the case propounded by Mt. Champavati. Any immaterial details may be eliminated, and the substance, rather than the form of charges in the two indictments have to be considered. But the two indictments are essentially different. They relate to separate and independent transactions, affecting distinct individuals. It is impossible to hold that the effect of acquittal with reference to the complaint of the one is a bar to the entertainment of the second complaint. This application is without force and is dismissed.

R.M./R.K. *Application dismissed.*

(5) [1881] 9 All. 52=(1886) A. W. N. 281 (F.B.).
(6) [1895] A. W. N. 86.
(7) [1908] 5 A. L. J..137=(1908) A. W. N. 67 =7 Cr. L. J. 297.
(8) [1906] 29 All. 7=3 A. L. J. 562=(1906) A. W. N. 245.
(9) [1914] 36 All. 129=12 A.L.J. 106.

*A. I. R. 1930 Allahabad 95

DALAL, J.

Ram Karan Singh—Defendant—Appellant.

v.

Shiv Harakh Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 246 of 1928, Decided on 27th November 1929.

*** Hindu Law—Alienation—Legal necessity—Alienation of several plots of land—Only some plots covering amount of legal necessity—Court can release rest of property.**

Where legal necessity has not been shown for the entire sum borrowed in consideration of transfer but for the part only and the property is composed of several separate plots of land out of which some one or more can be sold for the amount of legal necessity the Court can while maintaining the alienation of such plots return the others to the sons. [P 96 C 2]

K. C. Mital—for Appellant.

M. L. Agarwala—for Respondents.

Judgment.—The plaintiffs brought the usual case for possession of property transferred by their father on the allegation that the transfer was made without legal necessity. The two subordinate Courts held that out of the consideration of Rs. 300, there was legal necessity for Rs. 100 which was paid towards an antecedent debt, that Rs. 50 was not paid and that no legal necessity was proved for the sum of Rs. 150. The argument here was that as to Rs. 150, the lower appellate Court had accepted the position of the defendant appellant that that sum was borrowed for the purchase of bullocks and that the Court held this sum to be paid without legal necessity, simply because there was no recital in the sale-deed. Such, however, is not the position. The lower appellate Court said that the bullocks were purchased prior to the sale and there was no proof that the money was borrowed for the purchase of those bullocks. The finding, therefore, of the lower appellate Court is not vitiated by wrong reasoning.

The second argument referred naturally to the Privy Council decisions, disagreeing with the view of this Court that where legal necessity was not proved for the entire sum borrowed, the property should be returned to the son on payment of the sum for which legal necessity was proved. The question according to the decision of the Privy Council would be whether the sale was necessary for legal necessity. The argument of the respondents was that here, there was not one block of property which could not be sold separately, but there were three plots out of which one or two plots of one-third of the area could have been sold for Rs. 100. This argument appears to be sound. The question, is, therefore, whether the father was put to the necessity of selling any of the properties in suit. There are three plots, one No. 669 double the size of the two together Nos. 721 and 729, and as the plots are separate, there is no reason to believe that the father could not have sold No. 721 and portion of 729 to satisfy the need of Rs. 100. Under the circumstances the appeal cannot succeed for plot 669.

The final argument was that the sons had ratified the sale by something which they said in their written statement in a previous suit. I am not prepared to consider this argument when no certified copy of that written statement is produced. I do not know exactly what position they took up whether to resist possession in a suit under S. 9, Specific Relief Act, they had stated that they could hold possession as exproprietary tenants or whether they had stated that from the time of the sale they were exproprietary tenants and should not be ejected. Much would depend on the exact terms of the written statement, and that paper not being before me, I refuse to consider the point of ratification.

In the result I dismiss the appeal as regards plot 669, but decree the appeal plot 721 and of part 729. The decree of the Subordinate Court shall be modified accordingly. No sum shall be paid to the defendant-appellant. The plaintiffs shall receive possession of plot 669 without making any payment. The plaintiffs'shall receive two-thirds of their costs, while the defendant shall receive one-third throughout.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 96

DALAL, J.

Lachhmi Prasad—Defendant—Appellant.

v.

Ganesh Din and *another*—Plaintiffs—Respondents.

Second Appeal No. 125 of 1928, Decided on 22nd November 1929. against decree of Sub-Judge, Allahabad, D/-28th October 1927.

Limitation Act, S. 10—"For any specific purpose" implies express trust.

The words "for any specific purpose" merely indicate an express trust i. e., a trust that is not constructive or one arising by implication of law, or such that there is no doubt

as to its specified terms nor any uncertainty as to affirming them : 32 *Bom.* 394 ; 1922 *P. C.* 212, *Rel. on*; 1925 *Rang.* 289, *Dist.* [P 97 C 1, 2]

Mukhtar Ahmad—for Appellant.

Ram Newas Shukla—for Respondents.

Judgment.—The plaintiffs sued the defendant Lachhmi Prasad for possession of an occupancy holding, on the ground that he was in possession of the holding as a trustee. The question of trust is of importance as the plaintiffs desired to escape the bar of limitation by reason of the provisions of S. 10, Lim. Act. Both the subordinate Courts have held that there was an express trust and that the property had vested in the defendant-trustee. They have quoted the defendant's own statement and further referred to the fact that the plaintiffs redeemed a mortgage of the occupancy holding. It was not explained on behalf of the defence how else except as a trustee from the plaintiffs' father he could have obtained possession of the occupancy holding. Mr. Mukhtar Ahmad argued that the trust was not for any specific purpose. The words "for any specific purpose" merely indicate an express trust, i. e., a trust that is not constructive or one arising by implication of law : see *Bhurabhai Jamnadas* v. *Bai Rukmani* (1). In the present case both the subordinate Courts have held that the trust was an express one for the benefit of Sheoparson's sons, the plaintiffs to the suit, and that it was Sheoparson who made the trust. The property had vested in Lachhmi Pershad, because he was managing it and treating it as his own.

Another point argued was that the minors could not make a trust and that on the death of Sheoparson the minors became entitled to the occupancy holding. The trust, however, is not alleged to have been made by the minors but by their father. In the case quoted by the appellant's learned counsel Mr. Mukhtar Ahmad from Rangoon *Ma Thein May* v. *U Po Kin* (*A. I. R.* 1925, *Rang.* 289) there was no express trust but the father took over the management of his daughter's property on the death of the mother of that daughter. In another case, this one of the Privy Council, the counsel drew the Court's attention to the definition of "specific purpose" given by their Lordships of the Privy Council. Their Lordships said that

"it must be a purpose that is either actually or specifically defined in the terms of the will or settlement, or a purpose which, from the specific terms can be certainly affirmed : (*Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh*. *A. I. R.* 1922 *P. C.* 212).

In the present case there is no doubt as to the specified terms of the trust and there is no uncertainty as to affirming it. In my opinion the provisions of S. 10 do apply, and I dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1908] 32 Bom. 394=10 Bom. L. R. 540.

A. I. R. 1930 Allahabad 97

NIAMATULLAH, J.

Amrit Singh—Defendant—Applicant.

v.

Bhagwan Singh—Plaintiff—Opposite Party.

Civil Revn. No. 183 of 1929, Decided on 27th November 1929, against order of Dist. Judge, Agra, D/- 7th March 1929.

Agra Tenancy Act (3 of 1926), S. 242 (1) (a)—"Subject matter" refers to subject matter of suit and not appeal.

The words "subject matter" in S. 242 (1) (a) refer to the subject matter of the suit and not to the subject matter of the appeal and so where the value of the original suit exceeds Rs. 200, but the value of the appeal is below that amount, the appeal lies to the District Judge: *A.I.R.* 1929 *All.* 845, *Rel. on.* [P 98 C 1]

Baleshwari Prasad and *Nathumal*—for Applicant.

N. P. Asthana and *Baij Nath Sahai*—for Opposite Party.

Judgment.—This is an application for revision of an order dated 5th November 1928, passed by the District Judge of Agra, returning the memorandum of appeal filed before him for presentation to the proper Court. The plaintiff-applicant brought a suit for arrears of revenue amounting to Rs. 224-2-9 before an Assistant Collector of the First Class, who decreed it in full. The defendant appealed to the District Judge impugning the decree passed by the Court of first instance to the extent of Rs. 146-4-0. It will thus appear that the subject matter of the original suit exceeded Rs. 200 but the subject matter of the appeal was below Rs. 200. The learned District Judge held that, in so far as the valuation of the appeal before him was below Rs. 200, no appeal lay on the civil side. The view has reference to the provisions

of S. 242, Agra Tenancy Act 3 of 1926. The present application for revision has been filed by the defendant (appellant before the learned District Judge) impugning the correctness of the view taken by the learned District Judge. As I read S. 212 it presents no difficulty to my mind, as regards the forum of appeal arising out of a suit for arrears of revenue in which the amount claimed exceeds Rs. 200. It is not necessary to discuss in detail the language of S. 242 to examine whether an appeal lies to the District Judge only where the subject matter of the appeal exceeds Rs. 200, or it is enough if the subject matter of the suit was of a value exceeding Rs. 200. A learned Judge of this Court has had the occasion to consider this question carefully in *Raghuraj Singh* v. *Hargovind* : *A. I. R.* 1929 *All.* 845. I accept the reasoning of the learned Judge in its entirety. He has held definitely that the words "subject matter" in S. 242 (1) (a) refer to the subject matter of the suit and not to the subject matter of the appeal. I must, therefore, hold that where the value of the original suit exceeded Rs. 200, but the value of the appeal is below that amount, the appeal lies to the District Judge. This being so, the application for revision must succeed. It is accordingly allowed and the lower appellate Court is directed to re-admit the appeal and dispose of it on the merits. Costs will abide the result.

V.B./R.K. *Application allowed.*

A. I. R. 1930 Allahabad 98

NIAMATULLAH AND BENNET, JJ.

Sukh Lal—Plaintiff—Appellant.

v.

Kanjman and *others*—Defendants—Respondents.

Second Appeal No. 27 of 1927, Decided on 25th November 1929, against decree of Sub-Judge, Agra, D/- 2nd November 1926.

Contract Act, S. 45—Payment to one without consent of other does not give discharge of debt due to others.

Where there are several mortgagees and there is no specification in the mortgage-deed in regard to who advanced the money, the presumption is that the money was advanced in equal shares and payment whether by bond or otherwise to one of them without consent of or reference to the others does not discharge the mortgage debt due to others : 25 *All.* 155 and 32 *All.* 164, *Rel. on.*; *A. I. R.* 1925 *Mad.* 261, *Foll.* [P 98 C 2, P 99 C 1]

N. P. Asthana—for Appellant.

S. K. Dar—for Respondents.

Judgment.—This is a second appeal by a plaintiff Sukhlal whose suit for enforcement of a simple mortgage bond has been dismissed by the lower appellate Court. The facts are that on 22nd December 1909 Patti Ram, the father of defendants 1 to 3 executed a simple mortgage bond for Rs. 400 in favour of Sukhlal and his brother Chedalal mortgagees. Sukhlal alone brought the suit and joined his brother Chedalal as defendant 4. The contesting defendants 1 to 3 pleaded that on 21st March 1917 their father Pattiram discharged the whole mortgage debt on the bond of 1909 by executing a new bond in favour of Chedalal alone for Rs. 900 out of which Rs. 500 went to satisfy the mortgage debt of 1909 and Rs. 400 was a new loan from Chedalal to Pattiram. It was also pleaded that in the original mortgage of 1909 Sukhlal's name was merely farzi and Sukhlal had not advanced any of the mortgage consideration. It has been found as a fact by the lower appellate Court that the finding of the Munsif was correct, that the defendant failed to prove that Sukhlal did not advance any of the consideration of the mortgage bond of 1909.

It has not been alleged in this case that Sukhlal and Chedalal were joint. The lower appellate Court held that both the brothers Sukhlal and Chedalal were entitled to act and receive payments individually without reference to the other, and that the mortgage bond of 1917, though executed in favour of Chedalal alone, discharged the bond in suit. Sukhlal plaintiff has appealed. In *Ramchandra* v. *Goswami Rajjan Lal* (1) it was held that where two mortgagees had advanced money equally one of them could not give a discharge for the entire mortgage debt without the consent of the other or reference to him. Similarly in *Manzur Ali* v. *Mahmudunnissa* (2) it was held that where there is no specification in the mortgage-deed in regard to who advanced the money, the presumption is that the money was advanced in equal shares. We consider,

(1) [1910] 32 All. 164=5 I. C. 129=7 A.L.J. 99.

(2) [1903] 25 All. 155=(1902) A. W. N. 216.

therefore, that under the circumstances of the present case the payment in 1917 to Chedalal alone without reference to Sukhlal would not have been a sufficient discharge of the mortgage debt due to Sukhlal. It is still more the case when the debt is discharged not by payment of money but by the execution of a new mortgage bond. Even in the Madras High Court where a contrary view in regard to payment is taken, it was held in *Ramasami* v. *Chandra Kottayya* (3) that where the payment was made by a new bond to one of several obligees, it did not discharge the obligation to the other obligees.

The plea that Chedalal had authority to receive discharge of the mortgage debt for Sukhlal was not pleaded in the written statement and issue 3 on which a finding to this effect has been made is an issue which was framed on a different pleading, namely whether the rightful person to whom payment should be made was Sukhlal or Chedalal. This plea, therefore, cannot be put forward in this case.

Accordingly we allow this appeal and restore the decree of the Court of first instance in favour of the plaintiff. The costs in the decree under O. 34, R. 4, will be the costs in all Courts.

V.B./R.K. *Appeal allowed.*

(3) A. I. R. 1925 Mad. 231=48 Mad. 693.

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* A. I. R. 1930 Allahabad 99

MUKERJI AND BENNET, JJ.

Banwari Lal—Appellant.

v.

Maksudan Lal and *others*—Respondents.

First Appeal No. 61 of 1928, Decided on 28th October 1929, from order of Dist. Judge, Allahabad, D/-25th November 1927.

*** Succession Act, (39 of 1925), Ss. 211 and 370—Survivor of joint Hindu family claiming to represent deceased should be granted certificate to collect debts — Succession Certificate Act (1889)—Hindu Law.**

The preambles of the Succession Certificate Act (1889) and the Succession Act (1925) both talk of "legal representatives" and "successors," terms which are not strictly applicable to the case of the survivors of a joint Hindu family. Accordingly when a creditor, who holds a debt as a member of a joint Hindu family, dies and the debt passes by survivorship to the remaining members, the survivors cannot be compelled to take out a succession certificate in order to obtain a decree in a suit for recovery of the debt. But it does not necessarily follow that the converse proposition is true and where the survivors choose to call themselves "legal representatives" and ask for succession certificate their application should be dismissed. The claimants may very well say that they represent the deceased persons estate and on that right they should be allowed to collect the debts with the help of a certificate. [P 99 C 2, P 100 C 1]

Gopi Nath Kunzru—for Appellant.

Judgment.—This is an appeal by one Lala Banwari Lal who applied before the District Judge of Allahabad to obtain a succession certificate. It appears that a certain gentleman Lala Kishori Lal died possessed of certain shares of the United Provinces Electric Supply Co. Ltd. The applicant states in his application that he and other persons whose names are shown in the column of relatives (sons and grandsons) of the deceased, were members of a joint Hindu family with the deceased and that to receive the dividends of the shares it was necessary to obtain a succession certificate.

Notices were issued to the members of the family other than the applicant and nobody took exception to the application. The petition was heard ex parte but the learned District Judge dismissed it on the ground that no succession certificate could be granted to a member of a joint Hindu family who gets the property by right of survivorship and not as an heir.

Lala Banwari Lal has appealed and the question is whether he ought to be granted a seccession certificate.

There can be no doubt that the preamble of the Succession Certificate Act (Act 7 of 1889) and the preamble of the Succession Act (Act 39 of 1925) both talk of "legal representatives" and "successors," terms which are not strictly applicable to the case of the survivors of a Hindu joint family. Accordingly, it has been held that where a certain creditor, who held a debt as a member of a joint Hindu family died, and the debt passed by survivorship to the remaining members of the family, the survivors could not be compelled to take out a succession certificate in order to obtain a decree in their suit for the recovery of the debt. But it does not necessarily follow that the converse proposition is true and where the survivors themselves choose to call them-

selves 'legal representatives' and ask for a succession certificate, their application should be dismissed. In ordinary language, the claimants may very well say that they represent the deceased person's estate and in that right they should be allowed to collect the debts with the help of a certificate.

We think that there was no legal bar to the granting of the application. We accordingly allow the appeal, set aside the order of the Court below and direct it to issue a succession certificate as prayed. As there was no contest, no order as to costs is called for.

R.M./R.K. *Appeal allowed.*

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* A. I. R. 1930 Allahabad 100

MUKERJI AND KING, JJ.

Mohammed Shafi and *others*—Plaintiffs—Appellants.

v.

Chedu and *others*—Defendants—Respondents.

First Appeal No. 98 of 1928, Decided on 23rd October 1929.

*** Civil P. C., S. 151—Suit dismissed under O. 17, R. 3—Appeal preferred—During pendency of appeal application for restoration allowed—Appeal dismissed for want of subsisting decree—On revision preferred by defendant order restoring suit was reversed—Application made to revive appeal—Appeal could be revived.**

A suit was dismissed under O. 17, R. 3, whereupon an appeal was preferred by the plaintiffs. During the pendency of the appeal an application was made for restoration of the suit and it was allowed. The defendant thereupon applied in revision to High Court. During the pendency of the revision a statement was made to the appellate Court that the decree was no longer subsisting and hence the appeal was dismissed. The High Court deciding the revision application set aside the order restoring the suit. Consequently an application was made to the appellate Court to revive the appeal which had been dismissed on the ground that the decree appealed against had been set aside. The application was allowed and appeal revived. The defendants preferred an appeal contending that the appellate Court had no jurisdiction to revive the appeal.

Held: that there was ample ground for the Court to exercise its inherent jurisdiction in restoring appeal and the appeal could be restored. 35 *All.* 331 (*P. C.*), *Rel. on.* [P 100 C 2]

T. A. K. Sherwani—for Appellants.

N. P. Asthana—for Respondents.

Judgment.—The facts of the case are given in the judgment of the Court below and briefly are these:—A suit in which there were several plaintiffs was dismissed on 14th July 1927. One of the plaintiffs applied to the first Court, namely, the Munsiff for the restoration of the suit after setting aside the order of 14th July 1927 which we may mention, was an order under O. 17, R. 3, Civil P. C. Two of the plaintiffs filed an appeal against the decree. While the appeal was pending, the application of one of the plaintiffs for restoration of the suit was heard and allowed, on 29th October 1927. The defendants thereupon came to this Court in revision. While the revision applications was still pending, a statement was made to the appellate Court that the Munsiff by his order dated 29th October 1927, had set aside the decree of 14th July 1927, against which the appeal was pending. As the decree was no longer subsisting the appeal could not be maintained and it was dismissed. The High Court in exercise of its revisional powers, by its judgment dated 29th January 1928, set aside the Munsif's order of 29th October 1927, by which the suit had been restored. Within a few days of the passing of the order by the High Court, the appellants in the Court below (two of the plaintiffs) made an application to it to revive the appeal which had been dismissed on the ground that the decree appealed against had been set aside. That application having been allowed, the defendants have come up in appeal. It is contended before us that there was no ground on which a review application could be entertained by the Court below.

It appears that the application filed by the appellants in the Court below was framed as an application for review of judgment. Conceding that no such application lay under the rules laid down in O. 47, Civil P. C. it seems to us there was ample ground on which the Court below could exercise its inherent jurisdiction to restore the appeal and hear it. The circumstances are very peculiar. The decree having been restored, it was necessary that the appeal should also be restored and heard. The Privy Council case of *Debi Bakhsh Singh* v. *Habib Shah* (1) is a sufficient authority for such procedure. In the result we dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

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(1) [1913] 35 All. 331=16 O. C. 194=19 I. C. 526=40 I. A. 150 (P. C.).

* A. I. R. 1930 Allahabad 101

NIAMATULLAH AND BENNET, JJ.

Gobardhan—Appellant.

v.

Raghubir Singh—Respondent.

Second Appeal No. 1684 of 1926, Decided on 14th November 1929.

*** (a) Registration Act, S. 17—Agreement to reconvey property sold by contemporaneous deed, and agreement relinquishing such right to get reconveyance do not require registration.**

An agreement to reconvey property sold by a contemporaneous deed does not require registration, nor does the agreement to relinquish the right so created : (1906) *A. W. N.* 108; 1921 *Bom.* 442, *Dist.*; 38 *Bom.* 703; 1924 *Bom.* 174 and 1925 *Bom.* 497, *Rel. on.* [P 102 C 2]

(b) Deed — Construction — Two contemporaneous deeds, one purporting to sell property, other giving right of repurchase to vendor or his lineal descendants—Transaction is not mortgage.

Unless the property transferred can be considered to be no more than a security and the money advanced as a loan the transaction cannot be characterized as a mortgage. Therefore, if one deed conveys in explicit terms all right, title and interest of the vendor without any reservation of any kind and a second deed merely gives a right of repurchase to specified individual, namely the vendor and his lineal male descendants, the right is not one which can run with the land nor can it enure to the benefit of the legal representative of the vendor. It is no more than a privilege and the property affected by them cannot be considered to be mere security and hence transactions cannot be considered as a mortgage. [P 102 C 1]

(c) Specific Relief Act, S. 23 (b)—Unassignable interest assigned—Assignee is not assignor's representative.

Where a person has only a personal interest which he cannot assign, his assignee can in no sense be regarded as his representative as to be entitled to obtain specific performance under S. 23 (b). [P 102 C 2]

K. N. Katju—for Appellant.

K. N. Laghate—for Respondent.

Judgment.—Second appeals 1684 of 1926 and 559 of 1927 arise out of the same suit brought by Badri Singh, Baldeo Singh and Raghubir Singh for redemption, on foot of two documents, one dated 10th July 1917 and the other dated 11th July 1917, alleged to evidence a transaction of mortgage, and in the alternative for possession of the property in suit on foot of the second of the two documents treating it as an agreement to reconvey the property. The facts in detail are these: Gayadin was originally the owner of the property in dispute. By the earlier deed above mentioned he purported to sell the property for Rs. 1400 to Gobardhan appellant before this Court. By the second of those deeds Gobardhan, the vendee, agreed to reconvey the property sold to him by the first deed, on receipt of Rs. 1,400 to Gayadin or his male lineal descendants at any time they or any of them desired to repurchase. Gayadin died, and Raghubir, plaintiff 3, is his son and legal representative. It has been found by the lower appellate Court that Raghubir relinquished his right of repurchase under the agreement dated 11th July 1917 by a documet executed by him on 3rd February 1920 which was not registered. The lower appellate Court had also found that this deed was for consideration and that the relinquishment is valid except for want of registration, which in its view was compulsory. Subsequently, on 15th January 1924, Raghubir sold two-thirds of his rights under the agreement of 11th July 1917 to Badri and Baldeo plaintiffs 1 and 2. The present suit was brought by Badri, Baldeo and Raghubir, claiming possession of the property in suit treating the transaction evidenced by the deeds of 10th July 1917 and 11th July 1917 as one of mortgage, and in the alternative, as already stated, on the basis of the agreement dated 11th July 1917, giving them the rights to repurchase the property.

The Court of first instance at first dismissed the suit, holding that the transaction did not amount to a mortgage, and that the plaintiff had not claimed any relief explicitly on foot of the agreement dated 11th July 1917. On appeal the lower appellate Court allowed amendment of the plaint so as to contain the alternative relief of possession on foot of the agreement dated 11th July 1917. The lower appellate Court remanded the suit to the Court of first instance for a finding on the question whether the plaintiffs were entitled to succeed on the basis of the agreement dated 11th July 1917, assuming the transaction of 10th July 1917, taken with the agreement was not one of mortgage. The Court of first instance held that plaintiffs 1 and 2 acquired no interest under the deed dated 15th January 1924, because Raghubir had no assignable interest. His right, whatever it was, created by the agreement of 11th July 1917 was in personam. On receipt of the finding of the first Court the lower appellate Court dismissed the

suit of plaintiffs 1 and 2 but decreed possession on payment of Rs. 1,400 to Raghubir. As regards the deed of relinquishment dated 3rd February 1920, which was set up as a bar against any possible claim by Raghubir, who, according to the defendant, had relinquished all rights by that document, it was held that in the absence of registration it was not admissible in evidence. In that view Raghubir's right to repurchase was left unaffected. The defendant has filed appeal No. 1684 of 1926, impugning the decree of the lower appellate Court in so far as it is in favour of Raghubir. Second appeal No. 559 of 1927 has been preferred by Badri and Baldeo in so far as they have not been held to be entitled to any relief, the transfer by Reghubir in their favour being held ineffective.

The learned advocate for the appellant in appeal No. 559 of 1927 has contended that the sale deed of 10th July 1917 and the agreement of 11th July 1917 should be read together and considered to evidence a transaction amounting to a mortgage. The lower appellate Court has held that the requisite conditions to make the transaction a mortgage are wanting. We think that the view of the lower appellate Court is correct. Unless the property in dispute can be considered to be no more than a security and the money advanced as a loan, the transaction cannot be characterized as a mortgage. The first deed conveys in explicit terms all right, title and interest of the vendor without any reservation of any kind. The second document merely gives a right of repurchase to specified individuals, namely the vendor and his lineal male descendants. It is not a right which can run with the land, nor is it a right which can enure for the benefit of the legal representatives of the vendor. It is no more than a privilege. There is no subsisting right to a debt recognized by these documents. The property affected by them can in no sense be considered to be mere security. Under these circumstances we think that the finding of the lower appellate Court that the two documents relate to two different transactions, the first evidencing a transaction of sale and the second evidencing an agreement by the vendee to resell the property under given conditions is correct.

In view of what we have held in respect of the nature of the transaction it must be conceded that Raghubir did not possess what would be called equity of redemption in case the transaction were one of mortgage. As already stated, he had a personal right to repurchase which could uot be alienated to others, at any rate any one who is not a male descendant of the original vendor. It is not suggested that Badri and Baldeo are the male descendants of the vendor.

It is next contended that under S. 23 (b), Specific Relief Act, Badri and Baldeo are entitled to enforce the agreement which their assignor Raghubir could have enforced. This argument begs the whole question, which is whether they are legal representatives of Raghubir at all. If the latter had only a personal interest, which he could not assign, Badri and Baldeo can in no sense be regarded as his representatives so as to be entitled to obtain specifie performance under S. 23 (b), Specific Relief Act. This argument must therefore be rejected. No other argument was addressed to us in support of second appeal No. 559, and in the view we take of the questions urged before us, this appeal must fail and is dismissed with costs.

Appeal No. 1684 of 1926 must, in our opinion, succeed. We are unable to agree with the view taken by the lower appellate Court as regards the necessity of registration of the deed of relinquishment dated 3rd February 1920. It is true it purports to extinguish the right of Raghubir to repurchase the property in dispute. Qua registration it stands on the same footing as a document which creates the right to repurchase. If an agreement to reconvey the property, which creates the right is not compulsorily registrable, it should follow that an agreement to extinguish the same right cannot require registration. We have referred to the close analogy existing between the two agreements, because the case law bearing on the question referred to by the lower appellate Court and relied on before us relates to agreements to reconvey the property. Apart from authority, the provisions of Ss. 17 (1) (b) and 17 (2) (v), clearly cover the question before us. While under the former a non-testamentary instrument which purports or operates to create, declare,

assign, limit or extinguish any right, title or interests . . . . . of the value of Rs. 100 and upwards to or in immovable property requires registration, under the latter any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of Rs. 100 and upwards to or in immovable property but merely creating a right to obtain another document which will, when executed, create declare, assign, limit or extinguish any such right, title and interest is not compulsorily registrable. The test, therefore, is whether the document in question itself creates any right in immovable property, or merely creates a right to obtain another document, which when executed, will create or extinguish a right in immovable property,

We have no doubt that the right extinguished by the agreement dated 3rd February 1920, is a right to obtain another document, which when executed, will confer a right in immovable property. The right disposed of or dealt with by the agreement itself does not attach to any immovable property. It is, as we have already stated, the identical right created by the agreement dated 11th July 1917. The same right is created by one and extinguished by the other. Neither in one case nor in the other the right is a right to or in immovable propertly. S. 54, T. P. Act, clearly lays down that a contract for the sale of immovable property is a contract which does not of itself create any interest in or charge on such property. Whatever doubt might have previously existed on the effect of this provision, Act 2 of 1927 has made it clear that such document was never meant to be one requiring registration. The learned advocate for the plaintiff-respondent has referred to another part of S. 54, T. P. Act, in support of the contention that a right of repurchase is intangible property, and threefore, any document putting an end to such a right is compulsorily registrable under section. We are not prepared to give effect to this argument holding, as we do, that the right to repurchase, which has been extinguished by the agreement of 3rd February 1920 is a purely personal right. It cannot be regarded as intangible property of the character contemplated by S. 54, T. P. Act.

The lower appellate Court has referred to the case of *Suraj Pershad* v. *Phul Singh* (1), as an authority for the proposition that an agreement to reconvey property is compulsorily registrable. It is possible to distinguish that case from the one before us; but even if it is not distinguishable, it cannot be regarded as good law now. It proceeds on the assumption that the right to repurchase property in future is a right to or in immovable property. We have already discussed this aspect of the question and shown that this view cannot be accepted. The parties to the suit out of which the appeal before the learned single Judge who decided that case arose were not the parties to the agreement but their representatives-in-interest, and if the agreement in question in that case were regarded as conferring merely a personal right, the suit was liable to dismissal on that ground. The party relying on the agreement had, therefore, to accept the position that the agreement contained a covenant running with the land. On this hypothesis registration becomes compulsory. The judgment is a very brief one and the various questions which require consideration are not adverted to.

Bala Khandapa v. *Sadashiv Hari* (2), is another case relied on by the lower appellate Court. It was held that the deed of sale and the agreement together evidence the transaction of a mortgage and could not be construed separately as evidencing two transactions. On that supposition the agreement was an integral part of the document creating a mortgage and, therefore, compulsorily registrable.

In a later case *Mir Gazi* v. *Miya Ali* (3), it was held that an agreement to reconvey property sold by a contemporaneous deed does not require registration. In *Sangawa* v. *Huchangowda* (4), the same view was taken. Lastly, in *Harikisandas Bhagwandas* v. *Bai Dhanu* (5), which is a ruling of Full Bench of the Bombay High Court, a distinction has been drawn between a case in which the agreement and the sale-deed con-

(1) [1906] A. W. N. 180.
(2) A. I. R. 1921 Bom. 442.
(3) [1914] 38 Bom. 703=28 I.C. 132=16 Bom. L. R. 582.
(4) A. I. R. 1924 Bom. 174=48 Bom. 166.
(5) A. I. R. 1926 Bom. 497=50 Bom. 566 (F.B.).

stitute a mortgage and a case in which it is to be regarded as a sale with an agreement to resell. In the former registration of the agreement is compulsory, evidently because it evidences the transaction of the mortgage. In the latter case the agreement relating to a purely personal right does not require registration.

The view which has been repeatedly taken by the Bombay High Court and which we are inclined to take is based on the provisions of S. 17, Registration Act, already referred to.

In view of the conclusions arrived at by us on the question of registration, we hold that the agreement of 3rd February 1920, is admissible in evidence, though unregistered. It is not impugned on any other ground. The right of Raghubir to repurchase the property in dispute was expressly abandoned and he had no right left which could be transferred, assuming he had a transferable right, by the latter deed of 15th January 1924 in favour of Badri and Baldeo, plaintiffs 1 and 2. This being so, Raghubir lost his right to repurchase when he executed the agreement dated 3rd February 1920; and he cannot now claim to exercise that right.

In view of the conclusions arrived at by us, this appeal is allowed. The plaintiffs' suit is dismissed with costs in all the Courts.

V.B./R.K. *Appeal allowed.*

A.I.R. 1930 Allahabad 104

NIAMATULLAH, J.

Sisram and *others*—Applicants.

v.

Ram Chander Mal—Opposite Party.

Civil Revn. No. 218 of 1929, Decided on 27th November 1929, against order of Addl. Sub-Judge, Moradabad, D/- 5th February 1929.

Provincial Insolvency Act, S. 34—Debt contracted after adjudication—In order to be provable in insolvency proceedings it should exist at date of discharge or be based on liability existing at time of adjudication.

In order that a particular debt contracted after the order of adjudication may be a debt provable in insolvency proceedings, the debt should have existed at the date of order of discharge or if contracted subsequent thereto, it should have been based on a liability existing at the time of adjudication. [P 105 C 1]

Vishwa Mitra—for Applicants.

Binod Behari Lal — for Opposite Party.

Judgment.—This is an application for revision of an order passed by the learned Additional Subordinate Judge of Moradabad. It arises out of a suit brought by the plaintiffs for recovery of Rs. 199-10-0 on foot of a bond executed by Niadar Singh defendant 4, Indar Singh defendant 5 and Imrat Singh, father of defendants 1 to 3. It was contested on a variety of grounds one of which was that Niadar Singh defendant 4 was an undischarged insolvent and leave of the insolvency Court not having been obtained for the institution of the suit the same was not maintainable against him. This ground prevailed in the Court of first instance, but the lower appellate Court has overruled it and decreed the suit against all the defendants. The present application for revision has been filed by the defendants.

The only question argued before me is whether, in the absence of leave of the insolvency Court, the lower appellate Court was justified in passing a decree against the undischarged insolvent. It appears that the bond on which the suit is based was executed after the order of adjudication. An insolvent is not under any disability in the matter of entering into contracts and the bond is, therefore, not open to objection on the score of its validity. As to whether a suit can be instituted against him on foot of a bond executed after the order of adjudication depends on the provisions of S. 28, Insolvency Act, which lays down that the whole of the property of the insolvont shall vest in the Court or in a receiver and shall become divisible among the creditors, and that no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court. If, the debt contracted under the bond is provable in insolvency proceedings, the consequence laid down by the section, namely, that no legal proceedings can be taken against the insolvent except with the leave of the Court, must follow, S. 34 specifies the debts which are provable in insolvency proceeding. It provides all debts and lia-

bilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act. The test, therefore, is that the debt should have existed at the date of the order of discharge, or if contracted subsequent thereto, it should be based on a liability existing at the time of adjudication. The obligation under the bond in suit was incurred several years after the order of adjudication. It is true that the loan advanced under the bond was applied by the insolvent in satisfaction of certain debts which existed at the time of adjudication, but the liability which is sought to be enforced in the present suit was a new obligation and incurred when the bond was executed. The circumstances are not such as to establish a case of subrogation. In this view of the matter I am constrained to hold that the debt in question in this case is not provable in insolvency proceedings, and, therefore, leave of the Court was not necessary as a condition precedent to the institution of the present suit. The decree passed by the lower appellate Court is, therefore, open to no objection. How far the decree passed under circumstances like these will be effective for obtaining satisfaction of the bond is another question and does not call for any decision at this stage.

For the reasons stated above this application for revision cannot succeed and is dismissed with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1930 Allahabad 105

DALAL, J.

Nathu—Appellant.

v.

Ganpat Singh and *others* — Respondents.

Second Appeal No. 356 of 1928, Decided on 27th November 1929, against decree of Addl. Dist. Judge, Meerut, D/- 4th January 1928.

(a) Landlord and Tenant— Tenant of exproprietary holding cannot evade payment of rent to assignee of person with whom he enters into an agreement to pay rent.

A tenant of an exproprietary holding cannot evade payment of rent to the successor-in-interest of person with whom he enters into an agreement to pay rent. [P 105 C 2]

(b) U. P. Land Revenue Act, (3 of 1901), S. 36— Though mutation Court has to fix rent parties can agree to pay rent which is not above legal maximum and recover it in civil Court.

The duty of fixing the rent under S. 36, Land Revenue Act, is laid in the first instance not on the parties but on the mutation Court though a right is reserved to the parties to apply subsequently if the revenue Court omits to make an order. There is nothing in this to prevent the parties from agreeing upon a rent which is not above the legal maximum; such rent if agreed upon can be recovered in civil Court. *A.I.R.* 1924 *All.* 944, *Foll.* [P 105 C 2, P 106 C 1]

K. N. Malaviya—for Appellant.

M. L. Agarwala—for Respondents.

Judgment.—The defendant-tenant of an exproprietary holding desires to escape payment of rent on two grounds: First, that he did enter into an agreement for payment of the rent to his usufructuary mortgagee Mithan Lal, but that Mithan Lal's transferee who redeemed the mortgage was not entitled to take advantage of that agreement. Secondly, that the agreement itself was not enforceable because the rent was not fixed under S. 36, Land Revenue Act, and no rent fixed otherwise than by the revenue authority may be recovered from an exproprietary tenant.

There is no force in the first ground of objection. The defendant Nathu sold his equity of redemption to the plaintiff Ganpat Singh. Thereupon Ganpat Singh redeemed a mortgage of 11 bighas 6 biswas out of 17 bighas 6 biswas from Mithan Lal. He is, therefore, the successors-in-interest of Mithan Lal and can enforce an agreement entered into between Mithan Lal and Nathu. Mithan Lal has no objection to the portion of the rent proportionate to 11 bighas 6 biswas being recovered separately by Ganpat Singh. The defence comes particularly with a bad grace from Nathu when he himself sold the equity of redemption and must have understood the probable consequences of a redemption by Ganpat Singh.

The other point is covered by authority of a single Judge of this Court: In *Sri Kantoo* v. *Imdad Ali* (1) the learned Judge observed:

"The duty of fixing the rent under S. 36, Land Revenue Act, is laid, in the first instance not on the parties but on the mutation Court though a right is reserved to the parties to apply subsequently if the revenue Court omits to

(1) A. I. R. 1924 All. 944.

make an order. I can find nothing in this to prevent the parties agreeing upon a rent which is not above the legal maximum nor do I see any reason why such rent if agreed upon by the parties, should not be recoverable by them in the Courts."

The real question for decision, therefore, will be whether the rent agreed upon was in accordance with the limit laid down in S. 36, Land Revenue Act, or not. The lower appellate Court has held that the rent agreed upon was not in excess of that which would be fixed under S. 36. The rent is, therefore, recoverable. I dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

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MUKERJI AND BENNET, JJ.

Benares Bank, Limited, Agra—Plaintiff—Appellant.

v.

Pirya Das Pitam Chand and *others*—Defendants—Respondents.

First Appeal No. 213 of 1926, Decided on 11th November 1929, against decree of Addl. Sub-Judge, Agra, D/- 20th February 1926.

(a) Negotiable Instruments Act, S. 31—Drawee not liable till hundee accepted and burden of proof to show acceptance lies on holder.

A drawee is not liable as such on a hundi till he has accepted the same. Where, therefore, a person is to be charged with liability, it must be shown that he has accepted that liability and the burden of proof is therefore on the holder to show that drawee had accepted the liability to pay the hundis on behalf of his firm. [P 107 C 2]

(b) Negotiable Instruments Act, S. 66—Want of presentment exempts even endorser.

Under S. 66, Negotiable Instruments Act, a bill of exchange made payable at a specified period after date must be presented for payment at maturity, and the want of presentment exempts the endorser. [P 108 C 2]

B. E. O'Conor—for Appellant.

Iqbal Ahmad and *B. Malik*—for Respondents.

Judgment.—This appeal and the connected appeal No. 582 of 1926 have arisen out of two independent suits, but the parties in them are the same except for this that in the suit out of which the appeal 582 of 1926 has arisen, there was an additional defendant in the firm of Bahadur Mull Priya Das.

The facts in the two cases being similar, they may be decided by the same judgment. The facts, briefly, are these. The firm of Ganesh Lal Har Bilas of Agra drew one batch of ten hundis on 28th May 1924, and another batch of five hundis on 12th June 1924 each of the fifteen being for Rs. 1,000. The same firm draw another hundi for the sum of Rs. 2,500 on 29th July 1928. In each of these 16 hundis, the drawees were the firm of Priya Das Pitam Chand of Delhi and the persons in whose favour the hundis were drawn were Jangi Lal Debi Prasad, a firm of Agra. Jangi Lal Debi Prasad endorsed the hundi in favour of the Benares Bank Limited in the case of the 15 hundis of Rs. 1,000 each and the Benares Bank sent the same to the Mercantile Bank of India of Delhi for collection. The hundi of Rs. 2,500 passed through another hand before it reached the Benares Bank Limited and in this case the endorser was the firm of Bahadur Mull Priya Das who obtained the hundi from the original holders.

The two suits were brought by the Benares Bank against all the parties to the hundi. In the suit 338 of 1925 which was based on the 15 hundis of Rs. 1,000 each the firm of Priya Das Pitam Chand alone were the contesting defendants. In the other suit which was based on the hundi for Rs. 2,500 (No. 326 of 1925) the contesting defendants were Priya Das Pitam Chand and Bahadur Mull Priya Das.

The learned Judge of the Court of first instance decreed the suits against the drawers and the payees, but dismissed the suits as against the drawees and Bahadur Mull Priya Das.

The Benares Bank Limited have appealed. The ground on which the suit failed against the drawees was this that the firm of Priya Das Pitam Chand never accepted the hundis and therefore never made themselves liable on them. The main point for decision in both the appeals therefore is whether the drawees ever accepted the hundis and made themselves liable to pay. In F. A. No. 582 of 1926 there is the further question of the liability of the firm of Bahadur Mull Priya Das.

It appears that when the hundis were received by the Mercantile Bank of India at Delhi, they sent them to the firm of Priya Das Pitam Chand. One of the partners of the firm, viz. Pitam

Chand, wrote the word "seen" (dekhi) on the hundi and signed his name. It was urged on behalf of the plaintiffs that the word "seen" with the signature of Pitam Chand amounted to an acceptance of the hundis.

The evidence that has been adduced on behalf of the plaintiffs to prove that the word "seen" is equivalent to acceptance, is hardly worth anything. No witnesses have been called to prove on behalf of the appellants that in the Delhi market, the word "seen" is treated as equivalent to acceptance (sikari). Two witnesses who were servants of the Mercantile Bank have been examined, but what they say is really an expression of their opinion and nothing beyond that. They were unable to cite any instance of any other customer who ever wrote the word "seen" or "dekhi" on a hundi and used the word in the sense of acceptance. The first witness Bala Prasad described himself as the "Bill acceptor in the Mercantile Bank, Delhi." He said that he took the hundis to the firm of Priya Das Pitam Chand and got the endorsement of "hundi dekhi" on the documents. Then he expressed the opinion that this endorsement, "hundi dekhi" meant that the hundis had been accepted. He added that after the endorsement had been made he asked the endorser whether he had accepted the hundis and received the reply in the affirmative. In cross-examination, the witness contradicted himself and stated that he did not ask the endorser whether he had accepted the hundis or not. In cross-examination, Bala Prasad further stated :

"As regards acceptance of hundis too, I know nothing beyond this that "seen" and "accepted" mean the same thing."

Then he said :

"I do not know whether in Delhi Mundi, "seen" and "accepted" are taken to mean the same thing, but I take them to meen the same thing."

It seems to be clear to us that this witness is not at all in a position to prove any practice or custom.

The next witness is Shyam Behari Lal. He is the accountant of the Bank. He too is unable to furnish any information as to practice. What he really says is that in his opinion, the hundis had been accepted by the endorsement of the word "dekhi" on them. At p. 18 of the record he says :

"From these words (seen the hundi) I think they accepted the hundis."

At p. 19 again, he says in answer to the question :

"Does the drawee become liable if he writes, "seen" ? In my opinion, he becomes liable."

We presume that although the Mercantile Bank of India did not do much business in hundis drawn in oriental language, it should be in a position to produce or cause the production of hundis in which the word "seen" had been used in the sense of acceptance, if their contention were right. But no such document was produced except some to be presently mentioned. It appears that Pitam Chand as a member of the firm Priya Das Pitam Chand accepted several hundis drawn by Ganeshi Lal Harbilas and paid the money due on them as the drawee and acceptor. He was called upon to produce these hundis. These documents were produced, as also the defendants' bahi khata, as the evidence called for by the plaintiffs. The plaintiffs' counsel said that he did not want the account-books and accordingly only the hundis were placed on the record. They show two entries. The first entry is of "dekhi" and the second entry is of acceptance in clear terms, stating also that payment was made on that date. These documents therefore do not prove that the word "dekhi" was ever used in the sense of acceptance. The learned counsel for the plaintiff-appellant argued that these hundis being in the possession of Pitam Chand, the latter was in a position to make any entry he liked. The suggestion is that the entry as to acceptance was made by Pitam Chand just before the documents were produced in Court. It is not open to a party to criticise its own evidence like that. Even if we exclude these hundis as affording no evidence against the plaintiff, his position does not improve, for the dearth of evidence still remains.

A drawee is not liable as such in a hundi till he has accepted the same. Where, therefore, a person is to be charged with liability, it must be shown that he has accepted that liability. The burden of proof was, therefore, on the plaintiff to show that Pitam Chand had accepted the liability to pay the hundis on behalf of his firm. The plaintiff has failed in proving this.

On the other hand there is a good deal of circumstantial evidence to show that

it was not at all likely that Pitam Chand would accept any liability in respect of these hundis. The earliest due date of one of the hundis was 27th July 1928. Two days later, Pitam Chand gave a statement in writing to the Bank which is on the record as Ex. 45. It has not been printed, but we have been supplied with a typewritten copy of it. It runs as follows :

"I am not receiving any goods from Babu Ganeshi Lal Har Bilas; so I return these hundis. There is no money due to them from me and therefore, I, cannot make any payments on these hundis."

On 16th hundi, which was brought to Pitam Chand on 6th August 1924 (this is the basis of the suit No. 326 of 1925 out of which appeal No. 582 of 1926 has arisen), Pitam Chand wrote the usual words, "hundi dekhi." It could hardly be expected that Pitam Chand would accept the liability on a hundi for Rs. 2,500 after he had definitely stated to the Mercantile Bank of India that he had not been put in funds by the drawers of the hundi to enable him to pay. The fact that on 6th August 1924, Pitam Chand wrote the same words as he had written on hundis which had been produced before him on earlier days goes to show that Pitam Chand never understood by writing "seen" that he was accepting any liability.

We find that the Mercantile Bank quietly accepted the Ex. 45 dated 29th July 1924, from Pitam Chand. There is nothing to suggest that the Bank insisted on payment of the hundis by the firm Priya Das Pitam Chand on the ground that they had accepted the hundis. This would go to show that the Mercantile Bank never regarded Priya Das Pitam Chand as acceptors of the hundis. This view is further confirmed by the letter addressed by the Mercantile Bank of India to the Agent, Benares Bank Limited on 2nd August 1924, printed at p. 109 of the record. The Mercantile Bank of India described Priya Das Pitam Chand as " drawees " and not as acceptors. The important portion of the letter is this :

"Drawees say they will pay on receiving invoices from the drawers. Kindly let us have your instructions."

This letter was written long after three of the hundis had fallen due as the letter itself shows.

Pitam Chand has entered the witness-box and has given an explanation of the circumstances under which he wrote the words "hundi dekhi" on the hundis. His evidence receives corroboration from the statement of Bala Prasad as pointed out by the Court below. In view of the fact that the appellants have entirely failed to establish the liability of the firm of Priya Das Pitam Chand, we do not think it necessary to discuss the evidence adduced by the defendants.

We hold that Priya Das Pitam Chand never accepted the hundis and the appellants' suit against them was rightly dismissed.

The next point is whether the firm Bahadur Mull Priya Das are liable as endorsers of the sixteenth hundi. Under S. 66, Negotiable Instruments Act, a bill of exchange made payable at a specified period after date, must be presented for payment at maturity. There is no evidence that the hundi was ever presented for payment at maturity to the firm of Priya Das Pitam Chand. The want of presentment exempts the indorser Bahadur Mull Priya Das. On this short ground the appeal No. 582 of 1926 fails against Bahadur Mull Priya Das.

The result is that both the appeals fail. The present appeal No. 213 of 1926 is hereby dismissed with costs.

V.B./R.K. *Appeals dismissed.*

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NIAMATULLAH, J.

Mahadeo Chaube and *others*—Plaintiffs—Appellants.

v.

Ram Raj Chaube and *others*—Defendants—Respondents.

Second Appeal No. 1461 of 1927, Decided on 20th November 1929, from a decree of the Sub-Judge, Ghazipur, D/- 13th May 1927.

(a) Agra Tenancy Act (3 of 1926), S. 24, Proviso—N. W. P. Rent Act (12 of 1881), S. 9—Collateral relatives are heirs only if they share in cultivation of holding in question.

Section 9 makes collateral relatives of a deceased occupancy tenant his heirs only if they share in the cultivation of the particular holding in question. Proving that plaintiffs have been joint with deceased in cultivation of another holding is not enough. [P 109 C 1]

(b) Evidence Act, S. 116 — Mortgage — Rights of mortgagee—Mortgagee can assert that heirs of mortgagor under Hiudu Law

did not succeed to his occupancy right in accordance with Act 12 of 1881.

A mortgagee cannot deny the title of his mortgagor on the date of the mortgage. It is however, open to him to assert that on the death of the mortgagor persons who are his heirs under the Hindu Law did not succeed to his occupancy rights in accordance with the special rules laid down in Act 12 of 1881.

[P 109 C 1]

Badri Narain—for Appellants.

S. N. Verma—for Respondents.

Judgment.—The plaintiff-appellants brought the suit out of which this appeal has arisen for redemption of certain occupancy lands held by the defendants under a mortgage deed, dated 23rd April 1885, executed by Bhawani, who was the occupancy tenant. The appellants claim to be the collateral relatives of Bhawani, who died issueless and without leaving a widow or any heir nearer than the plaintiffs. It was pleaded in defence that the plaintiffs were not joint with Bhawani in cultivation of the holdings at any time before the mortgage, and being collateral heirs they could not, and did not, inherit the occupancy rights belonging to Bhawani. The Courts below have found concurrently in favour of the defendants. It must, therefore, be accepted as a fact that the plaintiffs were not the heirs of Bhawani as regards his right of occupancy in the lands in suit. It is, however, urged on their behalf that the plaintiffs have been proved to be joint with Bhawani in the cultivation of another holding of nine biswas; but S. 9, Act 12 of 1881, makes collateral relatives of a deceased occupancy tenant his heirs only if they shared in the cultivation of the particular holding in question. This being so, the palintiff's contention must be rejected.

It is next argued that the defendants, who entered into possession as mortgagees, cannot now claim higher rights and repudiate the right of the mortgagor or his heirs. The contention is too widely put. A mortgagee cannot deny the title of his mortgagor on the date of the mortgage. It is, however, open to him to assert that on the death of the mortgagor persons who are his heirs under the Hindu Law did not succeed to his occupancy rights in accordance with special rules of succession laid down in Act 12 of 1881. This contention should also be rejected.

No other argument has been addressed to me. This appeal fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

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SULAIMAN, AG. C. J. AND KENDALL, J.

Dhurjati Upadhiya—Plaintiff—Appellant.

v.

Ram Bharos Pande and *others*—Defendants—Respondents.

Letters Patent Appeal No. 56 of 1927, Decided on 18th October 1929, from a judgment of Mukerji, J. D/- 25th March 1927.

Adverse possession—Where possession is by title there can be no adverse possession.

Where there is a title to which possession may be traced it cannot be assumed or asserted that possession is adverse.

A died leaving certain property to his wife *B*. *B* by adverse possession got absolute proprietary interest in the property and it became her stridhan. *B* attempted to make a gift of the property to her daughter *C* and got the mutation of names effected in *C's* favour. *C* continued in adverse possession till *B's* death. On *B's* death *C* became the sole heir and remained in possession of property till her death. *C's* husband's heirs claimed the property on the ground that it was stridhan of *C*. The heirs of *B* contested the claim pleading that *C* held Hindu daughter's estate only, which should revert to the heirs of *B*, the last full owner.

Held: that on *B's* death when *C* became the sole heir and the exclusive owner of the property for the time being, her adverse possession came to an end. Her own possession could not be adverse against herself. From *B's* death *C's* possession was that of a Hindu daughter and on *C's* death the property would not go to *C's* heirs but to heirs of *B* who was the last full owner: *A. I. R.* 1919 *P. C.* 44, *Dist.*

[P 110 C 2]

N. Upadhiya—for Appellant.

P. L. Banerji and *Mukhtar Ahmad*—for Respondents.

Judgment.—The property is dispute originally belonged to Molai who in 1881 put his wife Mt. Nepali in possession and got mutation of names effected in her favour. It has been assumed all along that by adverse possession Mt. Nepali acquired an absolute proprietary interest iu this property. The property therefore became her stridhan. In 1890 long after the death of her husband she attempted to make a gift of this property in favour of her daughter Mt. Lakhpati and got mutation of names effected in her favour. It is admitted that Mt. Lakhpati continued in adverse pos-

session of this property from 1890 to 1899 when Mt. Nepali died. On the death of Mt. Nepali, her daughter Mt. Lakhpati was her sole heir. She continued in possession of this property as before till her death in 1920. Mt. Nepali had not executed a registered deed of gift in favour of Mt. Lakhpati as required by law.

The plaintiff is an heir of Mt. Lakhpati's husband and claims the property on the ground that it was the stridhan of Mt. Lakhpati which would devolve on her own legal heir. On the other hand the defendants contest the claim pleading that Mt. Lakhpati held a Hindu daughter's estate only which reverted the heirs of Mt. Nepali the last full owners and that they being the heirs of Molai are entitled to succeed to this estate.

The first Court dismissed the claim with regard to this property and decreed it with regard to other properties with which we are not now concerned in this appeal. The District Judge allowed the appeal and decreed the plaintiff's claim in respect of this two anuas eight gandas share. On appeal an learned Judge of this Court has restored the decree of the first Court. His judgment is based on the principle of law that where there is a title to which possession may be traced, it cannot be assumed or asserted that the possession was adverse and that when the daughter accepted the benefit of the inheritance she could not say that her possession even after her mother's death was adverse to her.

It has been laid down by their Lordships of the Privy Council in the case of *Varada Pillai* v. *Jeevarathnammal* (1) that where a person has begun to hold a possession adverse to two cosharers, and, before the statutory period of limitation, succeeds to the title of one of the two, his possession continues to be adverse, to the other cosharers, though he has become jointly interested with the latter. In such causes the adverse possession continues even though by succession he acquires title to joint possession. But the case of a cosharer is different from the present case because in that case there is in existence another person who can sue for joint possession or declaration which would at once put an end to the adverse possesion.

In the present case Mt. Lakhpati was holding the property adversely against Mt. Nepali. On the death of the latter she became the sole heir to the estate. Her possession could not be adverse against any one in the world except herself inasmuch as she alone was entitled to retain possession. It is inconceivable that Mt. Lakhpati's possession could be adverse as against herself. There was no one who could have brought a suit to dispossess her, and of course she herself would not move in the matter. In these circumstances we are of opinion that this case is distinguishable from the case of cosharers referred to above and we must hold that from the moment Mt. Lakhpati became the sole heir and exclusive owner of the property for the time being, her previous adverse possession came to an end. From that time onwards her possession was that of a Hindu daughter entitled to succeed to her deceased mother's shridhan.

It cannot be disputed that on the death of Mt. Lakhpati the property would not go to her own heirs but to the legal heir of Mt. Nepali who was the last full owner. The plaintiff therefore has no right to claim this property. The decree of the learned Judge of this Court is right and we dismiss this appeal with costs including in this Court fees on the higher scale.

R.M./R.K. *Appeal dismissed.*

(1) A. I. R. 1919 P. C. 44=43 Mad. 244=46 I. A. 285 (P. C.).

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MUKERJI AND KING, JJ.

Jang Bahadur—Objector—Applicant.

v.

Bhagat Ram-Sheo Prasad—Opposite Party—Respondent.

First Appeal No. 95 of 1928, Decided on 23rd October 1929, from order of Sub-Judge, Basti, D/- 17th April 1928.

Civil P. C., O. 21, R. 89—Interest of mortgagee in usufructuary mortgage is immovable property.

The interest of a mortgagee in a usufructuary mortgage is immovable property within the meaning of O. 21, R. 89: 15 *All.* 134 and *A.I.R.* 1924 *All.* 796, *Dist.*; 27 *M. L. J.* 239, *Diss. from*; 29 *Cal.* 1 (*F.B.*), *Rel. on.* [P 111 C 2]

Akhtar Husain Khan—for Applicant.

P. L. Banerji—for Opposite Party.

Judgment. — This a judgment-debtor's appeal arising under the following

circumstances: The appellant, Jang Bahadur, held an usufructuary mortgage over a considerable property, the amount of the mortgage being over Rs. 35,000. The respondents, holding a simple money decree against the appellant, got the interest of the appellant as mortgagee attached and sold. The sale was effected for Rs. 2,500 only and the respondents themselves made the purchase. The appellant applied for the setting aside of the sale, on the ground of fraud. The application was not heard on the ground that O. 21, R. 89, Civil P. C., had no application, inasmuch as the property sold was moveable property. The appellant challenges the correctness of this decision and the only question which we have to answer in this appeal is whether the mortgagee's interest in a usufructuary mortgage is immovable property within the meaning of R. 89, O. 21, Civil P. C.

In our opinion the answer to the question can be found out, from two sources. Either the answer will be furnished by the Transfer of Property Act which defines a mortgage or from the General Clauses Act which defines immovable property. Whichever source, we look into, we find that the answer will be the same. Under S. 58, T. P. Act, a mortgage is a transfer of an interest in an immovable property. It follows, therefore, that what the mortgagee holds is a part of the interest in immovable property originally owned by the mortgagor. If we look to the definition given in the General Clauses Act (for the Civil Procedure Code itself gives no definition) we find it as follows:

"Immovable property shall include land, benefits to arise out of land, * * *."

The definition of usufructuary mortgage as given in S. 58, T. P. Act, shows that the mortgagee is entitled to take possession of the property and to receive the rents and profits in payment of his mortgage money. Obviously, his interest is something which arises out of land. It has been conceded before us that at the date of the attachment and sale the judgment-debtor was in possession and his name was recorded in the khewat.

Several cases have been cited before us by the learned counsel for the respondents. Among these, two come from this Court. The one, *Karimannissa* v. *Phul Chand* (1), was a case of a simple mortgage and nothing was said there which might possibly apply to a usufructuary mortgage. The other case *Umra Singh* v. *Lal Singh* (2), proceeded entirely on the consideration of the incidents of a simple mortgage. It may be that, if we apply the definition of mortgage as given in the Transfer of Property Act, a simple mortgage and a usufructuary mortgage will stand on the same footing. Whether they do so stand or not for the purposes of the Civil Procedure Code we need not decide. It is enough to say, that there are essential differences between the incidents of a simple mortgage and those of a usufructuary mortgage. If we apply the definition, as given in the General Clauses Act, a difference might possibly be drawn between a simple mortgage and a usufructuary mortgage. The two cases from this Court therefore are no sure guide. We express no opinion as to their correctness or otherwise.

In Madras it seems to have been definitely held that a simple mortgage and a usufructuary mortgage stand on the same footing, where the nature of the mortgagee's interest is concerned. It has been held there that in both cases the interest is a moveable property. The latest Madras case seems to be *Peetikayil Nammad* v. *Othenam Nimbor* (3), which regards the point as settled by authorities in that Court. The Bombay High Court seems to have taken a different view as also the Calcutta High Court. There is a Full Bench decision of the Calcutta High Court, reported in *Paresh Nath Singha* v. *Nabogopal Chattopadhya* (4) which, although given under the old Civil Procedure Code, would be an authority for the proposition that the mortgagee's interest in a usufructuary mortgage is an immovable property, within the meaning of the Civil Procedure Code. We hold that the property sold was immovable property within the meaning of O. 21, R. 89, Civil P. C., and the appellant's application should have been heard on its merits. We set aside the order of the Court below and remand the case to

(1) [1893] 15 All. 134=(1893) A. W. N. 51.
(2) A. I. R. 1924 All. 796=46 All. 917.
(3) [1914] 27 M. L. J. 239=26 I. C. 508.
(4) [1902] 29 Cal. 1=5 C. W. N. 821 (F.B.).

it for disposal according to law. Costs here and hitherto will abide the result.

V.B./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 112

SEN AND NIAMATULLAH, JJ.

Mohammad Qamar Shah Khan — Plaintiff—Appellant.

v.

Mohammad Salamat Ali Khan—Defendant—Respondent.

Second Appeal No. 1076 of 1926, Decided on 18th October 1929, against decree of Dist. Judge, Pilibhit, D/- 2nd March 1926.

(a) Civil P. C., O. 41, R. 1—Memorandum presented by unauthorized person is no appeal—Civil P. C., O. 3, R. 1.

Where a memorandum of appeal is presented in Court by an unauthorized person it is no appeal at all and the Court may reject it for that obvious defect but the Court is not justified in treating it as an appeal in due form and rejecting the same as statute barred. [P 112 C 2]

(b) Civil P. C., S. 11—Order of rejection of memorandum of appeal presented by unauthorized person cannot operate as res judicata.

An order of rejection of a memorandum of appeal which has been presented by a vakil not properly authorized according to law cannot operate as res judicata in a subsequent proceeding in which an appeal has been filed in proper form but beyond limitation. [P 113 C 1]

(c) Limitation Act, S. 5 — Omission to mention vakil's name in vakalatnama through pure mistake is sufficient cause — Civil P. C., O. 3, R. 1.

Where a party intending to engage a pleader executes a vakalatnama but by pure mistake omits to mention his name in the said vakalatnama and the pleader in his turn fails to endorse his acceptance and the mistakes are due to pure inadvertence and accident and do not proceed from any dishonest intention there is sufficient cause for extending the period of limitation of an appeal, which, though in proper form has been presented after a short delay. [P 113 C 2]

Iqbal Ahmad and *Mukhtar Ahmad*—for Appellant.

N. P. Asthana—for Respondent.

Judgment.—This and the connected appeal No. 1092 of 1926 arise out of a suit for profits instituted by the plaintiff-appellant in the Court of revenue for the years 1329 and 1330 Fs. The facts elicited from the record show a chapter of accidents. The trial Court dismissed the suit for profits on 29th December 1925. An appeal was preferred in the Court of the learned District Judge of Pilibhit, on 28th January 1926, and on that date the appeal was within time. The appeal was admitted and 2nd March 1926 was fixed for hearing. On that date, it appeared that there had been no proper presentation of the appeal because Babu Uma Charan Lal, vakil, who signed the memorandum of appeal had not been duly appointed. The memorandum of appeal was accompanied by a vakalatnama but it did not contain the name of Babu Uma Charan Lal and there was no endorsement of acceptance by the vakil.

It may be incidently noticed that the name of no other vakil was mentioned in the vakalatnama ; and it is patently clear that it was the intention of the appellant to engage Babu Uma Charan Lal and to prosecute the appeal through him alone.

The case came on for hearing before Mr. Johnstone the learned District Judge of Pilibhjt, on 2nd March 1926. He dismissed the appeal on the ground that it was time barred. It appears to us that the order, in question, was not technically correct because the appeal could not be time barred, if there was no proper presentation of the appeal. In fact, there was no appeal before the Court and no question of limitation arose in the case. Where a memorandum of appeal is presented in Court by an unauthorized person, it is no appeal at all and the Court may reject it for that obvious defect but the Court is not justified in treating it as an appeal in due form and rejecting the same as statute barred.

The plaintiff applied for review of the order, dated 2nd March 1926, on 5th March 1926, and prayed that time be extended under S. 5, Lim. Act, and also under S. 151, Civil P. C. This application was disallowed by the Court on the very date, that is, on 5th March 1926, on the ground that there was no appeal then pending before the Court and consequently the provisions of S. 5, Lim. Act, could not apply.

Undaunted by his reverses, the plaintiff presented, on 7th March 1926, a fresh appeal which was in proper form. He filed an affidavit in which he set out facts to attract the operation of S. 5, Lim. Act. This time the vakalatnama was duly executed, the name of the vakil duly mentioned, the acceptance properly endorsed and the memorandum

of appeal signed by the vakil. A prayer was made for extension of time and for condonation of a delay of 23 days since the expiry of the original period of limitation. The affidavit stated in the clearest terms that the plaintiff appellant had intended to engage Babu Uma Charan Lal as his vakil, that it was due to mere accident or inadvertance that his name had not been mentioned in the vakalatnama and that the vakil had in his turn failed to accept the vakalatnama from pure oversight.

The case came on for hearing on 6th May 1926, before a District Judge other than Mr. Johnston. The appeal was resisted not on the ground that there was no sufficient cause for extending the period of limitation under S. 5, Lim. Act, but for the reason that it was barred by res judicata. This plea found favour with the learned District Judge, who observed as follows :

"A preliminary objection is raised that the appeal has already been dismissed. I cannot hear this appeal. It is barred by res judicata. No question of S, 5, Lim. Act, or any other question can be decided. I dismiss this appeal with costs."

This view is obviously erroneous. The appeal originally instituted on 28th January 1926 was no appeal at all. It is true that the learned District Judge, instead of rejecting the memorandum of appeal, as he ought to have done, had improperly used the word 'dismissed' and had further observed that the appeal was time barred. The order dated 2nd March 1926, could not operate as res judicata to the hearing of the appeal which was instituted on 7th March 1926. An order of rejection of a memorandum of appeal which had been presented by a vakil not properly authorized according to law cannot operate as res judicata in a subsequent proceeding in which an appeal has been filed in proper form but beyond limitation. There was not and there could not be any question of res judicata before the Court and the only question which required consideration was whether the prayer for extension of time was to be granted or refused.

This matter, however, was not considered by the Court below. We do not consider it necessary to remand the case. The facts are clear and the case may be disposed of forthwith.

We are of opinion that sufficient cause has been made out for extending the period of limitation qua the appeal filed on 7th March 1926.

Where a party intending to engage a pleader executes a vakalatnama but by a pure mistake omits to mention his name in the said vakalatnama and the pleader in his turn fails to endorse his acceptance and the mistakes are due to pure inadvertance or accident and do not proceed from any dishonest intention, there is sufficient cause for extending the period of limitation of an appeal which, though in proper form has been presented after a short delay. We hold therefore that the appeal filed on 7th March 1926, should be considered to be a proper appeal and not barred by limitation.

The result is that we modify the order of the learned District Judge, dated 2nd March 1926, to this extent that the order should be construed as amounting to a rejection of a memorandum of appeal on the ground that it was no appeal at all. We make no order as to costs of this appeal.

As to Second Appeal No. 1092 of 1926, we direct that the appeal presented on 7th March 1926, should be numbered and registered as a proper appeal and proceeded with according to law. Costs here and hitherto in this appeal shall abide the result.

R.M./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 113

KING AND BENNET, JJ.

Phool Kuari—Plaintiff—Appellant.

v.

Bhagwan Das and *others*—Defendants—Respondents.

Second Appeal No. 2289 of 1927, Decided on 22nd November 1929, against decree of Addl. Sub-Judge, Moradabad, D/- 27th August 1927.

Civil P. C., O. 34, R. 1, Expl. 1 — Prior mortgagee impleaded by mistake—Proper decree would be for sale of property subject to prior mortgage.

Explanation to O. 34, R. 1 implies that on a decree for sale by a puisne mortgagee the decree should ordinarily be for sale of the property subject to the prior mortgage and interest of the prior mortgagee cannot be affected by such a term. Further the mere fact that the prior mortgagee was impleaded by mistake does not affect the nature of the decree which should be passed; 34 *All.* 323, *Dist.*; 22 *Cal* 33 *Foll.* [P 114 C 2

K. N. Katju—for Appellant.

Vishwa Mitra—for Respondents.

Judgment.—This appeal arises out of a suit to recover the money due on the basis of a hypothecation bond dated 10th November 1918.

The suit was not contested by the mortgagors but defendant 9, Bhagwan Das, was impleaded as a subsequent mortgagee of a portion of the mortgaged property, namely, the property which is situated in mahal "Yellow Bhagwan Dai" of mauza Fatehpur Asl.

Bhagwan Das pleaded that he had priority in respect of his mortgages and it was found as a fact that he held two usufructuary mortgages of a date earlier than the date of the mortgage in suit. He contended that the plaintiff should not be allowed to bring the property to sale without paying him the mortgage money due on his prior mortgages.

The trial Court granted to the plaintiff a decree for sale on condition that the plaintiff should pay Rs. 1,500 to the prior mortgagee Bhagwan Das, and ordered that in case of failure by the plaintiff to make such payment then the suit shall stand dismissed with costs.

The decree was upheld on appeal by the learned Additional Subordinate Judge of Moradabad. It has been contended before us in second appeal by the plaintiff that the decree of the trial Court which has been upheld by the lower appellate Court is defective in that it compels the puisne mortgagee to redeem the prior mortgagee as a condition of bringing the property to sale. The contention is that the proper decree to pass would be to decree the sale of the property in suit subject to the prior mortgages.

On this point we think that the contention of the learned advocate for the appellant is well founded. The lower appellate Court relied upon a ruling in *Manohar Lal* v. *Ram Babu* (1). That was a case in which the defendants were the auction purchasers of properties sold in execution of a decree obtained upon a prior mortgage and the plaintiff was seeking to bring the property to sale on the basis of his subsequent mortgage. It was held in that case that the plaintiff had no absolute right to bring the property to sale in satisfaction of his mortgage subject to the prior mortgage and that in the circumstances he ought to redeem the prior mortgage before bringing the property to sale.

In our opinion this ruling can be distinguished from the present case on the facts. In the case now before us the prior mortgagee has not brought a suit upon his mortgage and the interests of mortgagor and prior mortgagee are still separate. In the case upon which the ruling was passed the auction-purchaser had acquired the rights both of the mortgagor and of the prior mortgagee. The ruling proceeds upon its special facts which are quite different from the facts of the case now under consideration.

On the other hand, we have been referred to the ruling in *Kanti Ram* v. *Kutubuddin Mahomed* (2). That was a suit by a second mortgagee to which the prior mortgagee was a party and the plaintiff prayed that the amount due to him might to realized by sale of the mortgaged property. The Courts below dismissed the suit holding that the plaintiff was not entitled to sell the mortgaged property without redeeming the prior mortgage. It was held that this view was erroneous and that the plaintiff was entitled to a decree for sale of the mortgaged property subject to the lien of the prior encumbrancer. The facts of that case are on all fours with the facts of the case before us. Although the ruling is an old one it has not been shown to us that it has ever been dissented from and in our opinion it is still good law.

Under O. 34, R. 1 it is expressly provided, in the explanation, that a puisne mortgagee may sue for sale without making the prior mortgagee a party to the suit. That implies that on a decree for sale by a puisne mortgagee the decree would ordinarily be for sale of the property subject to the prior mortgage. The interests of the prior mortgagee cannot be affected by a decree given upon such terms. If the prior mortgagee is impleaded by mistake (as happened in the present case because the plaintiff was under the impression that Bhagwan Das was a puisne mortgagee and not a prior mortgagee) we do not think that the mere fact that the prior mortgagee is a party to the suit will affect the nature of the decree which should be passed. In our opinion the learned

(1) [1912] 34 All. 323=14 I. C. 674=9 A. L. J. 323.

(2) [1896] 22 Cal. 33.

advocate for the appellant is correct in contending that the proper decree would be for sale of the property subject to the prior mortgages.

Order 34, R. 12 shows that, if the prior mortgagee consents, then the property can be sold free from incumbrances on condition that the prior mortgagee will have the same interest in the sale proceeds as he had in the property sold. A decree on those terms would not seem to be proper in the present case because the prior mortgagee has not expressly consented to the sale of the property free from incumbrances.

The proper decree therefore will be for sale of the property subject to the prior mortgage. As the prior mortgagee is a usufructuary mortgagee it is clear that the auction purchaser will not be able to get possession of the property without redeeming the prior mortgages. The interests of the prior mortgagee therefore will in no way be effected.

It has also been argued that even if the views taken by the Courts below were correct there was no justification for dismissing the suit for sale completely if the plaintiff failed to pay up the mortgage money due to Bhagwan Das. He held a mortgage in respect of only part of the property mortgaged in the plaintiff's mortgage-deed. At the most, therefore, the Court should have dismissed the suit for sale in respect of the property covered by Bhagwan Das's mortgage bonds.

In our opinion this argument also is valid, but in view of our decision on the first contention it does not affect the result.

The respondent Bhagwan Das mortgagee is dead and in his place his son has been substituted. Mr. Vishwa Mitra, was appointed as advocate on behalf of Bhagwan Das but has not been appointed on behalf of the son who is therefore unrepresented in this appeal.

We allow the appeal and decree the plaintiff's suit for sale of the mortgaged property subject to the prior mortgages held by Bhagwan Das or his representative. The plaintiff-appellant will get his costs in this Court and in the Court below from Bhagwan Das, defendant 9, or his representative. The order as to costs of the trial Court will hold good. Let a decree be prepared accordingly under O. 34, R. 4. The period for payment will be six months from today's date.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 115

MUKERJI AND BENNET, JJ.

Eshaq Lal and *another* — Plaintiffs —Appellants.

v.

Dulla—Defendant —Respondent.

First Appeal No. 164 of 1926, Decided on 28th October 1929, from decree of Addl. Sub-Judge, Meerut, D/- 10th February 1926.

Transfer of Property Act, S. 43 — Mortgagee honestly believing that mortgagor has title when in fact he has none is entitled to bring property to sale when mortgagor inherits property.

Where the mortgagee honestly believes that the mortgagor has title to certain property, his name being recorded in the khewat, and the mortgagor has in fact no title the mortgagee having acted on erroneous misrepresentation is entitled to bring the property to sale when the mortgagor inherits the property : *A. I. R.* 1926 *All.* 102, *Dist.*

[P 116 C 1]

N. C. Vaish—for Appellants.

Peary Lal Banerji—for Respondent.

Judgment.—This appeal arises out of a suit for sale brought by one of the appellants Eshaq Lal, and one Ramji Lal who is now represented by the other appellants, for recovery of money on foot of a mortgage bond dated 6th March 1919, executed by the respondent Dulla. The suit has been dismissed on the ground that Dulla had no right to the property when he made the mortgage. Dulla did not appear in the case, but the respondent Harphul (who has since died and whose legal representatives have been brought on the record) alone contested the suit. The facts are briefly these:

One Bhure had two daughters Bhagwanti and Naoli. Bhagwanti's son is Dulla and Naoli's son is Harphul. Mt. Bhagwanti died sometime about 1907 and on her share of her father's property Dulla's name was recorded. Naoli died shortly before the institution of the suit and Harphul's name was recorded in her place. Dulla has made a gift of his half share in the property in favour of Harphul. It is also a fact that after the execution of the mortgage deed in suit, Mt.

Naoli brought a suit against Dulla to recover the half share recorded in the name of Dulla in the khewat and got a decree.

The defence set up by Harphul was inter alia, that Dulla was not competent to mortgage the property in suit because Naoli was the owner of the property at the date of the mortgage. There can be no doubt that such was the case, but the plaintiffs rely on S. 43, T. P. Act. The learned Subordinate Judge was of opinion that as the plaintiffs knew the state of the family affairs, there could be no equity in favour of the plaintiffs and Harphul was not estopped from pleading want of title in Dulla.

It may be conceded that the mortgagees knew at the date of the mortgage, that Bhure had two daughters, that one of the daughters was dead and the name of her son Dulla was recorded in the khewat. They also knew that Mt. Naoli was alive. But from this knowledge, it does not necessarily follow that that the mortgagees knew and believed that Dulla was not the owner of the property which was recorded in Dulla's name. We have already said that Dulla's name was recorded in the khewat. One of the plaintiffs went into the witness-box and he swore that he consulted the patwari at the date of the mortgage.

If as we believe was the case the plaintiffs honestly believed that Dulla was entitled to one-half share, in the right of his mother, the plaintiffs must have been acting honestly in the transaction. In the circumstances, they ought to be entitled to the benefit of S. 43, T. P. Act. The case of *Mulraj* v. *Indar Singh* (1) is clearly distinguishable from the facts of this case.

We hold that the plaintiffs acted on the erroneous represetation that Dulla was entitled to the property. Dulla having inherited the property on the death of Naoli, the plaintiffs are entitled to bring that share to sale.

In the result we allow the appeal, set aside the decree of the Court below and decree the plaintiffs, suit with costs throughout. A decree under O. 34, R. 4, Civil P. C., will be prepared. Six months are allowed to pay Interest at the stipulated rate will be paid during six months and thereafter it will be paid at six per cent per annum till recovery.

R.M./R.K. *Appeal allowed.*

(1) A. I. R. 1926 All. 102=48 All. 150.

A. I. R. 1930 Allahabad 116

YOUNG, J.

Shib Singh—Defendant—Appellant.

v.

Jograj Singh—Plaintiff—Respondent.

Second Appeal No. 1646 of 1928, Decided on 23rd October 1929, from a decree of Dist. Judge. Budaun, D/- 30th August 1928.

Civil P. C., O. 2, R. 2 (3)—Identical causes of action—Test, is whether evidence which enables plaintiff to obtain decree is same in both suits.

Where it is unnecessary to prove the same facts in both the suits and the evidence which would suffice the p laintiff to obtain a decree is not the same in both suits, the causes of action in both suits cannot be said to be the same : *A. I. R.* 1923 *All.* 311, *Rel. on.*

A brought a suit against *B*, his general agent, for a specific sum as money had and received to *A's* use. The suit was dismissed, it being held that *A* could not sue a general agent for one specific sum of money without asking for an account. *A* then brought a suit for accounts and payment of sum found due to him.

Held : that the two suits were not based on the same cause of action. The first suit having been dismissed on the ground that on facts stated no cause of action was shown, it could not be said that the second suit was based upon the same cause of action. There could not be any resemblance between a "cause of action" and "no cause of action." Moreover the first action was for a sum of money *B* had received to the use of *A* where *A* had only to prove that *B* had received a specific sum on his behalf, while the second action was for accounts where *A* had to prove that *B* was his general agent. [P 117 C 1, 2]

U. S. Bajpai and *G. S. Pathak*—for Appellant.

A. M. Khwaja—for Respondent.

Judgment.—This is a defendant's appeal. In 1919, the plaintiff was serving a term of rigorous imprisonment in jail and he appointed the defendant as his mukhtar-i-am. The defendant acted accordingly, and collected moneys belonging to the plaintiff and also disbursed moneys for him. In 1926 the plaintiff was released from jail and in August of that year the plaintiff dismissed the defendant from his agency, after having demanded, and failed to obtain, an account of the moneys due to him. In March 1927, the plaintiff sued the defendant for a specific sum of

Rs. 587 and interest, as money had and received to the plaintiff's use. It was held in that action, on authority, that the plaintiff could not sue a general agent for one specific sum of money without asking for an account, and the plaintiff's suit was dismissed. The plaintiff then brought this suit for accounts and payment of the amount found due to him. This suit was decreed in favour of the plaintiff by both the lower Courts. The defendant now comes on second appeal. The only point taken by counsel for the appellant in this Court is that O. 2, R. 2 (3) applies and that, because of this order, the plaintiff's suit is not maintainable.

Order 2, R. 2 (3) enacts that :

"a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs ; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

It has been strenuously contended on behalf of the appellant that the action in 1927 was based upon the same cause of action as the present action and that the plaintiff could have claimed the relief he now asks for in the previous action. Therefore it is contended he is now barred from claiming that relief in this action. The whole question is whether the two actions were based upon the same cause of action. In my opinion, they clearly were not. The first action was an action for a sum of money which the defendant had received to the use of the plaintiff. In order to prove his claim in that case the plaintiff merely would have to prove that the defendant had received a specific sum of money on the plaintiff's behalf. The present action is for accounts, and the plaintiff would have to prove that the defendant was his general agent. It is true that in the previous suit the plaintiff set out that the defendant was his general agent, but it was quite an unnecessary allegation and was irrelevant to the issues that were then to be decided. Again, the previous suit was dismissed on the ground that on the facts stated by the plaintiff no cause of action was shown because, where the the defendant was a general agent with power to disburse maney as well as to receive it, a single item of money would not be demanded from him without an account. It having been therefore held that the first case disclosed no cause of action, it cannot possibly be said that this case is based upon the same cause of action. There cannot be any resemblance between a "cause of action" and "no cause of action."

I am confirmed in my opinion as to this matter by two decisions of this High Court. One, in the case of *Mohammad Umar Khan* v. *Ummatul Rahim Bibi* (1) and the other in the case of *Manohar Das* v. *Babu Seetal Prasad* (2). In the former case the learned Judge said :

"The plaintiff's cause of action is defined as consisting of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court, and that a test which is valuable in considering whether the causes of action are identical is whether the evidence which would suffice to enable the plaintiff to obtain a decree in both suits is the same."

It is clear from what I have said above that it would be unnecessary to prove the same facts in both these cases and it is equally clear that the evidence which would suffice to enable the plaintiff to obtain a decree in both suits is not the same. As regards the latter case quoted above, it is laid down there that :

"an action against a general agent, simply on the allegation that he has recived money on account of the principal without remitting it to the latter, is not sustainable because the facts stated do not constitute a cause of action, it being alleged that there are grounds for believing that the money so received has not been disbursed on the plaintiff's account, but misappropriated by the agent."

This was the allegation in the first case, and on the authority of this case it is clear that the first case did not disclose a cause of action. It is, therefore, clear that the causes of action in both these cases cannot be the same and therefore, O. 2, R. 2 (3) does not apply. The appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(1) A. I. R. 1923 All. 311=45 All. 376.
(2) 23 W. R. 418.

A. I. R. 1930 Allahabad 117

SULAIMAN, AG C. J. AND SEN, J.

Sheo Balak Ram—Defendant—Appellant.

v.

Mathura Prasad and *another*—Plaintiffs—Respondents.

Second Appeal No. 759 of 1927, Decided on 24th October 1929.

(a) Agra Tenancy Act, S. 4 (7)—Scope—Mere fact that person is proprietor of specific plot of land does not make him petty proprietor.

The definition of petty preprietor given in S. 4 (7) makes it clear that the mere fact that a person is the proprietor of a specific plot of land does not make him a petty proprietor. It should further appear that he is not entitled to such an interest in the joint lands of the mahal or to take part in the administration of its affairs. [P 118 C 1]

(b) Deed—Construction—Where deed of gift indicates joint possession, donee is cosharer and is entitled to resist pre-emption.

Under a deed of gift a plot was transferred for planting groves but it was recited in the deed by the donor that the plot was a share out of fractional share of the mahal in his hand. The deed did not say that the donee would not be entitled to take part in the administration of the affairs of the mahal. The khewat also showed that donee was included among body of cosharers with joint liability to pay Government revenue, no separate revenue having been assessed on his plot.

Held: that the donee was a cosharer and entitled to resist suit for pre-emption. [P 118 C 2]

U. S. Bajpai—for Appellant.

K. N. Katju—for Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for pre-emption. The defendant acquired a specific plot of land No. 777 by virtue of a deed of a gift during the pendency of the suit. It is conceded that if by virtue of this acquisition he has become a cosharer in the mahal he is entitled to resist the claim. Both the Courts below have decreed the suit and held that the defendant has become a mere petty proprietor. They have noted that he has acquired only a specific plot 777 but have not gone into the further question whether he is entitled to any interest in the joint lands of the mahal or to take part in tbe administration of its affairs. The definition ef a petty proprietor given in S. 4 (7), Agra Tenancy Act makes it quite clear that the mere fact that a person is the preprietor of a specific plot of land does not make him a petty proprietor. It should further appear that he is not entitled to such an interest in the joint lands of the mahal or to take part in the administration of its affairs. The Courts below have not gone into this further question. Their finding is therefore not merely one of fact. Under the deed of gift the plot in question was transferred to him for the purpose of planting a grove, but it was recited in the deed by the donor that this plot was a share out of the share remaining in his hands which represented the fraction 4-1484/2789 of the entire mahal. The deed does not say that .the donee would not be entitled to take part in the administration of the affairs of the mahal. The khewat shows that the donee by virtue of this gift is included among the body of cosharers who own the entire 16 annas measuring 659 bighas and odd. The donee is shown as a cosharer and not as the owner of a miscellaneous property. There is obviously a joint liability upon him to pay the Government revenue for the entire 16 annas. Revenue has not been assessed separately on his plot. The Court of first instance has referred to the deposition of the vendor which was to the effect that a specific plot was transferred to him which was a share out of the share which had remained in his hands after the execution of the sale deed. No doubt the plot is a unit in the sense that it bears a specific khasra number and can be identified on the spot but according to the khewat it is not outside the 16 annas khalsa share.

We are accordingly of opinion that the view taken by the Courts below on this point was not correct. We, therefore, allow this appeal and setting aside the decree of the Courts below dismiss the suit with costs in the lower appellate Court and in this Court including fees on the higher scale. The defendants, however, must pay the costs of the plaintiff in the first Court as at the time when the suit was instituted the plaintiff had undoubtedly a right of pre-emption.

R.M./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 118

MUKERJI AND BOYS, JJ.

Sohan Lal—Plaintiff—Appellant.

v.

Raghubir Sahai and *another* — Defendants—Respondents.

Second Appeal No. 196 of 1927, Decided on 29th October 1929, from a decree of Dist. Judge, Budaun, D/- 21st October 1926.

(a) Contract Act, S. 10—Liability—Formalities laid down by law must be observed to create liability.

It is not every agreement that is binding on a party to it, simply because he agreed to

it. Where the law lays down a contract, to be effective, should be executed in a particular way and when certain formalities are laid down to be gone through before certain liability is created, those formalities cannot be dispensed with. [P 120 C 1]

(b) Agra Tenancy Act (1901), S. 47— Agreement to enhance rent is binding only when registered.

Section 47 lays down that where an agreement to enhance rent is arrived at it would be binding on the parties only where it is registered. Want of registration is, therefore, fatal to a person claiming the enhanced rent. The fact that the terms had been entered in a decree makes no difference : *A. I. R.* 1928 *All.* 352, *Foll.* [P 120 C 1,2]

(c) Registration Act, S. 17 — Decree containing subject-matter not concerning suit, still registration is unnecessary.

Even where a material which does not concern the subject-matter of the suit has been embodied in a decree, there is no necessity for registration. This means in effect that the document embodying that material can be given in evidence and used as proof of title. [P 120 C 2]

N. C. Vaish—for Appellant.

Baleshwari Prasad—for Respondents.

Mukerji, J. — This is a plaintiff's appeal and arises out of a suit for recovery of arrears of rent instituted by the appellant against the respondents.

The claim was that the defendants were liable to pay rent at the rate of Rs. 171-8-0 per year. The defence was that this rate could not be charged, and the annual rent payable was Rs. 90.

To prove the defendants' liability to pay the sum of Rs. 171-8-0 per annum, the plaintiff put into evidence a decree passed on compromise dated 9th October 1918. It appears that a few years ago the plaintiff brought a suit against the defendants for their ejectment, as non-occupancy tenants. The parties agreed that the defendants should pay, in future, an enhanced rent at the rate of Rs. 171-8-0 per annum instead of Rs. 90, which they had been paying up till this suit, provided the plaintiff agreed to confer on the defendants the status of occupancy tenants. The terms were recorded in the decree that was passed, though the decree resulted in the dismissal of the suit which, as I have said, was one for ejectment of the defendants.

The plaintiff having relied on this compromise, the defence is that the agreement to pay the enhanced rent, not having been registered as required by S. 47, Agra Tenancy Act, of 1901, it, the agreement, did not bind the defendants, and the plaintiff could not enforce the terms of the said agreement.

The contention of the defendants found favour with the lower appellate Court, though it did not find favour with the Court of first instance, which decreed the suit in its entirety.

In this Court it has been contended that the learned appellate Judge has overlooked the fact that the terms had been entered in a decree. Reliance has been placed on the case of *Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (1).

In this case which was decided by their Lordships of the Privy Council, the facts were briefly these : The appellant before their Lordships brought two suits, one against the Secretary of State for India, and the other against Watson and Co. Both were suits in ejectment. In the suit which had been instituted against Watson and Co. it was agreed that Watson and Co. should admit the title of the plaintiff, and the plaintiff (the appellant before their Lordships of the Privy Council) should lease out, in consideration of acknowledgment of a title, the lands in suit to Watson & Co. It was further agreed that, if the plaintiff succeeded in her suit against the Secretary of State for India in Council, she would grant a lease of the property claimed by her in that suit to Watson & Co. The plaintiff having succeeded in her suit against the Secretary of State for India, Watson and Co., brought this suit, which went up before their Lordships of the Privy Council, for specific performance of the contract as embodied in the terms of the decree. The defence was that the agreement was an agreement of lease, and therefore, the agreement to be valid was bound to be registered. The further contention was that as the decree in Watson's case had not been registered, the terms embodied in the decree could not be proved by the production of a copy of the decree. Their Lordships of the Privy Council pointed out that, under the provisions of the Registration Act itself, a decree did not require registration, and, therefore, the provision in S. 49, Registration Act, that documents, which required to be registered by the law of registration

(1) A. I. R. 1919 P. C. 79 = 47 Cal. 485 = 46 I. A. 240 (P.C.).

could not be admitted into evidence if they happened to be unregistered, did not apply to a decree which, as I have stated, did not require to be registered under the law of registration. It was contended before their Lordships that the agreement as to leasing out the lands which had been claimed against the Secretary of State was no part of the operative portion of the decree. Their Lordships pointed out again that a decree would not cease to be a decree simply because it contained matters which did not form a part of the operative portion of the decree. In the result, their Lordships agreed with the Calcutta High Court that the terms of the agreement between the parties could be proved by the production of the copy of the decree.

In this particular case before us there is no question as to the admissibility of the agreement entered into between the parties. The terms of the agreement would be admissible in evidence whether they were embodied in the decree or not, and whether the deed was registered or not. The terms at which the parties arrived in the ejectment suit are before us. The question that has to be answered is, whether the agreement creates a binding liability on the defendants. It is not every agreement that is binding on a party to it, simply because he agreed to it. Where the law says that a contract, to be effective, should be executed in a particular way : e. g., a mortgage has to be effected not only by the execution of a document, but by also it being registered and attested by two witnesses, where certain formalities are laid down to be gone through before a certain liability is created those formalities cannot be dispensed with. A registered but unattested mortgage-deed will be admissible in evidence, but not create a valid mortgage, and bind the property. As I have said, in this case, there is no question of admissibility of any document into evidence. The terms of the agreement are before us, and the sole question is whether the agreement, as agreement is binding on the defendants and will make the defendants liable to pay an enhanced rent. S. 47, Tenancy Act, of 1901 lays down that where an agreement to enhance rent is arrived at,it would be binding on the parties, only where it is registered. If that be so, the want of registration, in my opinion, is fatal to the plaintiff's claim.

A similar case came up before myself and my brother Boys, J., in *Dhanpat Rai* v. *Pooran* (2). The facts are indistinguishable ; but the Privy Council case quoted above was not cited before us. As I have already indicated, the Privy Council case does not make any difference at all.

In the result I would dismiss the appeal with costs.

Boys, J.—In view of the fact that I agree with the conclusion arrived at by my brother Mukerji, J., it is unnecessary for me to make more or few observations. Looking at the matter broadly we find that where material, which does not concern the subject-matter of the suit, has been embodied in a decree, there is no necessity for registration. This means in effect that the document embodying that material can be given in evidence, and that means that it can be used as proof of title. I can see no difference, in principle and that has been my only difficulty, between allowing embodiment in a decree to have the effect of dispensing with the necessity for registration which is otherwise called for by S. 17, Registration Act, and allowing embodiment in a decree to have the effect of dispensing with the necessity for registration called for by S. 47, Tenancy Act. But in the former case the exemption from necessity for registration is, once it has been found that the matter is embodied in a decree, and in view of their Lordships' ruling of the Privy Council, a matter of statutory enactment. It may be that if it had occurred to the legislature, it would have enacted that embodiment in a decree equally dispensed with the necessity for registration called for by S. 47. But it has not so enacted, and in view of the great importance rightly attaching to registration, I do not feel justified in extending the principle of the enactment in S. 17 (2) (vi), Registration Act, to S. 47, Tenancy Act, however, strong may be the logical argument that the same principle governs both cases.

By the Court.—The appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

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(2) A. I. R. 1928 All. 352.

A. I. R. 1930 Allahabad 121 (1)

SULAIMAN, AG. C. J. AND KENDALL, J.

Inayat Beg and *another*—Applicants.

v.

Umrao Beg—Opposite Party.

First Appeal No. 85 of 1928, Decided on 15th October 1929, from order of Sub-Judge, Agra, D/- 9th February 1928.

(a) Civil P. C., S. 2—Order refusing to stay execution is not decree.

An order refusing to stay execution is not a decree within the meaning of S. 2 and no appeal lies from such order. [P 121 C 2]

(b) Civil P. C., O. 21, R. 29—Where application to stay execution is made to Court which did not pass decree, O. 21, R. 29, does not apply.

A obtained a decree against *B*, which was transferred to another Court for execution. In the latter Court *B* filed a declaratory suit for injunction to be issued against *A* restraining him from taking out sale proceedings. It was urged that that application should be treated as if it had been made under O. 21, R. 29.

Held: that O. 21, R. 29, did not apply to the facts of the case as *A* was not the decree-holder of a decree of the Court in which the suit was pending and to which application was made. O. 21, R. 29, was only applicable to the holder of decree of "such Court." [P 121 C 2]

Damodar Das, *M. A. Aziz* and *A. Sanyal*—for Applicants.

Mushtaq Ahmad and *Baleshwari Parsad*—for Opposite Party.

Judgment.—This is an appeal from an order refusing to issue an injunction. The respondent had obtained a decree from the Court of the Subordinate Judge of Mainpuri which had been transferred to Agra for purposes of execution. In the Court of the Subordinate Judge of Agra the plaintiff-appellants filed a declaratory suit with a view to avoid the decree previously obtained by the defendant. They applied to the Court at Agra for an injunction to be issued to the defendant restraining him from taking out sale proceedings, and also for an injunction to be issued to the Execution Department directing the amin to postpone the sale. The application did not specifically mention the particular rule under which it was made, but as the prayer was for an injunction it was assumed in the Court below that the application was under O. 39, Civil P. C. R. 1 of that order had been amended by that time and injunction could not be issued by the Court. The view taken by the learned Subordinate Judge on this point was perfectly correct.

The learned advocate for the appellant has urged that the application should be treated as if it had been made under O. 21 R. 29, Civil P. C. In the first place the application did not purport to have been made under that rule, and did not ask for a stay of the execution. In the second place, even if it had been under that rule, no appeal would lie from an order refusing it. An order refusing to stay execution is not a decree within the meaning of S. 2, Civil P. C. In the third place that rule does not apply to the facts of this case, because the defendant was not the holder of a decree of the Court in which the suit was pending and to which the application was made. The rule is applicable only as regards the holder of a decree of "such Court." The appeal is accordingly dismissed with costs, including in this court-fees on the higher scale.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 121 (2)

MEARS, C.J. AND SEN, J.

Subhan Mochi and *another*—Plaintiffs—Applicants.

v.

Babu Ram Singh and *others*—Defendants—Opposite Parties.

Privy Council Appeal No. 28 of 1929, Decided on 8th November 1929 for leave to appeal to His Majesty.

Civil P. C., S. 109—Right of procession claimed by Mahomedans against Hindus is of general importance and fit case for appeal to Privy Council.

Where a declaration that Mahomedans should be authorized to take out "duldul" procession on 4th day of Moharram of every year without any obstruction or interference is the relief sought for, the matter is of general importance to both the communities Hindus and Manomedans and is in language of S. 109, otherwise a fit case for appeal to His Majesty in Council [P 122 C 1]

Nizamuddin Ahmad Siddiqui—for Applicants.

P. L. Banerji—for Opposite Parties.

Judgment.—This is an application for leave to appeal to His Majesty in Council, and the history of the litigation is as follows: In the year 1911 some quarrels broke out in Rasra, a Tahsil in the district of Ballia, between Hindus and Mohammedans over the slaughter of cows. It is said that both communities from that time onwards were not unwilling to annoy the other,

and it is also said that in 1920 a serious quarrel arose over an innovation on 4th day of Moharram, the innovation being a procession called the "dul dul" procession, which never previously had been held there. The Sub-Divisional Officer intervened with the hope of getting the relations of the Hindu and Mohammedan communities on a better footing and on 7th October 1920 an agreement was signed. The plaintiffs contended that this was not a representative agreement. The defendants contended that it was. Considerable difficulties are said to have arisen on each occasion of Moharram from 1920 until this present suit was instituted. The relief that was claimed was that the Court might declare that the plaintiffs were authorized to take out the "dul-dul" procession on 4th day of Moharram of every year without any obstruction or interference. It asked for a perpetual injunction issued to the Hindus of qasba Rasra and the Secretary of State restraining them from any obstruction in future to the taking out of that procession. The relief asked for was granted by the Court of first instance and that decision was upheld on 31st August 1925. The matter came up in second appeal before this Court. The Judges, in second appeal, set aside the decree of Ali Ausat, and it is contended that the effect of the second appeal is very wide in its application and of great importance not merely to the Mohamedan community in qasba Rasra, but generally. Dr. Siddiqui, who appears for the proposed appellants, says that the judgment in fact amounts to an assertion that it is incompetent for members of the Mohamedan community to take out any new religious procession at all. The valuation of the suit is, of course, nominal. The relief that is wanted is the declaration sought for. We are of opinion that this is a matter which is of general importance to both communities Hindus and Mahomedans and that it is, in the language of S. 109, Civil P. C., otherwise a fit case for appeal to His Majesty in Council. Under these circumstances we grant leave to appeal.

R.M./R.K. *Leave to appeal granted.*

A. I. R. 1930 Allahabad 122

MUKERJI AND BOYS, JJ.

Moti Lal and *others* — Defendants—Appellants.

v.

Nandan and *another* — Plaintiff and Defendants—Respondents.

First Appeal No. 110 of 1928, Decided on 18th October 1929, from order of Sub-Judge, Muttra, D/- 17th April 1928.

(a) Civil P. C., S. 104—No second appeal lies from result of appeal under O. 43, R. 1 (a).

No second appeal is allowed from the result of appeal under O. 43, R. 1 (a). The Court cannot, framing his order as an order passed under O. 41, R. 23, permit an appeal which would not otherwise lie. If the argument, that where the Judge purports to pass an order under O. 41, R. 23, an appeal is permissible by virtue of O. 43, R. 1 (u), is allowed there would be a conflict between Cl. (a) and Cl. (u) of O. 43, read in the light of S. 104. [P 123 C 1]

(b) Civil P. C., O. 43, R. 1 (u) (as amended by Allahabad High Court) — Language is changed to cover case of remand not coming within terms of O. 41, R. 23—Still second appeal is not permissible from such orders.

It happens that an order of remand is made from time to time which does not come within the four corners of the language of R. 23, O. 41, and yet such an order is justified. It is to cover a case like that the High Court of Allahabad changed the language of Cl. (u), so as to cover all possible orders of remand. But it cannot be said that a second appeal could be permitted from orders from which no second appeal is otherwise allowed. [P 123 C 1]

(c) Civil P. C., S. 115—No revision lies where Court deciding wrongly acts within jurisdiction.

The fact that the Court below acts wrongly would not invoke the revisional powers of the High Court when the Court below acts within jurisdiction and there is no question of law to be considered. [P 123 C 2]

S. C. Das - for Appellants.

U. S. Bajpai — for Respondents.

Judgment.—The plaintiff who is one of the respondents before us instituted the suit out of which this appeal has arisen for recovery of Rs. 150 principal amount and some interest on certain allegations which briefly come to this that the defendants were liable to make good the money to him (the plaintiff) as the heir of one Parsotam by virtue of certain agreements. The defence, inter alia, was that the suit was not cognizable by the Court at Muttra.

The learned Munsif who heard the case accepted the plea of the defendants and ordered the plaint to be returned to the plaintiff's pleader for presentation

to the proper Court. The plaintiff thereupon filed an appeal before the learned Subordinate Judge of Muttra. That learned Judge held that the suit was cognizable by the Munsif of Muttra and by an order which is complained of dated 17th April 1928, reversed the order of the Munsif.

The first point that arises for decision is whether an appeal would lie from the order of the learned Subordinate Judge.

The learned counsel for the appellant has argued that whatever might be the correct and proper order that should have been passed by the learned Subordinate Judge, he did purport, as a matter of fact, to pass an order under O. 41 R. 23 Civil P. C. and therefore by virtue of Cl. (u), R. 1, O. 43, Civil P. C. an appeal was permissible from the "order of remand" to this Court.

We are of opinion that this interpretation is not correct. It is true that the learned Judge did purport to pass an order under O. 41, R. 23, Civil P. C. He was, however, hearing an appeal allowed under O. 43, R. 1 (a). No second appeal is allowed from the result of such an appeal by virtue of the provisions of S. 104, Civil P. C. The learned Subordinate Judge, by framing his order as an order passed under O. 41, R. 23, Civil P. C., could not permit an appeal which would not otherwise lie. If we allow the interpretation which the learned counsel for the appellant would put, there would be a conflict between Cl. (a) and Cl. (u), O. 43, read in the light of S. 104, Civil P. C. The correct interpretation of Cl. (u), R. 1, O. 43 is this. Before the amendment made by the Allahabad High Court of this Cl. (u) the language of it stood as follows :

"Clause (u)—An order under R. 23, O. 41 remanding a case where an appeal would lie from the decree of the appellate Court."

It happens that an order of remand is made from time to time which does not come within the four corners of the language of R. 23, O. 41, Civil P. C., and yet such an order is justified. It was to cover a case like that that the High Court of Allahabad changed the language of Cl. (u) so as to cover all the possible orders of remand. But it was never contemplated and could never have been contemplated that, by altering the language of Cl. (u) a second appeal should be permitted from orders from which no second appeal is otherwise allowed. In the result we are of opinion that this appeal is not competent.

We were asked by the learned counsel for the appellant to treat the case in revision and to hear him. The decision of the case depends on a consideration of the facts of the case and no question of law has to be considered. Besides, the Court below acted within its jurisdiction and if it went wrong, assuming it did go wrong, that fact would not invoke the revisional powers of the High Court. In the circumstances, we do not think that we should take up the matter in revision at all supposing that it was otherwise a fit case to be taken up in revision. The appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 123

DALAL, J.

Ram Sarup—Decree-holder — Appellant.

v.

Mahomed Ubaidulla Khan—Objector —Respondent.

Execution Second Appeal No. 136 of 1929, Decided on 21st November 1929, from decree of Dist. Judge, Meerut, D/- 17th December 1928.

(a) Limitation Act, S. 20—Money order coupon in handwriting of debtor is sufficient for purposes of S. 20.

Where the money order coupon which requests the credit of the sum sent towards the debt is in the handwriting of the debtor, the writing amounts to the fact of payment appearing in the handwriting of the person making the same as required by S. 20, and fresh period of limitation should be computed from the date of the payment: *A. I. R.* 1926 *Cal.* 510, *Foll.*

[P 124 C 1]

(b) Civil P. C., O. 21, R. 2 (1)—Certificate by decree-holder under O. 21, R. 2 (1) is not application and can be made at any time.

A certificate by decree-holder under O. 21, R. 2 (1), of a payment made to him out of Court is not an application and can be made at any time. A mention in col. 5 of the application for the execution is sufficient certification under the law: *A. I. R.* 1929 *P.C.* 19, *Foll.*

[P 124 C 1]

Panna Lal—for Appellant.

S. N. Mukerji—for Respondent.

Judgment.—The view of law taken by the lower appellate Court is not correct. The final decree was passed on 29th June 1922. It was revived on 5th March 1925 under S. 20, Lim. Act. On 5th March 1925, the judgment-debtor

sent a certain sum in payment of the debt, and the money order coupon which requested credit of this sum towards the debt was in the handwriting of the judgment-debtor. This writing amounts to the fact of the payment appearing in the handwriting of the person making the same. Where a part of the principal of a debt is before the expiration of the prescribed period paid by the debtor a fresh period of limitation shall be computed from the time when the payment was made. Such a writing was considered to be a writing as required by S. 20, Lim. Act in *Ramkumar Sewchand Roy* v. *Nanuram Poddar* (1). A fresh period of limitation, therefore, would be computed from 5th March 1925. Subsequently a similar payment was made by the judgment-debtor on 30th October 1925 and a fresh period of limitation would run from that date. The application for execution having been made on 3rd May 1927, was within time.

The learned Judge of the lower appellate Court was of opinion that these payments cannot be recognized by the civil Court, and therefore, the writing cannot be used to start a fresh period of limitation, because they were not certified to the executing Court. There is, however, such a certificate in the application for execution, dated 3rd May 1927 in Col. 5 of the application. It has been held by the Privy Council in *Raja Shri Prokash Singh* v. *Allahabad Bank Ltd.* (2) that a certification by a decree-holder under O. 21, R. 2 (1) of a payment made to him out of Court is not an application and can be made at any time. A mention in Col. 5 of the application for execution is sufficient certification under the law.

I set aside the decree of the lower appellate Court and restore the decree of the first Court with costs of this Court and of the lower appellate Court.

R.M./R.K. *Decree set aside.*

(1) A. I. R. 1926 Cal. 510=53 Cal. 163.
(2) A. I. R. 1929 P. C. 19=3 Luck. 684=56 I. A. 80 (P.C.).

A. I. R. 1930 Allahabad 124

MUKERJI AND YOUNG, JJ.

Mohammad Abdullah Khan—Plaintiff—Appellant.

v.

Ford & Macdonald Co. Ltd., Aligarh—Defendant—Respondent.

Second Appeal No. 1707 of 1926, Decided on 14th November 1929, against decree of Second Addl. Sub-Judge, Aligarh. D/- 25th August 1926.

(a) Limitation Act, S. 19—Entry in account books unsigned is no acknowledgment.

An entry in the account books unsigned by the party against whom the money is claimed does not save limitation : 34 *All.* 464, *Foll.*

[P 125 C 1]

(b) Limitation Act, S. 19 — Letter — If inevitable deduction from admission is acknowledgment of liability to pay although doubtful on which side balance would lie it is sufficient acknowledgment.

If from the letter it appears that inevitable deduction from the admission is that the party against whom money is claimed acknowledged his liability to pay his debts if the balance should be ascertained to be against him the statement is sufficient acknowledgment. Even where it is doubtful on which side the balance would lie the statement is sufficient acknowledgment within the meaning of S. 19: 33 *Cal.* 1047 (*P.C.*), *Rel. on.*; *A.I.R.* 1925 *All.* 340, *Ref.*

[P 125 C 1]

H. M. Khwaja—for Appellant.

S. K. Das—for Respondent.

Judgment.—This is a plaintiff's appeal. The plaintiff brought a suit alleging that arrears of pay were due to him and that he had paid money for and on behalf of the defendant company. He claimed in all on account of pay Rs. 185 and on account of money that he had paid on behalf of the defendant company the sum of Rs. 206. He also claimed a certain amount of interest on the amount due to him.

The pay was for November and December 1922 and for ten days in January 1923. The plaintiff left the employment of the defendant or was dismissed on 11th January 1923. On 9th January 1926 the suit was filed. Both the trial Court and the lower appellate Court have found that the claims on both heads with the exception of ten days' pay in January 1923 are barred by limitation. The plaintiff on appeal and the Courts below relied upon a letter written by the managing director of defendant company on 25th March 1924 as an acknowledgment. This would start the period of limitation running afresh.

The defendant also relied in the Courts below on an entry in the account books of the defendants, as saving limitation. Dealing with the last point first, it is quite clear to us that such an entry in account books, unsigned by the party against whom the money is claimed does not come within S. 19, Lim. Act and cannot save limitation. That matter has already been decided in this Court in the case of *Juggi Lal* v. *Sriram* (1).

As regards the letter relied upon, it was in these terms:

"As I am leaving for England in a day or two, as you are well aware, I am unable to go into any more of your affairs. The details of your account are with Chiranji Lal in our Delhi office and if you will see him, he will be pleased to settle you up."

It is contended on behalf of the plaintiff-appellant that this is a sufficient acknowledgment within the meaning of S. 19, Lim. Act. In our opinion, the matter is concluded by the decision of the Privy Council in *Mani Ram Seth* v. *Rup Chand* (2). In that case, the words relied upon were :

"For the last five years, he (the respondent) had open and current accounts with the deceased."

Their Lordships said that it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debts to Moti Ram or his representatives if the balance should be ascertained to be against him.

This decision amounts to this that even, where it is doubtful on which side the balance would lie such a statement is sufficient acknowledgment within the meaning of S. 19. In this particular case which we have to decide, the words used are even stronger than those used in the case of *Mani Ram Seth* v. *Rup Chand* (2); for the managing director, by his words, clearly implies that there is some money due to the plaintiff. There is no question here of a possibility of some money being owed to the defendant by the plaintiff. The case of *Mani Ram Seth* v. *Rup Chand* (2) has already been considered by this Court in the case of *Seth Lal* v. *Beni Prasad* (3). It was decided in that case that where the writer of a letter admitted the existence of a running account and stated that his representatives would compare the accounts and pay what is found to be due, that amounted to a clear admission of liability under S. 19. One of us was a party to the judgment in that case and neither of us sees any difference in principle between that case and the one under appeal. The appeal must be allowed and the judgment of the lower appellate Court set aside and the case sent back to the lower appellate Court under O. 41, R. 23, for trial on the merits. The appellant is entitled to the costs of this appeal in any event.

V.B./R.K. *Appeal allowed*

(1) [1912] 34 All. 464=16 I. C. 146=10 A. L. J. 1.
(2) [1906] 33 Cal. 1047=2 N.L.R. 130=33 I. A. 165 (P.C.).
(3) A. I. R. 1925 All. 340.

A. I. R. 1930 Allahabad 125

MUKERJI AND YOUNG, JJ.

Harnath—Plaintiff—Appellant.

v.

Mt. Phool Koer—Defendant—Respondent.

Second Appeal No. 602 of 1926, Decided on 12th November 1929, against decree of Dist. Judge, Budaun, D/- 23rd December 1925.

Adverse possession—Cosharers — Lambardar continuing in possession after partition and delivery of possession—Earliest moment when possession can become adverse is when cosharer is entitled to ask for profits.

Where a lambardar continues in possession of the share in the zamindari property of one of the cosharers consequent upon partition and delivery of possession of the same, the earliest moment his possession can become adverse is the date when the cosharer would be entitled to ask for "profits." [P 126 C 1]

Balmukund—for Appellant.

A. M. Khawaja—for Respondent.

Judgment.—The facts of this case briefly are these; The pedigree on p. 9 will show the relationship between certain persons whose names it would be necessary to mention. Khemai, it appears, was the last survivor of three brothers, Bhagirath, Girdhari and himself. Parbati was in possession of a 1/3rd share of the family property as the widow of her husband, Bhagirath. Khemai brought a suit, being suit No. 30 of 1908, against Mt. Parbati to recover 2/3rds share from Parbati. The suit was decreed with respect to 1/3rd only, it being held that Khemai was in possession of 1/3. The result was that Parbati was held to be entitled to 1/3 share and Khemai was held to be en-

titled to 2/3. Khemai obtained delivery of possession over the property decreed to him on 2nd August 1910. Khemai has died and it has been proved that the plaintiff-appellant, Harnath, is his sister's son and, therefore, heir, in the absence of any nearer relation. The suit of Harnath was for recovery of Khemai's entire property and it succeeded in the Court of first instance in respect of 2/3 share. In appeal by the transferees of Parbati the suit was dismissed on the ground that the possession of Mt. Parbati was adverse as against Khemai from the date of delivery of possession to the latter, namely 3rd August 1910.

In this Court it has been argued that the possession of Mt. Parbati, who was the lambardar, was Khemai's possession because she held as the agent of all the cosharers in the property, and that, at the earliest moment when Parbati's possession could become adverse, was 1st August 1911, on which date Khemai would be entitled to ask for "profits."

We think that this contention is right. The case is to be distinguished from other cases where the judgment-debtor is under no obligation to hold the property on behalf of the decree-holder. The fact that Parbati was the lambardar of the zamindari property made her an agent for the decree-holder, Khemai, and, therefore, Khemai was in constructive possession of the property through Parbati, till at least 1st August 1911, when "profits" could be demanded. In this view, the suit with respect to the 1/3 share, which was decreed to Khemai, would be within time.

The principle enunciated above will not apply to house property or to the 1/3 share over which Khemai himself was in possession and which was, therefore, not in suit in the earlier case.

The result is that the appeal succeeds in part. We decree the claim for possession of 1/3 share over the properties Nos. 1, 2, 3 and 5, as shown in the schedule attached to the plaint at p. 8 of the paper book. The rest of the claim is dismissed. The plaintiff-appellant will have 1/3 of his costs in all the Courts and the contesting defendants will have their costs in proportion to their success (2/3) in all the Courts.

V.B./R.K. *Appeal partly allowed.*

A. I. R. 1930 Allahabad 126

SEN AND NIAMATULLAH, JJ.

Mt. Rukmin Kuer—Applicant.

v.

Mt. Ram Piari—Opposite Party.

Civil Revn. No. 143 of 1928, Decided on 15th October 1929, against order of Addl. Sub-Judge, Allahabad, D/- 21st April 1928.

Civil P. C., O. 43, R. 1 (w)—Review allowed on ground that judgment was unfair to one party—Remedy is appeal from decree and not appeal from order granting review—Civil P. C., O. 47, R. 7.

Order 43, R. 1 (w) has to be read subject to O. 47, R. 7. And so where a Court amends its own error upon the ground that the judgment was wrong or unfair to one of the parties the remedy of person aggrieved by the review of judgment lies by an appeal from the decree passed on review and not by an appeal from the order granting the review under the circumstances. The sufficiency or otherwise of the reason for granting of a review outside the limit of O. 47, R. 7 does not invest the person aggrieved with a right under Civil P. C, to appeal: 40 *All.* 68; *A. I. R.* 1925 *All.* 552; 41 *Cal.* 746 and 27 *All.* 695, *Rel. on*; *A. I. R.* 1922 *P. C.* 112, *Ref.* [P 127 C 2]

N. P. Asthana—for Applicant.

U. S. Bajpai—for Opposite Party.

Judgment.—This is an application for civil revision under S. 115, Civil P. C., and has been made by the plaintiff in the action under the following circumstances: A suit for partition having been instituted a preliminary decree was passed upon a compromise. This was followed by a final decree. A civil Court amin was deputed to make a partition of the house property. He carried out the order, prepared lots and assigned one portion of the house to the plaintiff and another portion to the defendant. An application was presented by Mt. Ram Pyari defendant in the Court of the Munsif, West Allahabad, on 8th April 1927 under O. 47, R. 1, Civil P. C., in which she asked for a review of judgment inter alia on the ground that after the passing of the preliminary decree:

"Defendant 1 or her pleader or defendant 2, her son, was not at all given any information of the preparation of the decree absolute, nor did the Amin send any notice regarding measurement. Neither any information of the receipt of the Amin's report was given, nor was any information on the drawing of lots given. Narain Das, the husband of the plaintiff got all the proceedings taken in collusion with the amin."

The application was hotly contested and the record teems with applications

and counter applications which illustrate the rancour and hatred entertained by one party for the other and it is painful to have to wade through the long and unsavoury catalogue of mutual recriminations.

The learned Munsif made a local inspection. He was convinced of the truth of the petition. He was of opinion that the lots as formed by the amin were unequal. He held therefore that there were sufficient grounds for review and granted the review accordingly.

An appeal was preferred by the plaintiff under O. 43 Cl. 1 (w), Civil P. C., which was heard by Mr. S. M. Saiduddin, the Additional Subordinate Judge of Allahabad. A preliminary objection was raised before him on the ground that no appeal lay. He sustained the preliminary objection and dismissed the appeal.

It is from the aforesaid order that the application for revision has been presented to this Court.

Order 43 Cl. 1 (w) gives a right of appeal from an order under R. 4, O. 47, Civil P. C., granting an application for review. This order, however, should be read subject to O. 47, R. 7, Civil P. C., which provides that

"an order of the Court rejecting the application shall not be appealable, but an order granting an application may be objected to on the ground that the application was (a) in contravention of the provisions of R. 2, (b) in contravention of the provisions of R. (4), or (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause. Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit."

It is clear that an appeal lies from an order only in the three cases mentioned above. To hold otherwise would be to make the provisions of sub-R. (1) so far as they relate to appeal entirely superfluous. This is the view which has been taken in *Kurshed Alam Khan* v. *Rahmat Ullah Khan* (1): *Madaori Saran* v. *Parbati* (2) and in *Hari Charan* v. *Baran Khan* (3). The reason for the rule is not far to seek. There is nothing in law to bar the inherent power of the Court to amend its own error upon the ground that the judgment was wrong or was unfair to one of the parties. The remedy of the person aggrieved by the review of judgment lies by an appeal from the decree passed on review and not by an appeal from the order granting the review under these circumstances. In the present case it is clear that the order granting the review has not been challenged upon any one of the three grounds mentioned in O. 47, R. 7, Cls. (a), (b) and (c). It has been argued that the Court of first instance having granted the review upon what it considered as sufficient grounds, the alleged sufficiency of the grounds could be challenged in appeal under O. 43, Cl. 1 (w). It may be pointed out that their Lordships of the Judicial Committee in the case of *Chajju Ram* v. *Neki* (4), made a review of all the authorities and laid down the rule that "any other sufficient reason" in O. 47, R. 1, Civil P. C., means grounds analogous to those specified in the portion immediately preceeding these words. The ground upon which the review was sought was not a ground ejusdem generis with the grounds set out in the earlier part of O. 47, R. 1, Civil P. C. The right of appeal being restricted to the three grounds set out in O. 47, R. 7, Civil P. C., and the review having been granted upon a ground outside the purview of the said rule, no appeal lies. The sufficiency or otherwise of the reason for granting a review outside the limits of O. 47, R. 7, Civil P. C., does not invest the person aggrieved with the right, under the Civil Procedure Code to appeal. *Ali Akber* v. *Kurshed Ali* (5). The case referred to above is clearly in point. The judgment of the Court below is right. We dismiss this application with costs.

V.B./R.K. *Application dismissed.*

(1) [1918] 40 All. 68=43 I. C. 490=15 A. L. J. 899.
(2) A. I. R, 1925 All. 552=47 All. 891.
(3) [1914] 41 Cal. 746=25 I. C. 903.
(4) A. I. R. 1922 P. C. 112=3 Lah. 127 = 49 I. A. 144 (P. C.)
(5) [1905] 27 All. 695=2 A. L. J. 465= (1905) A. W. N. 154.

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MUKERJI AND BENNET, JJ.

Jaggu Mal—Plaintiff—Appellant.

v.

Brij Lal and *another*—Defendants—Respondents.

Letters Patent Appeal No. 48 of 1929, Decided on 15th November 1929,

(a) Civil P. C., S. 96—Dispute regarding land—Parties ask for departure from ordinary course of procedure calling upon Court

to inspect spot and decide question from oral statements at spot—Court deciding question accordingly—No appeal lies.

Where in a suit with regard to disputes concerning land, the parties ask for a departure from ordinary course of procedure and require the Court to decide the questions of fact by local inspection and oral statement on the spot, and the Court agrees to do so and accordingly decides the question, it is not open for a party then to come forward and ask the appellate Court to decide the same question. [P 128 C 1]

(b) Practice—Appeal—"Local Inspection."

An appellate Court is not bound to make any local inspection. [P 128 C 1]

Shabd Saran—for Appellant.

Judgment.—This a Letters Patent Appeal against the decree of a learned Judge of this Court refusing the appeal of one Jaggu Mal who was plaintiff in one suit and defendant in the other. These suits related chiefly to parnalas and an application was jointly made by the parties to the Munsif asking him to make an inspection of the locality to "see and decide" the matters in question and in place of evidence the Munsif might ask questions on the spot. Accordingly, the Munsif made a decision and an appeal was brought by Jaggu Mal against that decision. We agree with the learned Judge of this Court in holding that it was not open to Jaggu Mal to bring in an appeal after he had agreed to the Munsif deciding the case in the manner mentioned above. It is not open to a party to ask for a departure from the ordinary course of procedure and require a Court to decide questions of fact in this manner by local inspection and oral statements on the spot, and then come forward and ask an appellate Court to decide the same questions. For one thing, there is no evidence on the record which would enable an appellate Court to come to a decision. It was argued that an appellate Court might make a local inspection. Firstly, an appellate Court is not bound to make any local inspection and secondly, even if such an inspection were made, the oral statements on the spot would naturally be different from those made to the Court of first instance. Further, the impression created on the mind of the Munsif would be possibly different from that created on the mind of the appellate Court. Accordingly, we dismiss this Letters Patent Appeal.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 128

NIAMATULLAH AND BENNET, JJ.

Mahmood Ali and *others*—Defendants—Appellants.

v.

Chinki Shah and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1657 of 1926, Decided on 12th November 1929, against decree of First Sub. Judge, Cawnpore, D/- 3rd May 1926.

(a) Contract Act, S. 68—Property of minor threatened to be attached and sold for revenue—Creditor advancing loan to avert it, is entitled to be reimbursed from minor's property.

Where the properties of a minor are threatened to be attached and there is imminent danger of the same being sold for revenue, if a creditor realising the difficulties minor was in, advances money which is utilised to avert the danger the creditor advancing money is entitled to be reimbursed from the property of minor. [P 129 C 2]

(b) Contract Act, S. 68—Word "necessaries" means money urgently required for requirements of minor.

Word "necessaries" in S. 68 includes money urgently needed for the requirements of a minor and cannot be restricted to what is necessary for elementary requirement of minors such as food and clothing : 32 *All.* 325 ; 7 *Cal.* 140 and 21 *Cal.* 872, *Ref.* [P 129 C 2]

Shiva Prasad Sinha—for Appellants.

A. M. Khwaja—for Respondents.

Judgment.—This is a second appeal preferred by defendants 1 to 5 against the decree passed by the First Subordinate Judge of Cawnpore modifying the decree of the Court of first instance in a suit brought by the plaintiff-respondent for recovery of Rs. 637-7 being Rs. 471-6 principal and Rs. 166-1 interest at the rate of one per cent per mensem on foot of a promissory note executed by one Mir Wilayat Husain (defendant 7) under the following circumstances. Defendants 1 to 5 were minors on the date of the pronote. Except one who has since attained majority they are still minors. Mir Wajid Ali (defendant 6) was their certificated guardian. He is a very old man being aged 75, and probably for that reason left the affairs of the minors to be looked after by his son Mir Wilayat Husain, defendant 7. Default was made in payment of Government revenue in respect of the minor's property. Both the lower Courts have found that the Naib Tahsildar arrived to attach the property belonging to the minors for realisation of Government revenue. It

was under those circumstances that Dindayal defendant 8 advanced the necessary sum of Rs. 471-6 on foot of the pronote now sued on for payment of Government revenue. But for this timely assistance the property of the minors would have been attached and sold for satisfaction of Government revenue. Defendant 8, the original creditor, assigned his rights to the plaintiff-respondent, who has accordingly brought the present suit for recovery of money due from the estate of the minors. The Court of first instance held that the minors were not liable for payment of what may be found due to the plaintiff-respondent. A decree was, in that view, passed against defendant 7, the executant of the pronote. On appeal by the plaintiff-respondent the lower appellate Court held that the pronote executed by defendant 7 was not binding on the minors, who cannot be made liable on foot thereof. But in view of the circumstances found by it, which we have already mentioned, it held that the provisions of S. 68, Contract Act, justified a decree being passed against the estate of the minors for what had been advanced to satisfy their "necessity." It should be mentioned that defendant 6, the guardian, was according to the finding of the lower appellate Court, present when the transaction ending in the execution of the pronote was entered into. The lower appellate Court apparently was of opinion that though he did not execute the pronote, he is to be regarded as a consenting party to the transaction of loan. The decree was, for that reason, passed not only against defendants 1 to 5, the minors, and defendant 7, the executant of the pronote, but also against the gaurdian, defendant 6, who had not joined in execution of the pronote. Defendant 7 has acquiesced in the decree passed by the lower appellate Court and nothing further need be said as regards him. Defendant 7 has likewise not appealed from the decree passed against him by the lower appellate Court.

It is contended on behalf of defendants 1 to 5 that S. 68, Contract Act, relied on by the lower appellate Court is not applicable to the circumstances of the case. It is argued that no "necessaries" were supplied to them, but the money advanced by defendant 8 was utilized for payment of Government revenue, which ought to have been paid out of the income derived from the zamindari property in respect of which revenue was in arrears. We do not think that the scope of S. 68, Contract Act can be so narrowed down as to exclude a case of this kind. It may be that the guardian of the appellants ought to have paid the Government revenue before incurring any other expenses out of the income in his hands, but antecedent mismanagement will not alter the circumstances which existed at the time when the loan was advanced by defendant 8. It cannot be disputed that the property of the minors was threatened to be attached and there was imminent danger of the same being sold for satisfaction of revenue. If, therefore, defendant 8, realizing the difficulties the minors were in, advanced the money which was applied to avert the danger with which they were faced, we are of opinion that the terms of S. 68, Contract Act are clearly applicable. The word "necessaries" in S. 68 certainly includes money urgently needed for the requirement of minors and cannot be restricted to what is necessary for elementary requirements of the minors such as food and clothing.

In *Nandan Prasad* v. *Ajudhia Prasad* (1), S. 68, Contract Act was applied by a Full Bench of this Court to a case in which money had been advanced for the performance of the marriage of the sister of the minor whose estate was sought to be made liable. It was found that the money was really needed for the performance of her marriage. It was held that the money should be considered as one "supplied for necessaries' within the meaning of S. 68, Contract Act. Reference may also be made to *Watkins* v. *Dhunnoo Baboo* (2) and *Sham Charan Mal* v. *Debya Singh* (3), which are in point. In view of the circumstances of the case and the state of the law we have indicated, the decree passed by the lower appellate Court is correct. This appeal must fail and is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1910] 32 All. 325=5 I. C. 413=7 A. L. J. 236.
(2) [1881] 7 Cal. 140=8 C. L. R. 433.
(3) [1894] 21 Cal. 872.

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NIAMATULLAH AND BENNET, JJ.

Sheo Bandhan Singh and *others*—Plaintiffs—Appellants.

v.

Sahdeo Prasad Singh—Defendant—Respondent.

Second Appeal No. 1640 of 1926, Decided on 12th November 1929, against decree of Dist. Judge, Allahabad, D/-28th April 1926.

*** Evidence Act, S. 11—Deed barred by S. 49, Registration Act, is admissible in evidence under S. 11 if inconsistent with fact in issue—Registration Act, S. 49.**

A deed which is not admissible in evidence on account of its being barred under S. 49, Registration Act, can be admitted in evidence under S. 11 if it is inconsistent with fact in issue. [P 130 C 2]

A. P. Bajchi, *Ambika Prasad Dube*, *H. C. Mukerji* and *Kedar Nath Sinha*—for Appellants.

Mushtaq Ahmad—for Respondent.

Judgment.—These second appeals are brought by the plaintiffs against decree of the lower appellate Court. The plaintiffs brought three suits on the allegation that the plaintiffs belonged to two branches of the family of Ajaib Singh and the defendant Pudai Singh now represented by his son Sahadeo Singh belonged to the third branch. The plaintiffs alleged that this family was joint up to the year 1322 F when there was a partition. The plaintiffs alleged that some property remained undivided in that partition, and accordingly they sued for partition of that undivided property. Further the plaintiffs alleged that some property allotted to them in the partition was in the possession of the defendant and some of these suits are brought on that basis. The defence mainly was that in 1308 F there had been a partition, and that the partition set up by the plaintiffs in 1322 F was untrue. On behalf of the plaintiffs certain chithas were produced which gave details of property allotted to the plaintiffs in the partition of 1322 F. The defence, on the other hand, produced a deed of relinquishment of the date of that partition which showed that certain items of property allotted in the chithas of the plaintiffs to the plaintiffs were in fact relinquished by the plaintiffs in favour of the defendant. One of the grounds of appeal before us is that this deed of relinquishment should not have been admitted into evidence, because it was unregistered, and that its admission was barred by S. 49, Registration Act. It is quite true that section prevents the use of the deed of relinquishment for any purpose affecting immovable property or being evidence of any transaction affecting immovable property. But we consider that the document was correctly admitted under S. 11, Evidence Act, because it is inconsistent with the facts in issue, i. e., with the chithas relied on by the plaintiff.

The lower appellate Court has found as a fact that the chittas produced by the plaintiffs are forgeries and that there was not a partition in 1322 F such as is evidenced by the chithas. This is a finding of fact and is not open to challenge is second appeal. We consider therefore that these second appeals must fail so far as they relate to the deed of relinquishment. The Court of first instance had dealt with one item of property as follows. In para. 7 of the plaint it was alleged that plaintiff 1 and defendant 1 obtained a decree for Rs. 823-9-0 in suit No. 101 of 1911 on 2nd June 1911, and that the defendant 1 alone realized that amount on 17th April 1921. In the written statement it was admitted that the decree was passed and the amount was realized although the defendant stated that he did not know on what date. No further evidence on the point appears to have been tendered and the case put forward by the defence that there had been a transfer of two bonds by defendant 1 to plaintiff 1 in satisfaction of his share of this decretal amount was not proved Accordingly the Court of first instance granted a decree in favour of the plaintiff for Rs. 549-0-8 with proportionate costs, that is a share of two-thirds in favour of the plaintiffs. The lower appellate Court reversed this finding to the extent of decreeing only one-half to the plaintiffs. The grounds for this decision appear to be the fact that the decree was in the names of two persons plaintiff 1 and defendant 1, and accordingly the lower appellate Court thought that these persons were entitled to share the decretal amount in equal shares. But it appears to us that in the absence of anything to the contrary the natural

presumption is that this decree was passed on a loan from the joint family and accordingly the decretal amount ought to have been divided in the shares of the joint family and that after the partition the plaintiffs should receive a two-third share. Accordingly we allow the appeals to this extent that we restore the decree of the Court of first instance of Rs. 549-0-8 to the plaintiffs with proportionate costs throughout. The defendants will get proportionate costs of the appeals in this Court.

V.B./R.K. *Order accordingly.*

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NIAMATULLAH, J.

Chatur Prasad—Bara Bacha and *others*—Plaintiffs—Appellants.

v.

Baijnath Prasad and *another*—Defendants—Respondents.

Second Appeal No. 95 of 1928, Decided on 20th November 1929, from a decree of Sub-Judge, Gazipur, D/- 31st October 1927.

(a) Limitation Act, S. 5—Respondent living in different province dying four days before filing of appeal—Appellants not aware of death — Application to amend memo of appeal made after expiry of limitation—Time was extended.

Four days before filing of an appeal respondent had died. The appellants were not aware of the death. An application was made to make necessary additions after the expiry of limitation. The Court was satisfied that the error was bona fide and the respondent was living in different province.

Held: that period of limitation could be extended. [P 132 C 1]

*** (b) Civil P. C., S. 107; O. I. R. 10, and S. 153 — Memorandum of appeal can be amended as regards parties to correct bona fide error.**

Although an appeal directed against a dead man is not appeal, if the name of such dead man appears on the petition of appeal instead of his legal representatives, through a bona fide error the petition of appeal can be allowed to be amended under the provisions of O. 1, R. 10, read with Ss. 107 and 153.

[P 131 C 2]

(c) Civil P. C., S. 153—"Any proceeding".

The expression "any proceeding" is general enough to include filing of an appeal.

[P 132 C 1]

M. L. Agarwala—for Appellants.

Janki Prasad—for Respondents.

Judgment.—This appeal arises out of a suit brought by the present appellants and one Debi Prasad, who was plaintiff 1 in the array of parties, for demolition of certain buildings made by the defendant-respondents. The suit was decreed by the Court of first instance, but has been dismissed by the lower appellate Court on appeal by the defendants.

It appears that Debi Prasad died on 16th June 1927. The appeal was filed in the lower appellate Court on 20th June 1927, i. e., four days after the death of Debi Prasad. He was, however, shown as the first respondent. On 15th July 1927 an application was made by the defendants (appellants before the lower appellate Court) asking for permission to implead the legal representatives of Debi Prasad and for extension of time under S. 5, Lim. Act, on the ground that they were not aware of the fact of Debi Prasad's death when the appeal was filed. The lower appellate Court granted this application, being satisfied that the mistake in impleading Debi Prasad as a respondent was bona fide and that the circumstances justified the application of S. 5, Lim. Act. On the merits the appeal was allowed and the plaintiffs' suit was dismissed.

The present second appeal has been filed by the plaintiffs, and the only question argued on their behalf relates to the order passed by the lower appellate Court on the application dated 20th June 1927 permitting the legal representatives of Debi Prasad to be shown as respondents and extending the period of limitation on cause shown. It is contended that an appeal, which was no appeal in its inception in consequence of a dead man having been shown as a respondent, cannot become a good appeal by a subsequent amendment and by the legal representatives of such respondent being impleaded as respondents. It may be conceded that ordinarily an appeal directed against a dead man is no appeal in law; but it cannot be disputed that bona fide error in petitions of appeal as in case of plaints can be allowed to be amended in appropriate circumstances. I am of opinion that the provisions of O. 1, R. 10, Civil P. C., read with S. 107 of the same Code, enables a Court to allow amendment of petition of appeal and addition of parties as respondents. Dr. Agarwala has referred me to O. 41, R. 20, Civil P. C., in sup-

port of his contention that the powers of the appellate Court in the matter of adding parties is limited by its terms. I am unable to accept this contention. O. 41, R. 20, specifically refers to addition of parties who figured as plaintiffs or as defendants in the original suit. O. 1, R. 10, Civil P. C., is general and read with S. 107 permits addition of parties in appeal in a proper case, assuming, of course, that the addition of a new party in appeal is not objectionable on any other ground. S. 153, Civil P. C., has been applied by the Madras High Court in a case similar to the one before me : see *Gopala Kristnayya* v. *Lakshmana Rao* (1). It provides that the Court may amend any defect or error in any proceeding in a suit.

Read with S. 107, Civil P. C., it will certainly be applicable to appeals. The expression "any proceeding" is general enough to include filing of an appeal. For these reasons I hold that the lower appellate Court did not act contrary to law in allowing the names of legal representatives of Debi Prasad being inserted in the heading of the petition of appeal and the name of Debi Prasad being removed. This being done, the question which at once arose was whether as against the newly added respondents the appeal should be regarded to be within limitation. If the addition had been made before the expiry of the period of limitation, no further question could have arisen. In view, however, of the application dated 15th July 1927 having been made long after the expiry of the period of limitation, the appellants before the lower appellate Court fell back upon the provisions of S. 5, Lim. Act. They succeeded in showing to the satisfaction of the lower appellate Court that they were not aware of the fact of Debi Prasad's death before the appeal was filed, as the latter lived in Chhapra district in another province. Considering all the circumstances, the lower appellate Court extended the period of limitation. The discretion exercised by the lower appellate Court does not seem to have been exercised in an unreasonable manner. This being so, the appeal which the lower appellate Court eventually heard was in form as regards parties and was unaffected by any rule of limitation.

In the view which I take of the questions argued before me this appeal cannot succeed. It is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(1) A. I. R. 1925 Mad. 1210=49 Mad. 18 (F.B.).

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SULAIMAN, AG. C. J. AND KENDALL, J.

G. I. P. Ry. Co. and *others*—Defendants—Appellants.

v.

Jugul Kishore—Mukat Lal—Plaintiffs—Respondents.

First Appeal No. 352 of 1926, Decided on 24th October 1929, from decree of Sub-Judge, Bulandshahr, D/- 30th March 1926.

(a) Railways Act, S. 72—"Deterioration" includes depreciation in value—Contract Act, S. 161.

The words "deterioration" in the risk note is wide enough to include depreciation in value on account of a fall in the price of the goods. The meaning of the word "deterioration" in S. 161 which imposes liability on railway company is the same as in the risk note form B, which lays down special conditions under which the railway company is protected : *A. I. R.* 1924 *All.* 8, *Expl.* and *Dist.*; *A. I. R.* 1929 *All.* 597, *Appl. A. I. R.* 1925 *Nag.* 350, *not, Foll.* [P 134 C 2]

(b) Railways Act, S. 72—Risk note—Liability of railway—Where loss is incurred by consignor, goods being taken by different route, railway company is responsible.

If the goods are taken across a different route, and loss is incurred by the consignor, the carrier, i. e., the railway company, is responsible. When the contract is to relieve the company from liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods during transit, the exemption is only from liability during the transit and when once the goods are diverted from that route the protection ends. Change from ordinary route, therefore, puts an end to the protection given by the risk note : *Neilson* v. *London and North Western Ry. Co.* (1922) and 1 *K. B.* 192; (1922) 2 *A. C.* 263, *Foll.*; *A. I. R.* 1922 *Bom.* 74; *A. I. R.* 1925 *All.* 10; *A. I. R.* 1924 *Bom.* 386 and *A. I. R.* 1928 *Lah.* 899, *Rel. on.* [P 135 C 1]

(c) Railways Act, S. 72 — Intention to exempt must be in unambiguous language.

Where exemption from responsibility is claimed by a railway company on the basis of a risk note, the intention to exempt should be expressed in clear and unambiguous language. [P 135 C 2]

(d) Contract Act, S. 73—Interest should not be granted when full compensation is given to person suffering loss—But interest can be allowed as compensation for loss due to delay in payment.

Difference in prices represents the full amount of compensation to be given under

S. 73, Contract Act, on account of loss sustained by fall of market prices and decree for interest on such amount should not be given. But plaintiff is entitled to interest on account of delay in payment of amount due to him as loss and it can be awarded as compensation calculated on basis of interest. [P 136 C 1]

(e) Railways Act, S. 80 — Plaintiff can implead both companies in suit.

Although S. 80 gives plaintiff the option to sue any of two companies through whom the goods have been carried, it by no means prohibits him from impleading both the companies in a suit. Indeed, in many cases it may be difficult for the plaintiff to know before the institution of the suit on which line the loss actually occurred. [P 136 C 2]

Ladli Prasad Zutshi—for Appellants.

K. N. Katju—for Respondent.

Judgment.—This is an appeal by the railway companies from a decree in a suit brought to recover damages on account of the fall in the price of the goods as a result of an unreasonable delay in delivery. Bales of cotton under two separate consignments were despatched by the plaintiff from Khurja City for Cotton Depot at Bombay on 1st December 1923. One consignment reached Bombay in time and there is no complaint about it. The second consignment was to be sent to Bombay via Jumna Bridge (Agra). The consignment passed Jumna Bridge and reached Jhansi on 7th December 1923 but at that station owing to a mistake by one of the servants of the G. I. P. Ry. instead of being forwarded to Bombay it was sent to Collectorganj, Cawnpore. It remained there for a long time till the mistake was discovered and was ultimately sent to Bombay where it arrived in two lots, the bulk arriving in Bombay on 25th February 1924 and four bales arriving on 24th March 1924. The delivery was taken by the plaintiff of these bales within two or three days of their arrivals. The plaintiff claimed that there was a fall in the price of cotton which resulted in a loss to him and he claimed damages as well as interest on account of such loss alleging that the loss was due to the wilful neglect and negligence of the company's servants.

The defendant companies pleaded that there was no wilful negligence on their part and also urged that they were protected under the special contract entered into between the parties in the form of risk-note B. It was further asserted that the whole transaction had resulted in a net profit to the plaintiff and he was not entitled to get any damages. The claim for interest was also contested.

The learned Subordinate Judge has decreed the claim for damages holding that the consignment in the ordinary course should have arrived at Bombay on 20th December 1923 and that there was an unreasonable delay on account of the negligence of the G. I. P. Ry. Company's servants. He has further held that the prevaillng market rate about the time when the goods arrived at Bombay was Rs. 480 per candy, i. e., two bales. He has therefore given the plaintiff a decree for the difference in the value of the goods calculated at the rate prevailing on the date when the goods ought to have been delivered and the rate that prevailed when the goods actually arrived at Bombay. In addition to the amount he has given to the plaintiff interest in the amount of damages from 20th December 1923 till the 24th November 1924, the date of the institution of the suit.

Several points have been urged in appeal before us. The first question is whether the railway company was protected under the special contract as contained in risk-note form B. The plaintiff despatched the consignment at a special reduced rate and agreed in writing that the said goods may be carried in transit, from Khurja City via Jumna Bridge to Cotton Depot, harmless and free from all responsibility for any loss, destruction or deterioration of or damage to the said consignment from any cause whatever except for the loss of a complete consignment or of one or more packages forming part of a consignment due to wilful neglect of or theft by the servants of the companies. In this case the loss caused to the plaintiff is on account of the difference in the prevailing market prices between the date when the consignment should have arrived and the date when it actually arrived. It is not suggested that there was any inherent deterioration in the quality of cotton but on the findings of the Court below it cannot be disputed that there was a depreciation in the value of the goods on account of the fall in the price.

The first question for consideration before us is whether the word "deterioration" in the risk-note is wide enough

to cover depreciation in value on account of the fall in the market price. On this point the authorities are to some extent conflicting. It has been definitely laid down by the Lahore High Court in the case of *E. I. Ry. Co. Ltd.* v. *Diana Mal Gulab Singh* (1) that a fall in the market value is not contemplated by the use of the word "deterioration" in such note. On the other hand the case of *Madras Railway Co.* v. *Govinda Rau* (2) is some authority for the view that the scope of the word "deterioration" is wide enough to include such a case. Recently there has been a pronouncement by Mukherji, J., in *Bhagwan Das Lachhmi Narayan* v. *B. N. Ry.* (3) that the word "deterioration" does include a loss in the value of the goods consigned owing to a delay in delivery. It has been supposed by the Judicial Commissioners' Court at Nagpur in several cases *B. N. Ry. Co.* v. *Dillu* (*A. I. R.* 1925 *Nag.* 350) that the authority for holding that the word "deterioration" does not imply a depreciation in value is to be found in the case of *E. I. Ry. Co.* v. *Gopi Krishna Kashi Prasad* (4). In that case, however, the decision was not that the plaintiff should get a decree for the fall in the price of the article but it was held that the delay in delivery was so long that the article had become unserviceable and the plaintiff should be given a decree for its total value with interest, and the goods should remain with the defendant company to be disposed of by them. That case is therefore not a direct authority on this point.

That the word "deterioration" can connote the idea of a depreciation in value is borne out by the use of that expression in the judgments delivered jn *Wilson* v. *Lancs. and Yorks. Ry. Co.* (5) which have been referred to by the learned Judges in the Madras case quoted above. In Murray's dictionary as well as in Webster's dictionary the word "deterioration" is taken to be wide enough to mean "become lower or impaired in quality or value."

An additional reason for holding that the word "deterioration" covers the idea of depreciation in value will appear from the following circumstances: S. 72, Railways Act, sub-Cl. 3, lays down that nothing in the common law in England or in the Carriers Act regarding the responsibility of common carriers shall affect the responsibility of a railway administration and sub-Cl. 1 provides that the responsibility for the loss, destruction or deterioration of animals or goods delivered to the railway administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under Ss. 151, 152 and 161, Contract Act, 1872 and sub-Cl. 2 provides that an agreement purporting to limit that responsibility shall be in writing and on an approved form. Now S. 161, Contract Act, lays down that if by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. It is clear to us that the meaning of the word "deterioration" in S. 161 which imposes the liability on the railway company must be the same as in risk-note form B which lays down the special conditions under which the rail way company is protected. In both these, "deterioration" resulting from a delay in tendering the goods is contemplated. Our attention has not been drawn to any case of this Court which has directly laid down a contrary opinion. We therefore accept the view expressed by Mukerji, J., in the unreported case and hold that the word "deterioration" is wide enough to include depreciation in value on account of a fall in the price of the goods.

It follows therefore that if the railway companies have carried out their contract they would be protected from all liabiiity because of the special contract entered into between the parties.

But the next point urged on behalf of the plaintiff is that the contract between the parties contemplated that the goods should be transmitted across the ordinary route within a reasonable time and that when the railway company's servants owing to a mistake or negligence diverted the goods from Jhansi to Cawnpore the route was changed and the contract was not carried out. It is quite clear that the entire delay occurred

(1) A. I. R. 1925 Lah. 255=5 Lah. 523.
(2) [1898] 21 Mad. 172.
(3) A. I. R. 1929 All. 597.
(4) A. I. R. 1924 All. 8=45 All 534.
(5) [1861] 30 L. J. C. P. 232=9 C. B. (n.s.) 632=9 W. R. 635=3 L. T. 859=7 Jur. (n.s.) 862.

because the goods were wrongly sent from Jhansi to Cawnpore and the plaintiff would not have suffered any loss but for this diversion of the route. The question which we have to consider is whether this circumstance deprived the railway company of the protection to which they were entitled under the risk-note form B. On this question of law the preponderance of authority is undoubtedly in favour of the plaintiff. The Court of appeal in the case of *Neilson* v. *London and North Western Railway Co.* (6) laid down that if the goods were taken across a different route and loss was incurred by the consignor, the carrier was responsible. That principle was applied by the Bombay High Court in the case of *Vali Mahomed Hamad* v. *Agent, G. I. P. Ry. Co.* (7) to the case of the diversion of route by a railway company. After this case the House of Lords affirmed the opinion of the Court of appeal [*L.R.* (1922) 2 *A.C.* 263] in the case mentioned above and their Lordships unanimously accepted the view that :

"where the contract is to relieve the company from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods (during any portion of transit or whilst left in the company's possession to be stored whether the subject of a charge or otherwise) the exemption is only from liability during the transit and when once the goods ar diverted from that route the protection ends."

It was also remarked by their Lordships that :

"where a carrier seeks to protect himself from liability for the negligence of his servants by exemptions of this far reaching character he must do so in clear and unambiguous language, language which will convey to persons of ordinary understanding that he is reserving to himself a freedom from liability, save in the particular cases indicated, for anything that may happen to the goods entrusted to him to be carried to any named destination whether the route be or be not indicated."

This case has been discussed at considerable length in a well considered judgment by Boys, J., in the case of *Janki Das Gobind Ram* v. *Secy. of State* (8) in which passages from the various judgments have been quoted in extenso. It is therefore not necessary for us to repeat what has already been quoted and reported. Since then the Bombay High Court in the case of *Laxmi Narain* v. *G. I. P. Ry. Co.* (9) and the Lahore High Court in the case of *Secy. of State* v. *Dyal Mal Gujar Mal* (*A. I. R.* 1928 *Lah.* 899) have followed the same rule and held that the change from the ordinary route puts an end to the protection given by the risk note.

The language employed in the risk note form B is certainly not so clear as to inform the consignor that any loss incurred by him on account of delay that may be caused by sending the goods along a wrong route would not make the company at all liable. If the idea was to exempt the company from responsibility even in such a case it should have been expressed in clear and unambiguous language. The party which claims exemption from statutory liability on the basis of a special contract must satisfy the Court that the language on which the claim is based is free from all ambiguity and clearly gives the protection.

In view of the preponderance of authority in favour of the plaintiff we must hold that that protection ceased to be operative as soon as the goods were taken out of their ordinary route.

The next point urged on behalf of the railway companies was that there was no clear finding and at any rate there was no satisfactory evidence to show the actual market rate after the 27th December 1923. The evidence on this point was all one-sided. Jamna Das Ram Das, a witness, proved that on 19th February 1924 the rate was Rs. 480, per candy and he was able to show an entry in his sauda book for that date. He also stated that he himself sold Dhuri cotton which is similar to Khurja cotton at Rs. 480 per candy on 4th March 1924. Although the witness Kishan Lal was not able to show any entries in his account books after the 27th December 1923 showing the rate at which goods were sold or purchased by him he did state that the rate between the 19th February 1924 and 24th February 1924 was between Rs. 475 and 480 per candy. He further stated that there was no variation in the market rate of Khurja cotton between the 18th March and 31st March 1924 and that the market was steady at Rs. 470 per candy. Another witness Dayaji also

(6) [1922] 1 K. B. D. 192.
(7) A. I. R. 1922 Bom. 74=46 Bom. 830.
(8) A. I. R. 1925 All. 10=47 All. 234.
(9) A. I. R. 1924 Bom. 386.

said that on 10th March 1924 the rate of Khurja cotton was Rs. 465 per candy. The evidence was all one-sided and the railway company did not attempt to produce any evidence to the contrary. The learned Subordinate Judge on a consideration of the evidence came to the conclusion that Rs. 480 should be accepted as the prevailing market rate between February and March 1924. We see no reason to interfere with that finding.

The other findings that in the ordinary course the maximum period during which the goods ought to have been delivered was 20 days and that on 20th December 1923 the market rate was Rs. 588 per candy have not been challenged before us. The amount of damage accepted by the Court below representing the difference betweeen the market value on the date when the goods ought to have been delivered and the dates when they arrived at Bombay is therefore correct. We agree with the Court below that the plaintiff cannot be called upon to give credit for any profit that he might have made subsequent to the taking of the delivery of the goods, by postponing their sale and speculating on the market. Had he suffered any further loss he could not have made the company liable for it. *Jamal* v. *Moolla Dawood Sans & Co.* (10).

The next point on behalf of the company is that the learned Subordinate Judge has wrongly allowed interest on the amount of ascertained damages. It seems to us that this contention is partly correct. When the learned Judge gave the plaintiff a decree for the difference between the market price on 20th December 1923 and the price in February 1924 he should not have given a decree for interest on this amount. The difference in the prices represents the full amount of compensation to which the plaintiff is entitled under S. 73, Contract Act. But the interest on the amount so assessed from 24th March 1924 till the date of the institution of the suit represents the further loss suffered by the plaintiff on account of the delay in the payment of the amount due to him and it could certainly have been awarded to him as compensation calculated on the basis of interest.

10) A. I. R. 1915 P. C. 48=43 Cal. 493=43 I. A. 6 (P.C.).

The last point urged on behalf of the company is that under S. 80, Railways Act the plaintiff had the option of suing either the E. I. Railway to which the goods were delivered or the G. I. P. Railway on whose railway the deterioration occurred. It seems to us that although S. 80 gives the plaintiff that option it by no means prohibits him from impleading both the companies in a suit. Indeed in many cases it may be difficult for the plaintiff to know before the institution of the suit on which line the loss actually occurred. There is therefore no good reason for holding that the plaintiff could sue only one of the two companies and not both.

We accordingly allow this appeal in part, modify the decree of the Court below to this extent that we disallow the amount of interest given to the plaintiff from 20th December 1923 till the 25th February 1924 and uphold the rest of the decree. The railway companies will bear their own costs and pay those of the plaintiff.

R.M./R.K. *Order accordingly.*

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* A. I. R. 1930 Allahabad 136
Full Bench

MUKERJI, KING AND NIAMATULLAH, JJ.

Lallu Singh—Plaintiff—Appellant.

v.

Ram Nandan and *others*—Defendants—Respondents.

Second Appeal No. 850 of 1926, Decided on 22nd November 1929 from decree of Sub-Judge, Ghazipur, D/- 6th February 1926.

*** (a) Practice—Appeal—Question of pure law arising out of admitted facts can be raised in first appeal.**

Per *Full Bench*.—A question of pure law arising out of admitted facts can be raised in the first instance in the first appeal. [P 138 C 2]

***(b) U. P. Rent Act (12 of 1881), S. 9**—Per *Full Bench* — **Although usufructuary mortgage of occupancy holding is permissible, subsequent mortgages of the same property are void**—(*Niamatullah, J.*, contra).

Per *Full Bench*.—A usufructuary mortgage of an occupancy holding being in the nature of sub-letting is permissible under Act of 1881 but it is not permissible further to validly pledge the same property for further advances as security by way of mortgage or charge on the same. And if such pledge is created, the mortgagor is entitled to redeem

the holding without paying the amounts secured by subsequent mortgages or charges, and a personal covenant to pay does not change his liability: (*Niamatullah, J.*, contra), 15 *All.* 219, *Rel. on*; *A. I. R.* 1927 *All.* 743, *Dist.* [P 140 C 1]

(c) Transfer of Property Act, S. 100—Per *Full Bench*—**Usufructuary mortgage of a transferable holding—Subsequent bonds for further advance, stipulating not to redeem unless both bonds are paid for, creates charge and not a mortgage**—(*Mukerji, J.*, contra.)

Per *Full Bench.*—Where a transferable holding is mortgaged by usufructuary mortgage a second bond for subsequent advance stipulating not to redeem or resume possession of the holding without paying not only the sum advanced under the first deed but also that under the second creates a charge on the property and not a mortgage, (*Mukerji, J.*, contra) : *A. I. R.* 1922 *All.* 174 (*F.B.*), *Ref.* [P 158 C 1]

(d) Transfer of Property Act, S. 60—Sums not secured by mortgage but by personal covenant to pay—Mortgagor cannot be compelled to pay as condition of redemption.

Per *Full Bench.*—A mortgagor cannot be compelled as a condition of redemption to pay sums which are not secured upon the mortgage property nor can mere personal covenant to pay unsecured debts without pledge be binding on the mortgagor : (*Case law discussed.*) [P 158 C 1]

(e) Transfer of Property Act, S. 61—Whether mortgagor's liability is for subsequent advances depends upon the language employed in subsequent transactions.

Per *Mukerji, J.*—The question whether or not a mortgagor is liable to pay money secured on a subsequent bond by which a further liability is sought to be created on the property already mortgaged has to be answered on consideration of language employed in the subsequent transactions. [P 138 C 2]

(f) Transfer of Property Act, S. 61—Principle governing security for further loans and liability of mortgagors enunciated.

Per *Mukerji, J.*—Where a man borrows money on security of his property, the property being worth more than the amount borrowed and both the lender and the borrower agree that the property is capable of being served as security for further loans there is nothing to prevent the lender from making advances to the borrower on the same security. If there is any such second loan on the security of the property if the borrower repays one of the loans the lender has nothing to lose and he can hold his security till the second and the subsequent advance is paid up. If, however, when the second or subsequent advance is made the transaction happens to have no regard for the property previously given as security for the earlier transaction the lender cannot fall back on the security given for the earlier transaction and say that though the earlier obligations have been satisfied by the borrower, he would still hold the property pledged or given as security for the transaction for which as a matter of agreement no security was given. In the case of usufructuary mortgage if the nature of the transactions by which the second or subsequent loans have been granted do not give any right to the lender to keep the possession of the property over which possession was given to him on the basis of the first loan, the lender cannot retain the property as his security after he has received the amount of the first debt, and if the security does not entitle the lender to retain possession the mere fact that a charge was created on the property which charge might allow the lender to bring the property to sale subject to his own mortgage will not prevent the borrower from redeeming his usufructuary mortgage and from recovering possession: *A. I. R.* 1922 *All.* 174 (*F. B.*), *Ref.* [P 138 C 2 ; P 139 C 1]

(g) Registration Act, Ss. 17 and 48—Per *Full Bench* — **Non-registration of a bond creating further charge or mortgage on mortgaged property is not material to mortgagor's liability**—(*Mukerji, J.*, contra.)

Per *Full Bench.*—Where property mortgaged is transferable, non-registration of a bond creating a valid pledge of same security by way of charge or mortgage is not material to the mortgagor's liability under the bond. (*Mukerji, J.*, contra) : (*Case law discussed.*) [P 158 C 1]

U. S. Bajpai and *Gopal Swarup*—for Appellant.

Janki Prosad—for Respondents.

Mukerji, J.—The plaintiff is the appellant in this Court. His suit was, in its form, one for redemption of a mortgage which his father, defendant 13 and one Raghunandan, who died as a member of the joint family with the two other persons mentioned, purported to mortgage certain occupancy lands on Asarh Sudi 6, 1293-F., corresponding to sometime in July 1886 for a sum of Rs. 299-15-0. The plaintiff offered to redeem on payment of the aforesaid sum. The defence was that the plaintiff never made an offer to redeem, that there were two bonds by which certain moneys were tacked on the mortgage of 1886 and that to redeem the property the plaintiff was bound to pay not only the sum of Rs. 299-15-0 but also two additional sums amounting to Rs. 1,156-4-0. One of these bonds is dated 27th July 1893 and is for Rs. 170-0-0, carrying interest at 15 per cent per annum and the other was a bond dated 22nd July 1898 for Rs. 85-0-0 carrying interest at the same rate.

The rejoinder of the plaintiff to the defence that the plaintiff was bound to pay two additional sums seems to have been that there were no such bonds in existence and if they did exist, the plaintiff was not bound to pay them as a condition precedent to redemption.

The Court of first instance held on a consideration of the terms of the bonds that one of these created a charge on

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Advocate High Court
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the property mortgaged and the other did not. In the result, the first Court decreed redemption on payment of the amount due on one of these bonds, namely the bond of 1898 in addition to the amount due on the mortgage of 1886.

The defendants appealed and the plaintiff filed a cross-objection. The plaintiff contended that there was no charge created on the property by the bond of 1898, and further, having regard to the nature of the property no charge could be created according to law. The defendant's appeal was that they were entitled, as a condition precedent to redemption, to the payment of the money secured by the bond of 1893 as well.

In answer to the plaintiff's contention that the property mortgaged being an occupancy holding, it was not capable of having a charge or mortgage created on it, the learned Subordinate Judge; who heard the appeal, remarked that although the property could not be hypothecated, but if it has once been hypothecated, the plaintiff is bound to pay up the charges on it, before he gets back the plots. On a consideration of the language of the two bonds the learned Judge in the appellate Court came to the conclusion that the bonds created a charge on the property and the plaintiff must pay the total amount claimed by the defendants before he could redeem.

In this Court it has been contended that the plaintiff is not bound to pay the amounts of any of these bonds. The plea that the bonds were barred by time was not pressed. The appellant's argument divides itself up into three portions. The first is that as a matter of law, a further charge on the property could not be created by the transactions of 1893 and 1898, because the property was an occupancy holding and the law forbade any mortgage of it, much less a second mortgage, which did not involve delivery of possession. The second branch of the argument is that, having regard to the language of the two documents, it was never intended that the occupancy holding should be re-mortgaged to the mortgagee of 1886. The third argument which affects only one of the bonds under consideration is that it (the bond of 1898) being unregistered could not operate to create a second mortgage on the property mortgaged in 1886.

I shall take up the three points separately.

The question whether or not a mortgagor is liable to pay money secured on a subsequent bond by which a further liability is sought to be created on property already mortgaged has always to be answered on a consideration of the language employed in the subsequent transaction. The cases on the point are numerous, but very few of them purport to lay down any principle which may serve as a guide to the Courts in general. Further, as remarked by Banerji, J., in the Full Bench case of *Har Prasad* v. *Ram Chandra* (1), the case law on the point is conflicting in the extreme. It appears to me however, that it is possible to lay down a principle which alone should guide the Courts.

A man may borrow money on the security of his property. The property may be worth much more than the amount borrowed and both the lender and the borrower may agree that the property is capable of serving as a security for further loans. In such circumstances, there is nothing to prevent the lender from making further advances to the borrower on the same security. If there is any such second loan on the security of the property, if the borrower repays one of the loans, the lender has nothing to lose. He can hold his security till the second and subsequent advance or advances are paid up. If, however, when the second or any subsequent advance is made, the transaction happens to have no regard to the property previously given as security for the earlier transactions, the lender cannot fall back on the security given for the earlier transactions and say that, although the earlier obligations have been satisfied by the borrower, he would still hold the property pledged or given as security as security for the transaction for which, as a matter of agreement, no security was given. This statement of law is based on elementary principles and no argument is needed and no authority need be quoted for its support. Applying then, this principle to the case of a usufructuary mortgage it should follow that before a usufructuary mortgagee may be able to say that he would hold

(1) A. I. R. 1922 All. 174=44 All. 37 (F.B.).

the property given to him as security for the first transaction he must satisfy the Court that the property was re-mortgaged to him, usufructuarily, for the second or subsequent advances. If the transactions by which the second or subsequent advances were made did not amount to a mortgage, or amounted only to a simple mortgage or amounted only to a charge on the property (which would mean something inferior but akin to a simple mortgage) a lender cannot say that he would hold the possession back till the further advances have been paid up. .The reason is absolutely clear. Security granted to him for the second or subsequent advances did not entitle the lender to keep possession over the property, originally mortgaged to him with possession. It should follow that if the borrower wants to redeem the earliest mortgage which was with possession, he should be entitled to take back, on payment, the security which he had given for the loan. But if the second or subsequent advances are secured by way of second or subsequent usufructuary mortgages over the property originally mortgaged, the lender can easily say to the borrower :

"I will accept the amount of the first mortgage and release the property so far as that mortgage goes, but I will continue to hold the property as the security for the second or subsequent advances for which I hold second or subsequent mortgages with possession over the same property."

In these circumstances, if the borrower wants to take possession of the property, he must pay, not only the amount secured by the first mortgage, but also the amounts secured by the second or subsequent mortgages. The borrower may certainly redeem the first mortgage on payment of the amount of the first mortgage money, but the redemption will not bring back the property to him, if there be second or subsequent mortgages by him entitling the lender to hold possession of the property.

It is on the principles enunciated above that the Court has to look into the nature of the transaction by which further charges are said to have been created on the property. The Court has to see in such cases whether the second or subsequent transactions amount, substantially at any rate, to second or subsequent usufructuary mortgages over the property originally mortgaged. I have already pointed out that if the nature of the transactions by which the second or subsequent loans have been granted do not give the lender any right to keep possession over the property over which possession was given to him on the basis of the first loan, the lender cannot retain the property as his security after he has received the amount of the first loan. The Courts have no doubt sometimes used language, loosely, by saying that subsequent transactions by which money was borrowed created a "charge" on the property originally mortgaged with possession and, therefore, the lender is entitled to the subsequent advances as a condition precedent to the redemption of the original usufructury mortgage The use of the word, "charge" in such cases must be held as made in a non-technical sense. If in the subsequent advances, no security was given or if the security given did not entitle the lender to hold possession of the property as his security, the mere fact that a charge was created on the property, which charge might allow the lender to bring the property to sale subject to his own mortgage, will not prevent the borrower from redeeming the first "usufructuary" mortgage, and from recovering possession.

Following up this principle, we have to see first whether the two subsequent transactions in this particular case created or not a second or subsequent mortgage over the property originally mortgaged in 1886. Before examining the language of the documents of 1893 and 1898 we have to see whether the property which, it is said, was given as security, was capable of being offered as security. As I have already said, it is so described in the deeds and, as stated by the learned District Judge in his judgment, the property mortgaged is an occupancy holding. Its mortgage was prohibited by law at the date of its mortgage : vide Act 12 of 1881, S. 9. It was however, held by this Court that a usufructuary mortgage of an occupancy holding was in the nature of a sub-letting and to that extent the mortgage was allowable. The leading case on the point is that of *Kheali Ram* v. *Nathu Ram* (2). Their Lordships who decided the case put the sub-tenant and a usufructuary mortgagee on the same basis : see p. 230

(2) [1893] 15 All. 219=(1893) A.W.N. 125 (F.B.).

of the report. The mortgage of 1886 can therefore be upheld only as a mere subletting on the part of the mortgagors to the mortgagee. As the result of consistent decisions in this Court, based on the Full Bench ruling quoted, a first usufructuary mortgage of occupancy holding has been accepted as a valid transaction and it would be too late in the day to question it : see the case of *Brij Mohan Algu* (3).

If, however, a first usufructuary mortgage of an occupancy holding is allowed, does it follow that an occupancy tenant is allowed, by law to raise money by second or third mortgages, over the occupancy holding? A sub-letting is permitted because it does not amount to a transfer of the occupancy rights. The tenant is entitled to hold possession and he hands over his right to hold possession to the sub-tenant. This is the basis of the Full Bench case. Where, however, the tenant has already parted with possession in favour of a sub-tenant, it cannot be said that he can "further sublet" the same property to the said sub-tenant. There is no other possible way of looking at these second and subsequent transactions of mortgage by which money is raised on the security of the occupancy holding. Such second and subsequent mortgages must be held to be invalid in law.

If I am right in my view of the law, it must follow that, in this particular case, the two transactions of 1893 and 1898 are void in law and the plaintiff cannot be called upon to pay the amount secured on foot of the transactions evidenced by them. It is no doubt true that this view entails a slight hardship on the defendants and gives the plaintiff a benefit which he should not ordinarily be allowed to reap. The plaintiff borrowed the money and now he wants to take shelter under a rule of law, but we must enforce the law. If a certain property is not transferable by law, the fact that money has been lent on the security of that property will not alter the law. Equitable principles cannot be brought into play to nullify the clear rules of law.

Reliance has been placed on the case of *Hardayal* v. *Ganga Kozri* (4). It is said that this case is an authority for the proposition that where the property originally mortgaged is an occupancy tenancy, it is permissible to the parties to the transaction to borrow further sums on the security of the said holding. I have carefully read the judgment but could find no indication of any consideration of the question raised before us. Their Lordships no doubt purport to follow the case of *Har Prasad* v. *Ram Chandra* (1). The Full Bench case related to zamindary property. It does not appear that, in the case of *Hardayal* v. *Ganga Koeri* (4) any discussion was directed towards the nature of the property mortgaged and to the law, viz., although a subletting of an occupancy holding by way of usufructuary mortgage was allowed, whether a second or third mortgage was permissible under the law. The case is therefore entirely distinguishable from the case before us. I hold that the two bonds of 1893 and 1898 create no obstacle to the success of the plaintiff in the suit.

Taking the third point next, namely whether the fact that the bond of 1898 is not registered, is any bar to the success of the defendants? If the defendants can succeed in claiming the money secured by the transaction of 1893, only by establishing that the transaction of that year amounts to a second mortgage over the property mortgaged in 1886, it seems to me that the non-registration is fatal to the claim. Allowing for the sake of argument that the second transaction was nothing but usufructuary mortgage, it could be created in law only by a registered document. The possession was already with the defendants and no fresh mortgage therefore could be created by delivery of possession. In a recent Full Bench case, viz., *Sohan Lal* v. *Mohan Lal* (5), it has been held that where a property is already in the possession of one party, it could not be transferred to him by the ceremony of "delivery." It follows that where the transaction to be valid must be made, either by a registered instrument or by the "delivery" of the property, the transaction must be made by a registered instrument where delivery is not possible. In this view the deed of 1898 did not create a valid mortgage : see S. 59 T. P. Act.

Coming to the second point, both the documents of 1893 and 1898 are des-

(3) [1903] 26 All. 78=(1903) A. W. N. 192.
(4) A. I. R. 1927 All. 743.
(5) A. I. R. 1928 All. 726=50 All. 986 (F.B.).

cribed as documents of " Mashrutal Rahan". It is said in the bond of 1893 that the money borrowed would be paid on a particular date with a certain rate of interest and if it is not repaid, then it would be repaid as a condition precedent to the redemption of the mortgage of 1886. In the second deed of 1898, there is no date fixed for payment of the money, but the stipulation is that the money secured would be paid with interest as a condition precedent to the redemption of the mortgage of 1886. In the deed of 1898 there is also a reference to the deed of 1893. I am, therefore, not prepared to differ from the Court below and would accept its interpretation that it was agreed to treat the two documents as creating second and third mortgages respectively over the property originally mortgaged. The Full Bench case of *Har Prasad* v. *Ram Chandra* (1) lends support to this view.

In the result, I would allow the appeal, modify the decree of the Court below and grant to the plaintiff a decree for redemption on condition of payment of Rs. 299-15 within six months of this date under the usual terms. Only in case of default of payment there will be no order for the sale of the property, because the property being an occupancy holding cannot be sold to satisfy the mortgage.

Niamatullah, J.—This appeal arises out of a suit brought by the plaintiff-appellant for redemption of 13 bighas 16 biswas 10 dhurs of land in village Bhagwan on payment of Rs. 299-15, the principal money due under a mortgage-deed, dated Asarh Sudi 6th 1293, Fasli (1886). The deed in question admittedly allows redemption on payment of the principal sum. The profits of the property are to be appropriated by the mortgagee in lieu of his interest and no accounting is to take place. It was executed by the mortgagors Mahadeo Singh, father of the plaintiff-appellant, Mahabir Singh, defendant 13 and Raghunandan Singh, who is said to have died childless and whose heirs, if any, are no parties to the present litigation. The original mortgagee Paran Pat Shukul is now represented by his heirs and representatives, defendants 1 to 12 who are in possession of the mortgaged property.

The suit was contested by defendants 1 to 12 who claim in all Rs. 1711-3 due under (1) bond, dated 27th July 1893 for Rs. 170 carrying an interest at Rs. 1-4- per cent per mensem, (2) bond, dated 22nd July 1898 for Rs. 85 carrying interest at the same rate and (3) Rs. 299-15 principle due under the original mortgage-deed aforesaid.

The Court of first instance decreed redemption on payment of the principal sum due under the mortgage-deed in suit and Rs. 429-4 due under the second bond, dated 22nd July 1898 which was found to contain stipulations making the sum due thereunder payable as a condition precedent to redemption. As regards the first bond of 27th July 1893, it held that it contained no such stipulations and the mortgagor could ignore it in redeeming the mortgaged property. On appeal by the plaintiff and on cross-objections being filed by the contesting defendants, the learned Subordinate Judge modified the decree passed by the Court of first instance so far as to make the principal and interest due under the first bond of 27th July 1893 also payable on redemption. The present second appeal has been preferred by the plaintiff seeking exemption from the payment of sums alleged to be due under the two bonds already mentioned.

One of the contentions put forward before this Court by the plaintiff-appellant is that the mortgaged property is an occupancy tenure under S. 9, Act 12 of 1881, which is declared by law to be non-transferable, and that the two bonds in question, even if they otherwise operate as mortgage-deeds or create a charge, cannot affect the property in dispute so as to prevent the plaintiff-appellant from recovering possession of it. The argument is that the transfer of a property declared by law to be inalienable by sale, mortgage or otherwise is void ab initio, and whatever claim the creditor under the bonds may have for recovery of money, the property attempted to be hypothecated under those bonds cannot be considered to be subjected to any lien in favour of the creditor. As regards the usufructuary mortgage which the plaintiff seeks to redeem, the substance of his claim is said to be the right to recover possession from the defendants whose possession is that of sub-tenants. In so far as the bonds do not give any right to the

creditor to possession of the mortgaged property it is argued, he cannot retain possession thereunder. I think a case such as this is not open to the plaintiff-appellant for more reasons than one. It was not raised either in the pleadings or afterwards before the Court of first instance. The defendants have had no opportunity of meeting it. It involves a consideration of at least one very important question of fact, viz., whether the lands in question were part of an occupancy tenure under S. 9, Act 12 of 1881, the transfer of which is forbidden by law. There is no specific ground of appeal raising that question before us. The second ground of appeal is said to cover it. It runs thus :

"Because the two bonds do not hypothecate any property and as such cannot be tacked on to the bond, dated Asarh Sudi 6th 1293 Fasli."

Prima facie this ground of appeal only raises a question of construction of the bonds and enables the appellant to argue only that the stipulations contained therein do not amount to a "tacking" of them to the original mortgage deed. It was, it is true, distinctly raised before the lower appellate Court. It does not, however, appear that the argument was developed before it in the manner it has been done here. The only reference we find to it in the judgment of the learned Subordinate Judge is contained in the following two sentences :

"The plots under mortgage are occupancy holding plots. Of course there cannot be any hypothecation of them. But when hypothecated the plaintiff is bound to pay up the charges before he gets back the plots."

Assuming the second ground of appeal before us can be taken to cover it I am strongly of opinion that the appellant should not be allowed to urge it. The whole argument rests on the assumption that the lands hypothecated under the mortgage deed and the two bonds in question form part of an occupancy tenure under S. 9, Act 12 of 1881. It is not borne out by the evidence on the record that this assumption is well founded. The defendants can justly complain that they had no opportunity of meeting this case and are taken by surprise. The only evidence to which we have been referred in support of this allegation is to be found in certain vague recitals in the mortgage deed and the second of the two bonds. The mortgagedeed describes it as: "our tenancy fields in village Bhagwan 13 bighas 16 biswa 10 dhurs *Khet apna kashtkari mauza Bhagwan me terah bigha solah biswa das dhur, hasb tafsil.* Underneath the deed plot numbers and their areas are detailed without specifying the nature of the tenancy. The only other reference to the land in the deed is contained in a sentence to the effect that 'if any interference is made by us or our heirs in the occupation *dakhalkari khet ke sath kisi tarah ka muzahim ho to batil wa najaez hoga* the same will be void and unlawful."

The bond dated 22nd July 1898 refers to the land covered thereby as "our tenancy land" already mortgaged *musallam kashtkari apni.* There is no justification for holding on this dubious description of the property that it is an occupancy tenure of the specific character defined in S. 9, Act 12 of 1881, and declared by that Act to be inalienable. It is as likely to be held under a lease in perpetuity or for other long term in which case its transferability or otherwise would depend upon the terms of the lease. If it is one to which Transfer of Property Act applies it can be transferred in terms of S. 108 (j) of that Act. Even if it is not transferable under the lease, different considerations will apply and the transfer of the leasehold rights in contravention of the terms of the lease will be only voidable at the option of the landlord. There is an essential difference between a transfer forbidden by statute and that in contravention of the terms of the lease. In the former case the transfer is void ab initio being in defeasance of law, and even the parties to that transfer may question it subject to important exceptions ; while in the latter the breach of a covenant against transfer makes it only voidable at the instance of the landlord, but as between the parties thereto the transfer is binding. *Abdulla* v. *Mammod* (6) and *Wazir Mahomed* v. *Har Prasad* (7). As the record stands there is no more reason for us to assume that the mortgaged land is tenancy land of the former description than of the latter. A mortgagor is to be deemed to contract with the mortgagee that the interest which he professes to transfer subsists and that he has the power to transfer the same S. 65 (a), T. P. Act. If, therefore, we have to decide this important question on what is to be found in the mortgage deed and the bond, assuming the latter to be a mortgage, the only possible conclusion, to my mind, is that if the mortgaged

(6) [1903] 26 Mad. 156.
(7) [1922] 15 O. C. 67=13 I. C. 613.

property is no more than tenancy land, it is one which the mortgagor had the power to transfer.

Another serious objection to a plea of this kind being allowed in appeal is that the plaintiff-appellant framed his suit as one for redemption which presupposes a valid mortgage. He sought to redeem the entire mortgaged property without impleading the representatives of one of the mortgagors as he had every right to do in a suit for redemption. To allow him to succeed on the plea under discussion the suit has to be treated as one for possession from a sub-lessee as he alleges or a trespasser as the defendants may well be. If a question of the character we are now required to consider had been raised in the pleadings, he would have been put out of Court by the defendants on the ground that the plaintiff cannot maintain a suit for possession against his sub-lessee in a civil Court and that the proper forum for such suits is the revenue Court. As a matter of fact the defendants cannot be regarded as the plaintiff's sub-lessees. They have never paid any rent to the plaintiff, and if there is any relationship of landlord and tenant between the defendants and some other person, it is with the landlord to whom they have been attorning. It is only by introducing a fiction that the plaintiff would treat the defendants as his sub-tenants, that fiction being that the mortgage as a mortgage is invalid and that the defendants' possession under a transaction of a permissive character should be deemed to be under a sub-lease, which is the only form of transfer which can be made by an occupancy tenant such as the plaintiff is said to be. This position is in my opinion untenable in view of total absence of attornment by the mortgagee to the mortgagor. If the mortgage was invalid, the possession of the defendants as against the plaintiff was in trespass and could be put an end to at the option of the plaintiff. The transferee under a void deed cannot plead estoppel against statute. I do not consider it necessary to pursue this aspect of the case further, as, in the view I take, it is only a hypothetical proposition. But if the defendants are not sub-tenants and have been in possession all these years as trespassers, the defendants could well have pleaded limitation and adverse possession. They could also have questioned the right of the plaintiff to recover possession without impleading all the cosharers in the tenancy. It should be noted, as mentioned before, that the representatives of one of the mortgagors are no parties to this case.

Having succeeded in obtaining from the Courts below the relief of possession by redemption the plaintiff cannot turn round and maintain his ground on any other footing than that of a redeeming mortgagor. To allow him to do otherwise would not only be to inflict a hardship on the defendants but to permit him to approbate and reprobate. For all these reasons I hold that the plaintiff-appellant can urge only such grounds on appeal as are to be found in his pleadings and that he should not be permitted to impugn the two bonds on the ground that they cannot operate as creating a mortgage or a charge on a property which is an occupancy tenure declared inalienable by law.

As regards the liability of the plaintiff to pay money under the two bonds I find myself in agreement with the learned Subordinate Judge. The first bond dated 27th July 1893 is a registered deed containing the usual clauses which make it a deed of additional mortgage or charge. It provides that the sum of Rs. 170 borrowed thereunder will be paid in 1301 Fasli, i.e., a year later, and that if it is not so paid, the creditor will be at liberty to recover the same with the mortgage money due under the deed, dated Asarh Sudi 6th 1293, Fasli and that the executant will first pay the amount due under the bond and then redeem the aforesaid mortgage. The transaction embodied in the bond is therein described as Mashrutul-rehan. The property mortgaged in the original deed is mentioned at the foot of the bond. It is quite clear that the intention of the parties was to make the property already mortgaged as security for the payment of the fresh advance made by the mortgagee to the mortgagor under the bond and that redemption was made conditional on payment of the amount due thereunder. The case *Har Prasad* v. *Ram Chandar* (1) fully applies to this bond.

It has been contended that the bond does not declare the fresh advance as secured on the mortgaged property ini-

tially and that the charge fastens on the property subsequently on non-payment on due date. I am unable to accede to this contention. In every mortgage deed or a deed creating a charge which contains a personal covenant to pay after a certain time, the encumbrance is created forthwith, though it cannot be enforced till after the expiry of the period within which the debtor is allowed to pay. The definition of simple mortgage contained in S. 58 (b) is as follows :

Where . . . . the mortgagor binds himself personally to pay the mortgage money, and agrees . . . . that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of the sale to be applied . . . . in payment of the mortgage money. The transaction is called a simple mortgage . . . ."

Similarly charge has been defined to mean :

"Where an immovable property of one person is . . . . made security for the payment of money to another and the transaction does not amount to a mortgage the latter person is said to have a charge on the property."

Construing the language of the bond above referred to in the light of these definitions I think that the covenant to pay in 1301 fasli does not postpone the creation of a charge to a later date, viz., that fixed for payment or to the date of redemption of the original mortgage. If the intention of the parties was ty make the property referred to in the bond as security for the payment of the new advance, a charge must be deemed to have been thereby created. The case of *Harjas Rai* v. *Naurang* (8) does not apply to the facts before us. It was the case of a covenant contained in the sale deed indemnifying the vendee from possible loss of the property sold. The covenant in that case entitled the vendee to recover the consideration of the sale transaction with interest if there was :

"any injury to the property sold and if we do not effect mutation of names or do not give possession . . . . from out of our persons or the property sold or any other property."

The Court of first instance granted to the plaintiff-vendee who had sued for damages a decree for a certain sum of money by sale of the property sold which the vendors failed to secure possession of to the vendee, but refused to direct sale of "other property" belonging to the vendors. It was with reference to the latter that the High Court on second appeal held that :

"the covenant in question is not such as to create a specific charge in his favour."

The learned Judges thought that :

"the purchase money may in certain events be recovered generally from the persons or the property of the vendors. They do not create a charge within the meaning of the expression in the Transfer of Property Act."

The case before us is not one in which the plaintiff is seeking to enforce a charge said to exist on property not specific on the bond but described generally as the property of the executant. It is settled law that a stipulation which makes the person and property generally or the covenantor liable for a certain claim does not create a charge on any specific property. The case *Madho Misser* v. *Sidh Binaik Upadhya* (9) is likewise distinguishable. The bond in that case provided ;

"Whereas I have borrowed Rs. 99 from Madho Misser . . . . I shall pay interest at the rate of one rupee six annas per cent per mensem without any objection. I shall pay the entire principal with interest in the month of Baisakh 1289 Fasli without any objection. If I do not pay the money according to the stipulation, then I declare in writing that I shall lose my right to 1 bigha 7 cottas of guzashta land situated in mauza Kutha. If I do not pay the money according to the promise then the aforesaid Misser shall take possession of the land. Since Misser shall take possession of the land no interest of the money shall be paid by me, and he shall pay the rent of the landlord out of the profits of the land without any objection."

There is no difficulty in holding that the bond in that case contains no words which create any kind of hypothecation or charge. The creditor in that case was to take possession of the property, apparently for good, in default of payment on due date. The observation of the learned Judges that the document in that case did not create a charge at the time of its execution but operated:

" only as a chargee upon the land in question upon the non-payment of the principal money in 1289 Fasli. All that it does is to create the possibility of a charge ultimately arising on the land "

is an obiter dictum and has not been approved of at least by two High Courts. *Balasubramania Nadar* v. *Sivaguru Asari* (10) and *Nand Lal* v. *Daramdeo Singh* (11). Each deed has to be construed with due regard to its own terms

(8) [1906] 3 A. L. J. 220=(1906) A. W. N. 82.
(9) [1887] 14 Cal. 687.
(10) [1911] 21 M. L. J. 562=11 I. C. 629.
(11) A. I. R. 1925 Pat. 288.

and as I have already held the bond dated 27th July 1893 creates a charge from its date enforceable at a given time and in a given manner.

The second bond dated 22nd July 1898 is unregistered. It is argued that as a mortgage deed it is invalid in the absence of registration and delivery of possession of the property, which was already held by the mortgagee under the original mortgage-deed. It is not necessary to discuss the debatable question as to whether a mortgage can be made of the equity of redemption by an unregistered deed and as to whether an equity of redemption is susceptible of such delivery of possession as the mortgagor can make. It is conceded that in so far as a document creates merely a charge no registration thereof is necessary. As I read the bond I have no doubt that it creates at least a charge. It recites that the property specified therein had been mortgaged by the deed dated the 6th Asarh Sudi 1293 Fasli, that a deed of Mashrutul-rehan was executed previously and that another Mashrutul-rehan deed is now executed with the covenant that the sum of Rs. 85 borrowed then would be paid on or before redemption along with the sums due under the earlier deeds. It winds up by a declaration that the executant and his representatives-in-interest will pay the principal and interest due under the mortgage deed and the two deeds of Mashrutul-rehan and can then take back the deeds and possession of the property covered thereby and shall have no objection to abiding by that covenant. The deed in my opinion clearly secures the payment of money advanced thereunder on the property originally mortgaged.

The mortgagee is entitled to enforce the covenants contained in the two bonds which make redemption conditional on payment of all the sums due under the three deeds. They are not merely personal covenants but accompany a charge validly created on the equity of redemption left to the mortgagor after the first mortgage transaction. Such covenants run with the land and can be enforced not only against the executants of the bonds but against his heirs and representatives in respect of the property subject to the charge. The Full Bench case of *Har Prasad* v. *Ram Chandar* (1), is sought to be distinguished on the ground that the bond in that case was held to create a mortgage whereas in the case before us the unregistered bond cannot be held to create a mortgage. I do not think that the ratio decidendi of that case can be limited to the case of a mortgage so as not to be applicable to the case of a bond creating merely a charge. In either case an encumbrance is created on the property and the debtor is made liable to discharge it at the time of redemption. S. 100, T. P. Act, makes "all the provisions hereinbefore contained as to a mortgagor" applicable to the owner of the property subject to a charge. I hold, therefore, with the Court below that the money due under the second bond must be paid before the plaintiff can redeem the mortgaged property and recover possession thereof from the mortgagee.

In view of the findings arrived at by me above I would dismiss this appeal with costs.

By the Court.—As the members of this Bench are not agreed as to how the appeal ought to be decided we direct that the case be laid before the Hon'ble the Chief Justice so that the appeal might be heard by one or more of the other Judges as the Hon'ble the Chief Justice may direct for the decision of the points of law formulated below. Having regard to the fact that the opinion of the Hon'ble Judge or Judges who may hear the appeal on the points of law raised, specially the third point, will lay down, once for all, the principle or principles on which the vexed question of 'tacking of bonds to usufructuary mortgages' will have to be decided in future, we recommend that, if possible, the number of Judges who may hear the appeal may be as large as possible :

Points which have to be decided are:

1. Whether it was open to the plaintiff to raise the plea, viz., the property mortgaged is occupancy holding, in the Court below (see memorandum of objection, para. 2, pp. 12 of the paper book)?

2. Assuming that the property mortgaged is occupancy holding, is the plaintiff entitled to redeem without paying the amounts secured by the deeds of 1893 and 1898, on the ground that the transfer of occupancy holding is void in law?

3. Assuming that the property mortgaged is transferable, whether the deed of 1898 cannot be treated as compulsorily redeemable by the plaintiff along with the mortgage of 1293 Fasli on the ground that the deed (of 1898) is not registered ?

Mukerji, J.—Three points have been referred for the decision of the Full Bench and they are :

1. Whether it was open to the plaintiff to raise the plea, viz. 'the property mortgaged is occupancy holding', in the Court below : see memorandum of objection, para. 2, p. 12 of the paper book ?

2. Assuming that the property mortgaged is occupancy holding, is the plaintiff entitled to redeem without paying the amounts secured by the deeds of 1893 and 1898, on the ground that the transfer of occupancy holding is void in law ?

3. Assuming that the property mortgaged is transferable, whether the deed of 1898 cannot be treated as compulsorily redeemable by the plaintiff along with the mortgage of 1293 fasli, on the ground that the deed (of 1893) is not registered ?

As to the first point, it was conceded that it was open to the plaintiff to raise in the Court below the plea, viz., the property mortgaged was occupancy holding. I hold accordingly.

On point 2 I do not propose to write another judgment, although fresh arguments have been adduced before the Full Bench. My judgment on which the referring order is based, viz., the judgment dated 20th February 1929, answers most of the points argued. I shall, however, say just a few words more.

I have held that the deeds of 1893 and 1898, by their language, would constitute subsequent mortgages over the property originally mortgaged :see p. 10 of my judgment. My brother King, J., has taken the view, that the documents create charges and in view of the ruling of their Lordships of the Privy Council in *Panaganti Ramarayanimgaru* v. *Maharaja of Venkatagiri* (12) a mortgagor has to pay not only the money secured by the original mortgage of 1886, but also the amounts charged by the two subsequent deeds, on the property. On this point I do not propose to express any opinion, for in view of my finding no question of "charge" arises.

The next point on which I would like to say a few words more is this. My brother Niamatullah, J., is of opinion that the mortgagor or his legal representative, so long the latter is not a transferee of the property, should be held bound by the personal covenant to pay, into which he has entered, although the property was not made security for the loan. This would mean that what was not a security is to be converted into a security, simply because there is an agreement to pay the money, personally. Either there was a security or there was no security. If there was no security, the personal promising to pay cannot be converted into a security, for ex hypothesi there is no security.

I, therefore, am unable to resile from my position that so long as the subsequent bonds do not constitute a mortgage (preferably usufructuary mortgage, but a simple mortgage or at least a charge, in any case), there can be no bar to the redemption and recovery of property on payment of the mortgage amount originally secured. I answer accordingly.

On the point 3, for reasons already given my answer is that the plaintiff cannot be compelled to pay the amount secured by the deed of 1898 for the reason (inter alia) that the document is unregistered.

King, J.—The facts of the case are set forth in the judgments dated 20th February 1929 of my learned brothers Mukerji and Niamatullah, JJ., who differed in opinion and referred the appeal to a larger Bench for decision. The first point for decision is :

"Whether it was open to the plaintiff to raise the plea viz., the property mortgaged is an occupancy holding, in the Court below."

The fact that the property mortgaged is an occupancy holding was expressly agreed to by both parties in the lower appellate Court : see paper 69 C. I see no reason why a question of pure law arising out of admitted facts should not be raised in first appeal. No authority has been shown for the contrary view which has not been seriously pressed. I would answer the first question in the affirmative.

The second question for decision is :

(12) A. I. R. 1927 P. C. 32 = 50 Mad. 180 = 54 I. A. 68 (P.C.).

"Assuming that the property mortgaged is an occupancy holding is the plaintiff entitled to redeem without paying the amounts secured by the deeds of 1893 and 1898 on the ground that the transfer of occupancy holding is void in law"?

It may be noted at the outset that the fact, that the property mortgaged is an occupancy holding, is not based upon a mere assumption but upon the express agreement of the parties.

The right of an occupancy tenant to make a usufructuary mortgage of his holding during the currency of U. P. Act 12 of 1881 was recognized in the Full Bench decision in *Khiali Ram* v. *Nathu Lal* (1). The learned Judges took the view that, although the "right of occupancy" was declared to be not transferable, the legislature did not intend to prohibit the occupancy tenant from transferring the "right to occupy", or the right of possession, by way of sub-lease or usufructuary mortgage. This leading case, which was decided so long ago as 1893, has been uniformly followed ever since without any expression of doubt or dissent and we are bound to take it as laying down the correct law on this point. We must hold, therefore, that the usufructuary mortgage of 1886 was perfectly valid. In accordance with the terms of that mortgage deed, Ex. A, the mortgagor is prima facie entitled under S. 62 (b), T. P. Act, to recover possession of the property upon payment of the principal money only, as he offers to do.

Now we have to consider the effect of the subsequent deeds of 1893 and 1898, Exs. B & C.

The first question is whether they purported to create mortgages or charges on the property.

In my opinion they do not amount to usufructuary mortgages for the following reasons:

(1) They do not purport to transfer any interest in the property. The only interest which the borrower could originally transfer was the right of possession and enjoyment of the profits. This right had already been transferred by the mortgage of 1886. The deeds of 1893 and 1898 do not purport to transfer this right over again (if such transfers were possible) or to extend the right of possession for a longer term.

(2) The borrower did not deliver possession. The lender was already in possession as usufructuary mortgagee and there was no pretence of delivering possession to him over again. The delivery of possession is an essential feature of a usufructuary mortgage.

(3) The borrower did not authorise the lender to appropriate the profits in lieu of interest or in payment of the principal, or partly in lieu of interest and partly in payment of the principal. This is another essential feature of a usufructuary mortgage which is wanting.

So in my opinion the deeds of 1893 and 1898 cannot amount to usufructuary mortgages as defined in S. 58 (d), T. P. Act.

They cannot amount to simple mortgages as there is no express or implied agreement that the lender might cause the mortgaged property to be sold in payment of the mortgage money. The borrower never had any saleable interest and he never professed to give the lender any right of sale.

I hold that these deeds do not amount to mortgages of any description.

On the other hand, I think these deeds do purport to create charges, as defined in S. 100. T. P. Act. The parties intended that the lender should retain the property as security for the further loans. The borrower agreed not to recover possession of the property, by redemption of the mortgage, without repaying the further loans together with interest at the stipulated rate. I agree with Niamatullah, J., and the lower appellate Court that the deeds should be construed as purporting to create charges, but not mortgages.

The distinction between mortgages and charges is, however, unimportant in view of the interpretation which the Privy Council have put upon S. 61, T. P. Act in the case of *Panaganti Rama Rayanimgar* v. *Maharaja of Venkatagiri* (12). Their Lordships held that S. 61 enacts by implication that a mortgagor cannot redeem a mortgage without paying money due under a separate mortgage or charge on the same property. Upon this interpretation the mortgagor in this case would not be entitled to redeem the mortgage of 1886 without paying the money secured by the deeds of 1893 and 1898, if the latter are held to create valid mortgages or charges upon the property. In the present case there are express contracts in Exs. B and

C to the effect that the money secured by them must be paid before, or at the time of, the redemption of the mortgage of 1886, but it appears from the Privy Council ruling just mentioned that the mortgagor would be compelled to pay the money secured by Exs. B and C (assuming that they are valid mortgages or charges) as a condition of redeeming the mortgage of 1886, even without any express contract to that effect.

The next question for determination, therefore, is whether Exs. B and C do create valid mortgages or charges. We have not been referred to any case in which a similar question has been decided or discussed. In the case of *Hardayal* v. *Ganga Koeri* (4), the facts were very similar. An occupancy tenant mortgaged his holding with possession in 1876. Subsequently he took a further loan from the mortgagee and executed a bond promising to repay the further loan together with interest before redeeming the mortgage. A Division Bench of this Court held that the bond created a further mortgage and the mortgagor could not redeem the original mortgage without paying the amount due on the further mortgage also. The validity of the further mortgage by the occupancy tenant was never questioned or discussed, so this ruling is not of much help to us.

I have already expressed the opinion that Exs. B and C do not even purport to create mortgages although they do purport to create charges. Ex. C cannot in any view of the case create a valid mortgage because it is unregistered and there was no delivery of possession of the property. But apart from this defect (which applies only to Ex. C), I hold that when Exs. B and C were executed the executant was not competent to create a mortgage or charge upon the property. The only transferable interest which he ever had was the right of possession or cultivation. This right was only transferable by sublease or usufructuary mortgage and not in any other way, e. g. by sale. Now the executant had already transferred this right to the mortgagee by the usufructuary mortgage of 1886. He could not transfer possession for the second time to the mortgagee who was already in possession as a mortgagee. So the executant retained no transferable interest whatever in the property.

Now I think it is clear that a person having no transferable interest whatever in property cannot validly pledge that property as security whether by way of mortgage or of charge. So in my opinion Exs. B and C cannot operate either as mortgages or charges and I agree with my learned brother Mukerji, J. on this point.

But it has been argued that, even if Exs. B and C are invalid as mortgages or charges, why should not the plaintiff be bound by the personal covenants evidenced by those deeds to pay up the sums due upon them before redeeming the mortgage of 1886? The plaintiff is not a transferee from the original mortgagors but is the son and heir of a mortgagor. Prima facie he ought to be bound by the lender's personal covenant.

This question is not free from difficulty. The Transfer of Property Act itself does not afford any clear guidance on this point. It is argued for the appellant that S. 60 gives the mortgagor an absolute and unqualified right to redeem the original mortgage upon payment of the mortgage money, in spite of the subsequent contracts not to redeem without repaying the further loans. Reliance is placed on a Privy Council ruling in *Mohammad Sher Khan* v. *Seth Swami Dayal* (13), in which their Lordships point out that S. 60 is unqualified in its terms and contains no saving provision, as other sections do, in favour of contracts to the contrary. It must be observed, however, that their Lordships were considering contracts contained in the original mortgage deed itself. The view taken, as I understand it, was that the mortgagor could not, by stipulations in the contract of mortgage, derogate from the absolute right of redemption conferred on him by statute. The same argument applies to S. 62 where the right to recover possession of the property under Cl. (b) upon payment of the principal money appears to be absolute, notwithstanding any contract to the contrary. This doctrine cannot be applied without qualification to a subsequent and independent contract entered into by the mortgagor in consideration of receiving a further loan. Their Lordships of the Privy Council have themselves laid down in *Shankar Din* v.

(13) A. I. R. 1922 P. C. 17=44 All. 185=49 I. A. 60 (P.C.).

Gokul Prasad (14), that there is nothing in law to prevent the parties to a mortgage from coming to a subsequent arrangement qualifying the right to redeem. This ruling, however, cannot be taken to mean that every subsequent agreement, qualifying the right to redeem, whatever the form or terms of the agreement may be, must be upheld as valid. The question is whether the ruling covers a subsequent agreement not to redeem without paying unsecured debts due to the mortgagee.

First we should see whether the Act itself throws any light upon the question. Section 61 (as interpreted by the Privy Council) enacts that where the same mortgagee holds several mortgages of the same property then the mortgagor is not entitled to redeem one mortgage without paying the money due under the other mortgages. It also enacts that a mortgagor seeking to redeem one mortgage must also pay the money secured by a separate mortgage of separate property if he is bound by a contract to this effect.

It appears, therefore, that the right conferred by S. 60 or S. 62 to redeem a mortgage upon payment of the mortgage money due under that mortgage is not absolute, but is qualified by the provisions of S. 61. When a mortgagor seeks to recover possession of mortgaged property by payment of the principal money under S. 62 (b) the only qulifications of his right, recognized by statute, are that he cannot redeem (1) without paying money due to the mortgagee under a separate mortgage or charge (a) upon the same property even without a contract to this effect: (b) upon separate property if there is a contract to this effect; and (2) without giving reasonable notice of tender or payment, in accordance with para. 4, S. 60, if there is a contract to this effect. It appears then that the legislature recognizes that the mortgagor, when seeking to redeem a mortgage, is bound in certain circumstances to discharge certain secured debts as a condition precedent to redemption. There is no provision stating that the mortgagor is also liable to discharge unsecured debts, as a condition of redemption if he is bound by a contract to do so, but it cannot be safely inferred from the absence of such provision that the mortgagor is not so liable.

In the absence of clear statutory guidance we are entitled to consider the recognized principles of the English law of mortgage. According to Coote's Law of Mortgages (Edn. 8), Vol. 2, p. 1175:

"the general principle governing the question as to when a mortgagee will be allowed to charge further advances in account appears to be that such advances must have been made on the faith of an actual charge on the land and not on merely personal security."

On this principle a mortgagor cannot be compelled to pay off unsecured debts as a condition of redemption. This passage is quoted by Alston, J. in *Ranjit Khan* v. *Ramdhan Singh* (15) where he discusses the case *Sheo Shankar* v. *Parma Mahton* (16) and observes:

"In my opinion the finding there was no charge on the property was a sufficient answer to the plea that the plaintiff must pay off both debts before he could redeem."

In the latter case the mortgagor was the plaintiff's predecessor in title, so it is not clear whether the plaintiff was a transferee or a representative of the mortgagor; the decision did not turn upon that distinction. I gather from this passage in Coote's treatise that even the mortgagor himself would not be bound to pay an unsecured debt as a condition of redemption.

There is a further passage on the same page of Coote's treatise which is even more directly apposite:

"a further advance cannot be allowed in account if made on the security of a charge which proves to be invalid."

This rule is directly applicable to the present case as I have held that Exs. B and C purport to create charges but they do not create valid charges. It would seem anomalous to allow the lender to enforce an invalid charge indirectly under the guise of a personal covenant, when he could not enforce it directly as a charge.

The principle of English law appears to be that a mortgagor cannot be compelled, as a condition of redemption, to pay sums which are not secured upon the mortgaged property; mere personal covenants to pay unsecured debts, as a condition of redemption may be ignored. I see no reason why the same principle

(14) [1912] 34 All. 620=16 I. C. 78=15 O. C. 285 (P.C.).

(15) [1909] 31 All. 482=2 I. C. 859=6 A. L. J. 654.

(16) [1904] 26 All. 559=(1904) A. W. N. 123=1 A. L. J. 282.

should not be applied in India in the absence of statutory authority to the contrary.

The case law on this point is conflicting. In *Allu Khan* v. *Roshan Khan* (17) a proprietor having made a usufructuary mortgage of his property gave the mortgagee four successive bonds in consideration of further loans and stipulated that he would pay off the amount of the bonds before claiming redemption of the mortgage. It was held that the bonds did dot create charges on the property but the mortgagor's representative was nevertheless bound by the contract and must pay the amount of the bonds before redeeming the mortgage. This ruling is unsatisfactory as it speaks of the mortgagor seeking redemption as if he were a person seeking an equitable relief and proceeds upon the view that it would be inequitable for him to set aside the obligation contained in the bond. There are rulings of other High Courts to the same effect, namely, that bye-agreements to pay unsecured debts as a condition precedent to redeeming a mortgage are binding upon the mortgagors and their representatives although not binding upon assignees of the right to redeem: see *Hari Mahadaji* v. *Balambhat Raghunath* (18); *Yashvant Shenvi* v. *Vithoba Sheti* (19); *Unni* v. *Nagamma* (20); *Raisunnissa* v. *Zorawar Sah* (21).

The contrary view was taken in *Sheo Shankar* v. *Parma Mahton* (16) where it was held that such bye-agreements to pay unsecured debts were void as clogs upon the right of redemption and as inconsistent with the rights conferred upon mortgagors by S. 60, T. P. Act, 1882. This case was followed in *Rugad Singh* v. *Sat Narain Singh* (22) and in *Durga Pershad* v. *Dukhi Roy* (23). A similar view was taken in *Rajmal* v. *Shivaji* (24) in which the soundness of the decision in *Hari Mahadaji* v. *Balambhat Raghunath* (18) was doubted. With due respect to the learned Judges responsible for these decisions, I do not think that the equitable doctrine about clogging the equity of redemption is properly applicable to subsequent and independent contracts qualifying the right to redeem. The decisions may, however, be supported on the ground that contracts not to redeem without paying unsecured debts due to the mortgagee are inconsistent with the recognized principles of the law of mortgage in England and that those principles may be applied in India as rules of justice, equity and good conscience.

Sir Rash Behari Ghose in his Tagore Law Lectures on the Law of Mortgage (Edn. 5, p. 241) clearly expresses his own opinion as follows:

> "But if there is no pledge of the land, a mere agreement to pay other debts which may be due to the mortgagee as one of the conditions of redemption will not be binding upon the mortgagor so as to prevent him from redeeming on payment of the secured debt only. The cases in which contrary view was taken can hardly not be regarded as law. It is true that they have not been expressly overruled; but the trend of recent case law is in favour of the mortgagor."

He points out that to say that a mortgagee may not foreclose for anything beyond the debt due on the security, but a mortgagor must pay as the price of redemption unsecured debts due to the mortgagee as well as the mortgage money, is not merely anomalous but postulates:

> "something that is not true, namely, that redemption is not a right of the mortgagor but a mere favour shown to him."

His opinion is entitled to great weight. I agree to his view which is in accordance with the trend of most of the more recent decisions. I also agree with him that it was:

> "hardly necessary to invoke the highly ambiguous rule against clogging the equity of redemption which has been preserved in the English law merely on account of its venerable age."

I should prefer to hold that such bye-agreements are void as being inconsistent with recognized principles of the law of mortgage.

I would answer the second question in the affirmative.

The third question is;

> "assuming that the property mortgaged is transferable, whether the deed of 1898 cannot be treated as compulsorily redeemable by the plaintiff along with the mortgage of 1293 Fasli on the ground that the deed of 1898 is not registered."

(17) [1881] 4 All. 85=(1881) A. W. N. 133.
(18) [1885] 9 Bom. 233.
(19) [1887] 12 Bom. 231.
(20) [1895] 18 Mad, 368.
(21) A. I. R, 1926 Oudh 228=29 O. C. 118=1 Luck. 92.
(22) [1904] 27 All. 178=1 A. L. J. 579=(1904) A. W. N. 208.
(23) [1905] 9 C. W. N. 789.
(24) [1902] 27 Bom. 151=1 Bom. L. R. 966.

I have pointed out above that it is common ground that the property mortgaged is an occupancy holding and that the right of occupancy is non-transferable. This question was based upon a misunderstanding of the facts, and clearly does not arise from the facts admitted in this case. If, however, it is considered necessary to answer a hypothetical question, then my answer is that non-registration would not affect the plaintiff's liability under the deed of 1898.

The result is that I would agree with my learned brother Mukerji, J., in allowing the appeal in the terms specified by him.

Niamatullah, J. — At the hearing before the Full Bench we were referred to a statement of the defendant's pleader before the lower appellate Court, contained in paper No. 69-C, which puts the defendant out of Court so far as the first question referred to the Full Bench is concerned. In that statement it was admitted that the lands in dispute formed part of an occupancy holding. If the attention of the Division Bench had been drawn to it, a reference of the first question to the Full Bench would have been avoided. In view of the defendant's readiness to admit that the lands in dispute constitute an occupancy tenure, no possible objection can be taken by him to the case being argued on that assumption. It is only if that fact were in controversy that the plaintiff could complain of being taken by surprise at a time when he had no opportunity of establishing that the land in question is not tenancy land at all or, if it is such, it is not an occupancy tenure a transfer of which is void, being in defeasance of statute prohibiting alienation. The nature of the tenancy being admitted and there being no possibility of a question of fact being raised, the plaintiff-appellant was rightly allowed to argue what were questions of law pure and simple. I would answer the first question in the affirmative.

The principal point in the case is the one embodied in the second question, viz., whether:

"assuming that the property mortgaged is occupancy holding, is, the plaintiff entitled to redeem without paying the amounts secured by the deeds of 1893 and 1898 on the ground that the transfer of occupancy holding is void in law."

I may mention at the outset that both the bonds contain the usual stipulations which characterize deeds of further charge expressly making payment of sums due thereunder a condition precedant to redemption of the usufructuary mortgage of 1886. The bonds are described as mashrutul-arehen deeds, and the property mortgaged is detailed at the foot of each bond. The position of the parties to these deeds may be summed up in a few words. An occupancy tenant made a usufructuary mortgage of his holding in 1886, agreeing that he would not redeem or resume possession without paying a certain amount. Subsequently, in 1893, he executed a second bond hypothecating the holding in lieu of a fresh advance, agreeing not to redeem or resume possession of his holding without paying not only the sum advanced under the first deed but also that under the second. Lastly, in 1898, he executed a third bond in consideration of a further advance, agreeing that he would not redeem or resume possession of his holding without paying not only what was due under the first and second deeds, but also what would be due under the third. The question is whether the covenants contained in the later two deeds, which disentitle the mortgagor to redeem or to resume possession without payment of sums due thereunder are binding.

As regards the so-called mortgage of 1886, it is conceded that the plaintiff-appellant, the son and heir of the original mortgagor, cannot be allowed to recover possession without paying the amount due thereunder. It is argued that he is not under a similar obligation in relation to the later bonds because, being deeds of simple mortgage or charge, they are void and unenforceable. The distinction, thus sought to be drawn, postulates, by implication, the rule that mortgage of an occupancy holding is valid, if usufructuary, and invalid if simple. Having regard to the definition of mortgage as "a transfer of an interest in specific immovable property for securing payment of money" such a position is an impossible one. A simple mortgage of an occupancy holding is invalid, because it is a mortgage, i. e., "transfer of an interest." A usufructuary mortgage is no less a "mortgage" or "transfer of an interest." A

transaction must be a mortgage first, and simple or usufructuary afterwards, The subtle distinction between "a right of occupancy" and "a right to occupy" does not make it valid as a mortgage. An occupancy tenant has no more than a permanent right to occupy, acquired either by a lease or prescription. The essential distinction between a lease-hold right and rights created by transfer such as sale or mortgage, is that in the former only "a right to enjoy the property" is created: cf. S. 105, T. P. Act, while in the latter property itself or interest therein is transferred. Whenever a leasehold right is assigned by sale or mortgage, if it is assignable, only "the right to enjoy" is transferred and the transferrer, the original lessee, continues liable to his own lessor: cf. S. 108, T. P. Act. We cannot, therefore, justify usufructuary mortgage of an occupancy holding on the ground that it operates as a transfer of "right to occupy" and not of "occupancy right," as even in case of sale, assuming it to be valid, no more than right to occupy is transferred, for the simple reason that the occupancy tenant has no more than a permanent right to occupy. The distinction, therefore, between the transfer of an "occupancy right" and of "right to occupy" is without difference.

The distinction has, however, been recognized: *Khiali Ram* v. *Nathu Ram* (2), and the cases that follow it and should be accepted; but it must be said that the learned Judges who made it did not thereby uphold the validity of usufructuary mortgage as such of occupancy right. I have no doubt that a mortgage of occupancy holding usufructuary or otherwise, is void as a mortgage. A deed creating a charge on occupancy rights is equally invalid. It does not matter if such a deed is registered. It may, however, be upheld otherwise than as a mortgage and to a lesser extent. In case of usufructuary mortgage of an occupancy holding the mortgagor cannot recover possession without payment of sums due under the mortgage, not because it is a valid mortgage and the rules applicable to valid mortgages relating to redemption compel him to do so, but because he is bound by a covenant to pay, before resuming possession, which covenant is binding, apart from any supposed relationship of mortgagor and mortgagee, and under the general law applicable to agreements of a personal character. In this view of the matter, no distinction can be made between a covenant contained in the so-called deed of usufructuary mortgage and a covenant contained in the so-called deed of simple mortgage, a deed of further charge or simple money bond. In each case, it can be enforced against the person bound by it. Reliance is placed on *Khiali Ram* v. *Nathu Ram* (2) and *Brij Mohan* v. *Algu* (3), for the proposition that a usufructuary mortgage of an occupancy holding is valid and, for that reason, money due thereunder must be paid if the mortgagor seeks to redeem. The same reason, it is said, does not exist in case of simple mortgage, which implies a right of sale and is, therefore, invalid. I shall presently deal with the contention, but would remark in passing that a right of sale is equally implied in case of a usufructuary mortgage.

It is true S. 67, T. P. Act, disentitles a usufructuary mortgagor "to institute a suit for foreclosure or sale" but, if the mortgagor seeking to obtain possession institutes a suit for redemption and fails to pay within the period of grace, the mortgaged property is to be sold: vide O. 34, Rr. 7 (d) and 8 (4). Under the initial contract between the parties the mortgagee is only entitled to retain possession till he is paid off; and if dispossessed, he can sue for possession within 12 years: Art. 125, Lim. Act. The mortgagor cannot withhold it, relying on his proprietary title. The mortgagee, if left in possession, cannot call in his money by sale of the property except in the event of a decree for redemption being passed and money not being paid before due date. It cannot be suggested consistently with the definition of a mortgage, of usufructuary mortgage and their incidents that there is no transfer of an interest in case of usufructuary mortgage or that the mortgaged property is not made security for the money advanced. Mortgage has been defined in S. 58, T. P. Act to mean:

> "the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan. . . . . "

Then follows the definitions of various forms of mortgages, and usufructuary mortgage is defined thus:

"Where the mortgagor delivers possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest or in payment of the mortgage money and partly in lieu of interest and partly in payment of the mortgage, the transaction is called an usufructuary mortgage. . . . ."

A simple mortgage and an usufructuary mortgage are both 'mortgages,' as defined, with additional incidents. It cannot be doubted that one of the characteristics in both is that the mortgaged property is security for the loan. The rights of a usufructuary mortgagee broadly speaking, are (1) to retain possession till paid off, and (2) to recover his money, if he so desires, by sale of the property, when and if a decree for redemption is passed and money is not paid during the period of grace. The former right is also the characteristic of an arrangement in the form of a sublease or otherwise under which possession is made over by one to another on condition that it shall not be resumed without repayment of a sum of money advanced. It falls short of usufructuary mortgage because sale cannot take place in any contingency. The ratio decidendi of *Khiali Ram* v. *Nathu Ram* (2), so far as it relates to usufructuary mortgage of an occupancy holding is that it is valid only to the extent that right to occupy is transferred on condition that possession is to be retained by the creditor till money is paid and that it is invalid so far as it may give a right to the creditor to realise his money by sale of the property.

The learned Judges had before them the case of an occupancy tenant having sublet his holding and the question was whether subletting by an occupancy tenant is valid. Certain earlier cases of this Court were cited in support of the contention that subletting was not valid. One was *Ganga Din* v. *Dhurandhar Singh* (25) in which it had been held that an usufructuary mortgage of an occupancy holding was invalid and the other was *Abadi Husain* v. *Jurawan Lal* (26) in which a zar-i-peshgi lease by an occupancy tenant had been declared invalid. The learned Judges who decided *Khiali Ram* v. *Nathu Ram* (2) observed:

"No doubt, a usufructuary mortgage by an occupancy tenant of his occupancy holding does for the terms of the mortgage transfer such right to the possession of the land mortgaged as the mortgagor has, but it does not transfer the right of occupancy and no decree for sale of the right of occupancy could be obtained in a suit by the mortgagee under Act 4 of 1882." "whether para. 2, S. 9, Act 12 of 1881, applied or not. Even if an occupancy tenant . . . were to bring a suit for redemption of a usufructuary mortgage of his occupancy holding, no order for sale under S. 92, and no order for sale under S. 93, Act 4 of 1882, of the right of occupancy could, by reason of the bar of para. 2, S. 9, Act 12 of 1881 be made."

It is manifest from this passage that the usufructuary mortgagee of an occupancy right has no security for recovery of his money, and has only the right to possession and to enjoy the profits "in the manner provided by the mortgage." In other words, the transaction is not valid as a mortgage with all its incidents and subject to the provisions of law relating to usufructuary mortgages, but is valid only so far that the mortgagee can retain possession and enjoy as agreed between the parties, a feature which is not peculiar to usufructuary mortgage as such, but is also one of sublease or other arrangement under which possession of occupancy holding is made over by the tenant to another without creating an interest or charge in favour of the transferee. In such a case, as the ruling itself indicates, the rights and liabilities of the parties are governed not by the provisions of the Transfer of Property Act relating to mortgages but by the valid stipulations in the so called mortgage deed. This view makes the principle underlying *Khiali Ram* v. *Nathu Ram* (2) in accord with general law and with *Nidha Sah* v. *Murli Dhar* (27) in which their Lordships had to consider the effect of a mortgage deed which purported :

"to be a mortgage of them with possession to one Ishri Sah (for a period of 14 years from 1284 Fasli to 1297 Fasli) by which it was provided that on the expiration of the term the mortgagor 'shall come in possession of the mortgaged villages without settlement of accounts. . . that on the expiration of the term. . . the mortgagee shall have no power whatever in respect of the said estate. . . and after the expiration of the term this mortgage deed . . . . shall be returned to the mortgagor without his

(25) [1883] 5 All. 495=(1883) A.W.N. 89 (F.B.).
(26) [1885] 7 All. 866=(1885) A.W.N. 290.
(27) [1903] 25 All. 115=30 I.A. 54=8 Sar. 435 (P.C.).

accounting for the mortgage money secured under this document.'"

Their Lordships observed that :

"This instrument, though it is called a mortgage, and though it will be convenient to follow the nomenclature used in the document itself and in the pleadings and judgments in the Court below, is not a mortgage in any proper sense of the word. It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption expressed or implied. It was simply a grant of land for a fixed term free of rent in consideration of a sum made up of past and present advances."

And proceeded to say that :

"It appears that the so called mortgagor had not absolute proprietary rights in all the villages, and that the mortgagee did not get the full benefit purported to be given him by the mortgage. . . It was contended before their Lordships that the mortgagor having broken his part of the contract by failing to give the mortgagee possession of the entirety of the premises comprised in the mortgage ought not to be allowed to enforce the contract as against the mortgagee, but the answer to this contention appears to their Lordships to be that the plaintiffs are not seeking to enforce the contract ; they rely on their proprietary right, and it is for the appellant to show some stipulation either express or implied in the mortgage deed which deprives the plaintiffs of the right to recover possession. This the appellant cannot do. . ."

This is an authority for the proposition, which is clear to my mind apart from it, that where the transaction does not amount to a mortgage with all its legal incidents and in the absence of any security for repayment of money, the only guide in determining the rights and liabilities of the parties to it, is their agreement. My brother Mukerji, J. has expressed the opinion that usufructuary mortgages of occupancy holdings have been held to be valid in *Khiali Ram* v. *Nathu Ram* (2) and in cases which followed it, e. g. *Brij Mohan Das* v. *Algu* (3), in so far as they amount to subletting. I am in agreement with him, with the slight difference, that they held such mortgages to be valid, so far, and no further, as they amount to a contract, which in their view is a valid one by which an occupancy tenant agrees to allow the creditor to retain possession till his money is paid and that the so-called redemption suit is no more than a suit for possession in terms of an agreement and not the usual suit for redemption in which a decree for redemption can be passed directing sale of the property in the event of non-payment, as provided by O. 34, R. 8, Civil P. C. The terms mortgage, redemption etc., may be conveniently used as their Lordships of the Privy Council did in *Nidha Sah* v. *Murli Dhar* (27), but they are not such in the legal sense. That the usufructuary mortgagee of an occupancy tenant is enabled to retain possession by virtue of the stipulation in the deed in that behalf and not because he holds under a valid mortgage or because he is exactly a sub-tenant (in which case question of jurisdiction of civil and revenue Courts would arise) is clearly ruled in *Bindeshri Rai* v. *Sadho Charan Rai* (28) :

"The suit by transferee of the occupancy tenants' right to occupy"

say Blair and Banerji, JJ., in a case which was one by a usufructuary mortgagee :

"is in reality one to enforce the contract for delivery of possession for the term of the mortgage which the tenant made with him, a contract which is valid and enforceable at law (p. 593)."

Regarded as subletting the position is the same, viz., that the mortgage of occupancy holding is not valid as a mortgage but as something else, i. e., sublease, and to that extent only, with a covenant superadded that the subtenant shall not be ejected till a certain sum of money is paid, which has been held to be valid and enforceable. How far the decisions of this Court upholding usufructuary mortgages of occupancy rights in a modified form are based on good law it is too late to consider. They are so numerous and persistent that any attempt to depart from them will result in unsettling what has been unhesitatingly accepted by all Subordinate Courts and this Court.

It has been argued that a covenant by an occupancy tenant embodied in deeds of further charge, that he would not recover possession of the holding without payment of the fresh advances, is invalid under S. 23, Contract Act. It is said that it defeats the provision of S. 9, Act 12 of 1881. The only provision forbidding transactions in respect of occupancy right is in these words :

"No other right of occupancy shall be transferable in execution of a decree or otherwise than by voluntary transfer between persons in favour of whom as cosharers such right originally arose or who have become by succession cosharers therein."

I have quoted the relevant provision of law which it is said is defeated by the

(28) [1904] 26 All. 591.

covenant in question. What the section prohibits is "transfer" of occupancy holding, which the two deeds are not; and, if they are, they are invalid to that extent. There is nothing in S. 9, Act 12 of 1881, or any other law which prohibits an occupancy tenant to allow another person to remain in possession of the holding as subtenant or otherwise, and to agree that he would not eject and resume possession till certain sums are paid, a proposition which must be accepted in view of what was decided in *Khiali Ram* v. *Nathu Ram* (2). If we analyze the decision in that case, it affirms the validity of two distinct covenants, viz., (1) covenant giving to the creditor the right to occupy, (2) covenant giving him the right to retain occupation till he is paid.

The validity of the first only does not afford protection to the creditor, because whether his position be that of a sub-tenant or otherwise the occupancy tenant, relying on his occupancy right, can take possession. It is only covenant 2 which precludes him from doing so and enables the creditor to retain possession till he is paid. Why a covenant, couched exactly in the same terms, occurring in a subsequent deed should be held to militate against S. 9, Act 12 of 1881, it is difficult to understand. It is not an extension of the proposition which we are bound to accept in cases of usefructuary mortgages of occupancy holding on the principle of stare decisis, but it is the identical covenant in both cases. This Court has enforced such a stipulation contained in a deed of further charge relating to occupancy holding see *Hardayal* v. *Ganga Kori* (4). On its facts and the decisions arrived at, it is not possible to distinguish that case with the one before us. The learned Judges have taken note of the fact that the mortgaged property was an occupancy holding. They have, nevertheless, given effect to the deed of further charge. As I have said, once we make up our mind to accept the rule laid down in *Khiali Ram* v. *Nathu Ram* (2), and cases which followed in its wake, we cannot refuse to give effect to the covenant that the occupancy tenant would not take possession of his holding without paying a certain sum of money, whether such a covenant occurs in a deed purporting to be one of usufructuary mortgage or one which creates only a charge. If it is not in conflict with S. 9, Act 12 of 1881, where it occurs in a usufructuary mortgage, as we must hold it cannot be so if it occurs in a deed of further charge. It would be extremely illogical and and arbitrary if we give effect to it in one case and not in the other. Consistency may not be a virtue in some walks of life, but it is absolutely necessary in administering law.

Another argument that has been advanced is that a covenant in a subsequent bond disentitling the occupancy tenant to take possession without paying fresh advances operates as a clog on the right of redemption of the earlier usufructuary mortgage. This argument is easily refuted, as it is based on the erroneous assumption that the so called usufructuary mortgage is valid as a mortgage, and not as an arrangement of subletting. We cannot import the doctrine of clog into a transaction which cannot amount to a mortgage subject to all its incidents including right of sale in a certain contingency. Dr. Gour, relying on *London and Globe Finance Corporation* v. *Montgomery* (29), says :

"It is perhaps unnecessary to state that the rule against clog on redemption only applied to a mortgage. If therefore the transaction was not a mortgage, no covenant could be attacked on the ground of clog, though the principle which underlies that rule may equally avail to invalidate it, but its invalidity must then be tested by the general principles upon which contracts generally are voidable. A deposit of shares as security for a loan made on condition that the creditor should have the option of purchasing the shares at a fixed price up to a certain date was held not to amount to a mortgage, and that, therefore, the covenant could not be attacked as a clog on redemption. Gours's Law of Transfers Vol. 2, p. 1095, para. 1554."

Assuming the rule of clog on redemption can be invoked, it is wholly inapplicable. It is stated in Hals. Laws of England, Vol. 21, p. 143 in these terms :

"No agreement between mortgagor and mortgagee contained in the mortgage can make a mortgage irredeemable ; and no contract between a mortgagor and mortgagee made at the time of the mortgage, and as part of the mortgage transaction, or in other words, as one of the terms of the loan, can be valid if it provides that the mortgaged property shall become the absolute property of the mortgage upon any event whatsoever."

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(29) [1902] 18 T. L. R. 661.

"But the rule against clogging the equity of redemption does not invalidate subsequent and independent transactions between mortgagor and mortgagee relating to the mortgaged property. *Ibid* p. 140."

The following passage from Dr. Sir Rashbehari Ghose's Law of Mortgage, Vol. 1, Edn.5, p. 241, has been relied on:

"The question whether a mortgagor may redeem the mortgage on payment of the money due on foot of his security without also discharging other debts due from him to the mortgagee in spite of an agreement to the contrary has given rise to some controversy. The solution, however, is not very difficult. Of course, if the land is charged by way of mortgage with the repayment of such debts, the mortgagor can redeem only on payment of all the moneys so secured. But if there is no pledge of the land, a mere agreement to pay other debts which may be due to the mortgagee as one of the conditions of redemption, will not be binding upon the mortgagor so as to prevent him from redeeming on payment of the 2nd debt only."

The cases quoted at the foot, including *Sheo Shankar* v. *Parma* (16), on which it is based are all cases in which such a covenant was held to be a clog. This is now an exploded doctrine and cannot be accepted in view of subsequent cases: see *Ranjit Khan* v. *Ramdhan Singh* (15). The last word on the subject has been said by their Lordships of the Privy Council in *Shankar Din* v. *Gokal Prasad* (14), in which it has been held that:

"There is nothing in law to prevent the parties to a mortgage from coming to a subsequent arrangement qualifying the right to redeem. In this case the mortgage which it was sought to redeem was dated in 1816, and in 1870 the mortgagors had, in consideration of certain additional benefit reserved to them under a compromise, agreed to subject their right of redemption to certain conditions. The deed having been lost, the onus was on the plaintiffs to prove the terms of the mortgage, so as to show that the suit was not barred by S. 6, Oudh Estates Act (1 of 1860) (see *Raja Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (30) which onus he was found unable to discharge. Held (affirming the decision of the judicial Commissioner of Oudh) that the plaintiffs were not in any case entitled to redeem as long as there was no breach by the defendants of the covenants contained in the compromise."

It should be noted that, in this case, the subsequent covenant was purely personal. There is a long current of authorities which support the view that stipulations to pay, occurring in subsequent bonds, which do not create a charge are binding on the mortgagor and those bound by his personal obligations, such as heirs or donees, but not on transferees for considerations: see *Alu Khan* v. *Roshan Khan* (17), *Hari Mahadadji Savarkar* v. *Balambhat Raghunath Khare* (18), *Ragho Govind* v. *Balwant Amrit Gole* (31); case of a donee *Uni* v. *Nagammal* (22), *Rais-un-nissa* v. *Zorawar Sah* (21).

The mere existence of a subsequent mortgage or charge created by a subsequent deed not per se make it incumbent on the mortgagor to pay the money due in respect of such mortgage or charge as a condition precedent to the redemption of an anterior mortgage. It is only a stipulation contained in the subsequent mortgage deed, or deed of charge, viz., that the mortgagor shall not redeem without payment of subsequent advances, which binds him to do so. This is clear from the terms of S. 61, T. P. Act, which provides that:

"A mortgagor seeking to redeem any one mortgage, shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage, made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem."

It is, therefore, "the contract to pay" and not the nature of the subsequent transaction which creates the obligation. In *Khuda Bakhsh* v. *Alimunnissa* (32) it was held that in the absence of a stipulation in a deed of further charge that the redemption shall not take place without payment of subsequent advance, the mortgagor can redeem without paying subsequent advances though charged on the mortgaged property. There is no warrant for the proposition that the creditor cannot recover sums due under later bonds, unless they amount to usufructuary mortgages. No case has ever gone to this length, and in practice such a second mortgage with possession is rare, if it can take place at all. The mortgagee being already in possession, the mortgagor cannot agree to deliver possession again. He can only authorize the mortgagee to retain possession till subsequent advances are paid. Even where two successive deeds of mortgage with possession over the same property are executed and the second deed does not contain the usual stipulation that

(30) [1875] 3 I. A. 85=3 Sar. 570 (P.C.).

(31) [1883] 7 Bom. 101.

(32) [1904] 27 All. 313=1 A. L. J. 715=(1904) A. W. N. 273.

redemption of the first cannot take place without discharging the second, redemption of the first cannot be prevented, though the mortgagor will be kept out of possession by the existence of a second mortgage with possession. The question is not whether the mortgagor can recover possession without paying subsequent advances, but it is whether he can redeem the first mortgage without paying subsequent advances. There is a difference between redemption and obtaining possession. The former may take place without affecting possession. In many cases the mortgagor is desirous of merely discharging the incumbrance. Conversely, in many cases, the mortgagee may be unwilling to allow redemption of the first mortgage without payment of subsequent advances. For instances of cases where payment of money due under a subsequent deed was made a condition precedent to redemption, though it did not evidence a mortgage with possession : see *Bhikam Singh* v. *Shankar Dayal Singh* (33) and *Panaganti Ramarayanimgaru* v. *Maharaja of Venkatagiri* (12). S. 62, T. P. Act, was relied on in support of the contention that only the principal money due under the first deed need be paid to enable the mortgagor to obtain possession. That section has been said to be a supplement to S. 60, T. P. Act, and does not itself provide for a suit for redemption. It presupposes that the redemption of the mortgage is an accomplished fact by payment of principal to the mortgagor, by deposit in Court or by appropriation as usufruct. If redemption has not taken place by such payment, for instance, where other sums have to be paid as a condition precedent, the section does not apply. Sir Rashbehari Ghose says :

"This section should be read with S. 60; but quaere, whether a suit under it should be treated as an action to redeem or as an action of ejectment."

Whenever S. 62 was applied, absence of a contract to the contrary was stressed : see *Tajjo Bibi* v. *Bhagwan Prasad* (34) and *Khuda Bakhsh* v. *Alim-un-nissa* (32). Mr. Lindsay (as he then was) had the occasion to consider S. 62, T. P. Act, in *Zahid Ali* v. *Kedar Nath* (35) and expressed the following view :

"Section 62, T. P. Act, is a special section supplementary to the general provisions of S. 60. It provides a summary remedy which is available to a mortgagor in two special cases of usufructuary mortgage (a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the mortgaged property, (b) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money. It cannot apply to cases where from the conditions contained in the mortgage, accounts have to be made up between the parties."

"It contemplates the existence of only one transaction and does not at all touch the cases where a usufructuary having been executed, other mortgages by way of further charge have been executed by the same mortgagor."

I respectfully endorse this view in its entirety. Any other reading of the section would create endless confusion. S. 62, T. P. Act, is mandatory and unless it is subject to other contracts to the contrary a mortgagee must surrender possession, whatever rights he may have to retain possession under other legally enforceable agreements. The rational view of the section is that it provides rights and obligations of the mortgagor and mortgagee under one deed of usufructuary mortgage, assuming it is the only deed which regulates them.

I have discussed the effect of various rules applicable to mortgages, such as doctrine of clog, provisions contained in Ss. 61 and 62, T. P. Act, only on the assumption that the deed of 1886 amounts to a valid usufructuary mortgage of an occupancy holding. I have held in an earlier part of this judgment that, on the rulings of this Court, we can give effect to it not as a mortgagee but as a sub-lease or an arrangement under which no security for recovery of the money advanced is created. In that view we cannot apply rules of law applicable to mortgages only and not to sub-leases and other similar contracts which have to be given effect to according to the stipulations in the deeds evidencing them. The covenants in the deeds of 1893 and 1898 that money due thereunder must be paid before possession is to be taken by the plaintiff is as valid as an identical covenant in the deed of 1886, viz., that possession cannot be taken without payment of the sum then advanced. It may be convenient to

(33) [1909] 6 A. L. J. 255=1 I. C. 345.
(34) [1894] 16 All. 295=(1894) A. W. N. 93.
(35) [1914] 17 O. C. 388=27 I. C. 427.

adhere to the nomenclature used in the deeds, but in law there is no mortgage, no mortgagor, no mortgagee and no redemption. We must treat the suit as one for possession, and the suit is to be decreed only if the terms of the contracts between the parties justify it. For these reasons I answer the second question, referred to the Full Bench, in the negative.

The third question does not call for a decision in view of what I have held on the first. But if it were otherwise I would hold, in view of the personal obligation of the mortgagor, that registration is not compulsory to bind him to pay what is due thereunder.

By the Court.—The answers of the majority of the Full Bench on the questions formulated are as follows :

(1) It was open to the plaintiff to raise the plea.

(2) The plaintiff is entitled to redeem without paying the money secured by the deeds of 1893 and 1898.

(3) The non-registration of the document is not material.

V.S./R.K. *Reference answered.*

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YOUNG AND MUKERJI, JJ.

Abdul Hakim and *another*—Plaintiffs—Applicants.

v.

Mukarram Ali and *another*—Defendants—Opposite Parties.

Civil Revn. No. 36 of 1928, Decided on 14th May 1929, from order of Dist. Judge, Bareilly.

(a) Agra Tenancy Act (1926), S. 99—Grove-holder dispossessed from grove and fruit appropriated—Both transactions completed before coming into operation of Act (3 of 1926)—Suit for possession and mesne profits lies in civil Court.

Under the Agra Tenancy Act of 1901 a grove-holder is not a "tenant for grove land" and so where a grove holder has been dispossessed from the grove and fruit misappropriated, each transaction taking place before coming into operation of the Act of 1926, the suit for possession and mesne profits lies in civil Court and not to revenue Courts under S. 99, Agra Tenancy Act 3 of 1926. [P 159 C 2]

(b) Civil P. C., O. 7, R. 10—Order directing plaint to be returned for presentation to proper Court—Order can be revised by High Court.

It is open to a High Court to revise the order directing the plaint to be returned for presentation to proper Court : 16 *A. L. J.* 535 and *A. I. R.* 1921 *All.* 226, *Expl* : *A. I. R.* 1926 *All.* 58, *Ref.* [P 160 C 1, 2]

(c) Civil P. C., S. 115—Scope.

High Court's revisional power is not meant to correct a mere error of a question of fact or law but is confined to the question of jurisdiction. [P 160 C 1]

Nehal Chand—for Applicants.

Iqbal Ahmad and *Mukhtar Ahmad*—for Opposite Parties.

Mukerji, J.—This is an application in revision asking this Court to revise an order of the learned Munsiff of Bareilly, dated 15th July 1927, which has been affirmed on appeal, by the learned District Judge on 15th November 1927.

The facts which have given rise to the suit and the present application are, briefly, as follows: The applicants before us were the two plaintiffs in the Court of first instance. They said that they had purchased a grove on 19th August 1918 and became the owner thereof, by the purchase. About three years prior to the institution of the suit, during the absence of the plaintiffs in Calcutta, the defendants began to misappropriate the fruits of the trees and continued to do so, till the date of the suit. The plaintiffs, therefore claimed a declaration of the title and Rs. 150 being the value of three years' produce of the trees. Later on, by amendment, they claimed possession, if it was found that the plaintiffs were out of possession.

Of the two defendants one pleaded that the whole village of which the grove was a part was wakf property and he was the mutwalli of the same, that the plaintiff's vendor, Mendhu, was a mere tenant and he surrendered his holding. He also pleaded that the claim for the value of the fruits was not cognizable by the civil Court and that the suit was barred by the six months' rule of limitation.

The other defendant pleaded that he had nothing to do with the management of the property which, he said, was wakf property and that he was merely acting under the orders of defendant 1.

The learned Munsiff, before whom the suit was instituted held that Mendhu was a grover-holder and that after the sale of the grove he could not make a valid surrender of the grove to the zamindar. He, however, thought that the suit fell within S. 99, Agra Tenancy Act of 1926 and was not cognizable by the civil Court. He accordingly directed that the plaint be returned to the plaintiffs for presentation to the proper Court. An appeal was filed before the District

Judge and one of the grounds taken was that the cause of action of the appellants occurred before the Tenancy Act of 1926 came into operation and that, therefore, the Munsiff had erred in holding that S. 99, Tenancy Act, applied to the case. The learned Judge dismissed the appeal. In this Court, it has been urged that the views taken in the Courts below were wrong and the suit was cognizable by the civil Court. The learned counsel for the respondents supported the orders of the Court below on the merits and contended, further, that the revision was not entertainable at all in view of two cases decided by this Court, to be presently mentioned.

According to the allegations in the plaint, the plaintiffs' dispossession took place on 18th May 1924, when, for the first time, the defendants misappropriated the fruits of the plaintiffs' grove. The subsequent misappropriations, according to the plaintiffs, took place in May of the two following years, 1925 and 1926. The new Tenancy Act did not come into force till 7th September 1926. Thus the plaintiffs' cause of action was complete before the new Act came into force. There can be no doubt that under the rulings of the Allahabad High Court, a grove-holder was not a tenant under the Tenancy Act of 1901. Since the Tenancy Act of 1926 came into operation, the grove-holder's status is that of tenant. When the dispossession took place, the plaintiffs were not tenants and it cannot be said that the dispossession was that of a tenant by a landholders. The argument, however, for the other side, is that the case falls clearly within the language of S. 99, Agra Tenancy Act and that, therefore, there is no escape from the conclusion that S. 99 applied and the suit should have been filed in the revenue Court. Let us see if this is true.

Section 99 reads as follows :

"Any tenant . . . . . ejected from . . . . . his holding . . . . . otherwise than in accordance with the provisions of this Act, by his landholder . . . . . ."

I have already pointed out that at the date of dispossession, in 1924, the persons, who were dispossessed, were not tenants. Then, a grove was not a" holding" under the Tenancy Act of 1901, because a land occupied with trees and forming grove was not 'land' which could constitute a holding within the meaning of the Tenancy Act of 1901 Thus two of the conditions laid down in S. 99, Tenancy Act of 1926, are not complied with. Lastly we have to bear in mind the words :

"otherwise than in accordance with the provisions of this Act."

For the simple reason that the Act of 1926 was not and could not have been in force in 1924, the ejectment of the plaintiffs could not be said as being :

"otherwise than in accordance with the provisions of the Act of 1926."

The ten words just quoted cannot be treated as a mere surplusage and we cannot read the section as if those words did not exist. For the reasons given above, I am clearly of opinion that the plaintiffs' case does not and could not fall within the purview of S. 99 of the Act of 1926. That section can apply only to a dispossession which took place after 7th September 1926.

There is yet another reason, and a very cogent reason indeed, for holding that the legislature could not have possibly meant to provide for the case of a dispossession of a grove-holder to be covered by S. 99 if the dispossession took place prior to the coming into force of tne Act. The legislature has provided a rule of six months limitation for the institution of the suit under S. 99. If S. 99 and the rule of limitation be applied to the facts of the present case, we must come to the absurd conclusion that the plaintiffs' suit became time barred within six months of their dispossession i.e., on 18th May 1924, nearly two years before the Act of 1926 came into operation. This absurd conclusien is avoided and the entire Act and the policy of the Act can be given an intelligible and coherent meaning, if we accept the view which I have laid down above. This view, in a nutshell, is that the dispossession was not of a tenant, that it was dispossession from something which was not a holding and that it was a dispossession which was not otherwise than in accordance with the provisions of Act 1926. I hold that the suit as instituted was cognizable by the civil Court.

The next point to be considered is whether it is not open to the High Court to revise the order directing the plaint to be returned for presentation to the proper Court. The two cases on which reliance has been placed by the learned counsel for the respondents are

Jwala Prasad v. *E. I. Ry. Co.*, (1) and *Chandu Lal* v. *Kokamal* (2). Both the cases are of similar nature. In the case in *Jwala Prasad* v. *E. I. Ry. Co.* (1), the question was whether the plaintiffs' cause of action arose within the jurisdiction of the Court of Cawnpore or whether the suit lay in the Calcutta Court. The suit had been filed in the Cawnpore Court. The Subordinate Judge held that the suit should have been filed in the Calcutta Court. This finding was affirmed on appeal. It was held that this was a finding of fact and law and even if that finding were erroneous, it could not be disturbed in revision. Similarly, in the case in *Chandu Lal* v. *Kokamal* (2), the question was whether any part of the cause of action arose within the local limits of the jurisdiction of the Subordinate Judge of Agra. The Subordinate Judge of Agra was of opinion that he had no jurisdiction. The District Judge, in appeal held that the Subordinate Judge had jurisdiction and he directed that officer to try the suit. The decision that had been come to had to be come to, on a consideration of the allegations in the plaint and on evidence that was adduced in the case. The determination of the question depended on a determination of questions of fact and law. It has been repeatedly held by the Privy Council and this Court, that the High Court's revisional power is not meant to correct a mere error of a question of fact or law but was confined to the question of jurisdiction. It may always be said that a Court, when it passes an order on a question of jurisdiction it always considers the matter before it passes the order and therefore when a question of jurisdiction has been decided no revision would lie under S. 115, Civil P. C. If that is so, S. 115 would be of no use where a question of jurisdiction arises, although its only end is the correction of an error as to jurisdiction. In my opinion the learned counsel for the respondents had misunderstood the effects of the two cases on which be relies. The two cases lay down that where the question whether a particular Court has or has not jurisdiction calls to be determined, on a consideration of the circumstances of the case and the Court decides that the cause of action did not arise within the local limits of the jurisdiction of the Court, that decision is not merely a decision as to the jurisdiction of the Court but is a decision as to certain facts, which if they existed, would determine the question of jurisdiction. The finding on those facts might be a wrong finding, but the High Court cannot interfere with that finding. But where, as in the present case, the question is whether the civil Court, or the revenue Court should take cognizance and a Court erroneously decides that the other class of Court should take cognizance of the suit, it, in my opinion, clearly fails to exercise a jurisdiction which is vested in it.

In the case of *Bisheshar Prasad Panday* v. *Ragbubir* (3) the Subordinate Judge, in the Court of first instance, had directed the plaint to be returned for presentation to the proper (revenue) Court. The District Judge on appeal affirmed that decision. This Court interfered in revision and held that the Subordinate Judge had jurisdiction to hear the suit, set eside the order complained of and directed the Subordinate Judge to hear the case. In my opinion, there is no conflict whatsoever, between the cases in *Jwala Prasad* v. *E. I. Ry. Co.* (1) and *Chandu Lal* v. *Kokamal* (2), relied on by the counsel for the respondents and the case in *Bisheshar Prasad Panday* v *Ragbubir* (3).

In the result, I would allow the application in revision, set aside the order directing the plaint to be returned for presentation to the proper Court and would direct the Munsiff to restore the suit on its original number in the register, in his Court and to proceed with it in accordance with law. I would direct that the cost up to this stage of the litigation in all the Courts should abide the result.

Young, J.—I agree.

By the Court.—We allow the application in revision, set aside the order directing the plaint to be returned for presentation to the proper Court and direct the Munsiff to restore the suit to its original number in the register and to proceed with it in accordance with law. Costs in all the Courts hitherto shall abide the result.

V.B./R.K. *Application allowed.*

(1) [1918] 16 A. L. J. 535=46 I. C. 99.
(2) A. I. R. 1921 All. 226=43 All. 334.
(3) A. I. R. 1926 All. 58=48 All. 168.

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YOUNG AND SEN, JJ.

Emperor

v.

Kashi Nath and *another* — Respondents.

Criminal Appeal No. 520 of 1929, Decided on 10th September 1929, from an order of Addl. Sess. Judge, Cawnpore, D/- 2nd April 1929.

(a) U. P. Excise Act, S. 60 (a) — Where cocaine and weighing machines and packing material is found in a small house occupied by joint brothers both must be supposed to have knowledge of dealings with cocaine.

Where in a small common house occupied by two brothers belonging to a joint Hindu family, and running a common business, there are discovered not only an enormous quantity of cocaine but all the necessary weighing machines and packing material to deal with it, it is idle to suggest that both brothers would not know of the dealings in cocaine. One brother could not possibly carry on business in cocaine without knowledge of the other when they live in small confined rooms. [P 162 C 1]

(b) U. P. Excise Act, S. 60—Onus is on persons in possession of cocaine to prove satisfactory reason.

When once the possession of cocaine with the accused is found as a fact the onus is upon them to prove that they had sufficient reasons for being in possession of cocaine. [P 162 C 1]

U. S. Bajpai—for the Crown.

Saila Nath Mukherji — for Respondents.

Judgment.—This is the appeal on behalf of the Local Government. Two men, Kashi Nath and Chunni Lal, were acquitted on appeal by the learned Sessions Judge of Cawnpore of a charge of being in possession of cocaine, an excisable article, contrary to S. 60 (a), United Provinces Excise Act. In this case both the Magistrate who originally tried the case and the learned Sessions Judge were in entire agreement upon the findings of fact ; but the learned Sessions Judge came to the conclusion that it was his duty to set aside the judgment of the learned Magistrate on this ground :

"I have no doubt that either both the brothers or one of them deals in cocaine, but it cannot be said that necessarily both the brothers are dealing and if one of the brothers is dealing in cocaine which of them is so dealing."

The facts are that the two accused are brothers. They are members of a joint Hindu family, and they mess together and carry on a common business. It is admitted, at any rate, that the accused occupy a portion of a house, called baithak, which consists of a room with a tin shed upon it, from which cocaine was recovered, the lower room being rented out to some other person. Opposite, on the other side of the lane, is the house of the aunt-in-law of Kashi Nath, and it is alleged by the prosecution that the dalan and kothri of that house are also in the occupation of the two accused. On 30th June 1928, on information received, the police raided the house of Kamal Devi and the baithak. They took with them search witnesses. At the time of the search the two accused were not present in either of the houses. In the dalan of the house of Kamal Devi were discovered six small packages of cocaine in a tin canister, 5 or 6 rattis, a candle and sealing wax. In the kothri which was a small room and was found locked up, there was a locked box. Both the room and the box were broken open, and in the box were discovered 47 packages of cocaine, all sealed up in one envelope in all some 73 tolas of cocaine was discovered. In a niche in the kothri was discovered a weighing scale with white powder upon it. In the baithak across the road, the staircase leading to the apartment was found locked, and the lock was broken. In the baithak a steel box was discovered, which was also locked. This was also broken open, and in it were discovered one packet of cocaine, a knife and some sealing wax. There were also in this baithak three weighing scales and some sheets of wax paper.

In our view the prosecution have satisfactorily proved that the dalan and the kothri were occupied by the two accused. But, even if we did not so find, it is at any rate admitted that the baithak was occupied by the accused. It is not suggested in this case that the cocaine had been planted by the police. Indeed, it was idle to allege that such a large quantity of cocaine could be planted. If the prosecution evidence is true that in a locked up steel box in the baithak there was a package of cocaine, on this evidence alone a conviction would be correct. The facts in this case are overwhelmingly against the accused. The only point which we have to consider is the one upon which the learned Sessions Judge acquitted the accused.

It seems to us quite clear that, where in a small common house occupied by two brothers belonging to a joint Hindu family, and running a common business, there are discovered not only an enormous quantity of cocaine but all the necessary weighing machines and packing material to deal with it, it is idle to suggest that both brothers would not know of the dealings in cocaine. One brother could not possibly carry on business of this size without the knowledge of the other living as they did in small confined rooms. This is not the case of a large house, with one brother's apartment separate from the other. We are satisfied that the evidence can point only to the fact that both brothers were implicated in this cocaine business. No other finding, in our view, is possible. We are, therefore, of opinion that this cocaine was in the possession of both of them within the meaning of S. 60 (a), United Provinces Excise Act. Having found this as a fact, the onus cast by the Act upon the brothers is to prove that they had satisfactory reason for being in possession of the cocaine. No private person could have a satisfactory reason for keeping in possession no less than 73 tolas of cocaine. Therefore, no attempt has been made to provide a satisfactory reason. No satisfactory reason being provided, the accused are both guilty of the offence with which they are charged. We set aside the acquittal order of the learned Sessions Judge. We convict the accused. The only question that remains is one of sentence.

It is to be noted that the learned Magistrate inflicted the maximum sentence upon the accused, namely, two years' rigorous imprisonment and a fine of one thousand rupees each. Although we agree that the crime is an extremely serious one, we think that the sentence is excessive. The accused have already been punished to the extent of Rs. 2,000 the value of the cocaine discovered in their possession. Cocaine to that value is in the possession of the Government, and that expenditure the accused will never recover. The evidence in this case is that the accused started this business only recently. We are also informed that one of the houses of the accused is mortgaged. There is at least no evidence that they have made any profit out of this business. Under all the circumstances of the case, we consider that a sentence of one year's rigorous imprisonment and a fine of one hundred rupees upon each of the accused will be sufficient to meet the ends of justice. We do not think that this is a case in which the accused should be bound over for good behaviour after they have served out their terms of imprisonment in this case.

R.M./R.K. *Order accordingly.*

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MUKERJI AND KING, JJ.

Tumman Singh and *others*—Plaintiffs—Appellants.

v.

Sheodarshan Singh — Defendant — Respondent.

First Appeal No. 126 of 1928, Decided on 23rd October 1929 from order of Sub-Judge, Banda, D/- 30-4-1923.

Civil P. C., O. 23, R. 3— Statement that parties would accept terms stated by particular third person does not come within purview of O. 23, R. 3.

A instituted a suit against *B*. At one stage of suit before Court of first instance the parties agreed to abide by statement of one *C*. Next day *B* made an application that he had learnt that *C* was related to *A* and so *B* would not be liable to be bound by *C's* statement. The Judge held enquiry and decided that *A* was not related to *C* and passed decree in terms suggested by *C*.

Held: that *B* could not be pinned to the statement made by him. The statement did not come within the purview of O. 23. R. 3, it being not to the effect that parties had come to certain terms regarding the subject matter of the suit but being to the effect that they would accept certain terms which might be stated by *C. A. I. R.* 1924 *All.* 570, *Dist.*

[P 163 C 1,2]

Damodar Das—for Appellants.

Judgment. — This is an appeal against an order of remand passed under O. 41, R. 23, Civil P. C.

It appears that the plaintiffs who are the appellants in this Court instituted a suit for recovery of possession and mesne profits against the respondent who has not appeared to contest this appeal. At one stage of the trial on 19th December 1927, in the Court of first instance the parties agreed by statements made before the Court by their counsel, that they would abide by the statement of one Bhagwant Singh who was, accordingly, ordered to be summoned and the 9th January 1928

was fixed for recording his statement. The next day i. e., 20th December 1927, the defendant made an application to the Court stating that he had learnt that Bhagwant Singh was related to the plaintiffs and he would not like to be bound by Bhagwant Singh's statement. On 9th January 1928 the learned Munsif held some enquiry and came to the conclusion that the allegation that Bhagwant Singh was related to the plaintiffs was not true. The Court proceeded to take down the statement of Bhagwant Singh and, ultimately passed a decree in the terms suggested by Bhagwant Singh as being the terms of a proper decree.

The defendant being dissatisfied appealed to the lower appellate Court and his appeal has been allowed. The learned Subordinate Judge held that it was open to the defendant respondent to resile from his agreement, namely, that he would abide by the statement of Bhagwan Singh. The Court directed that the case should be tried on the merits.

In this Court it has been contended before us that Bhagwant Singh's statement would bind the respondent even if he resiled from the position taken up on 19th December 1927. As an authority for the proposition, the case of *Himanchal Singh* v. *Jatwar Singh* (1) has been cited. In that case no exception to the statement of the referee was taken till after that statement had been recorded. The case quoted does not show that the exception to the statement of the referee had been taken before it was recorded and the case, therefore is no authority on the point which we have to decide.

The learned counsel has also urged that the agreement that the parties would abide by the statement of Bhagwant Singh came under the purview of O. 23 R. 3 Civil P. C., and must be regarded as an adjustment of this suit by the parties. But this contention is against the very language of R. 3 itself. R. 3, O. 23 runs as follows :

" Where it is proved to the satisfaction of the Court that a suit has been adjusted x x x."

The statement that was recorded before the Subordinate Judge on 19th December 1927 was not to the effect that parties had come to certain terms regarding the subject matter of the suit but was to the effect that they would accept certain terms which might be stated by Bhagwant Singh.

We do not see how the respondent could be pinned down to his statement made on 19th December 1927 that he would accept the statement of Bhagwant Singh.

The result is that the appeal fails and is hereby dismissed, but without cost as the respondent is absent.

R.M /R.K. *Aypeal dismissed.*

(1) A. I. R. 1924 All. 570=46 All. 710.

A. I. R. 1930 Allahabad 163

NIAMATULLAH AND BENNET, JJ.

Ram Partap Pandey—Plaintiff—Appellant.

v.

Lalu Pandey and *others*—Defendants—Respondents.

Second Appeal No. 1691 of 1926, Decided on 14th November 1929, from decree of Sub-Judge, Basti, D/- 1st June 1926.

Civil P. C., S. 11—Prior mortgagee made party to suit by puisne mortgagee—Unless prior mortgagee's right is attacked and adjudicated upon adversely with reference to prior mortgage question of res judicata cannot arise in subsequent suit.

Under O. 34, R. 1, a prior mortgagee is not a necessary party to a suit for sale brought by the puisne mortgagee and whether he is a party or not his rights are unaffected by any decree which may be passed in enforcement of the puisne mortgage. Under these circumstances unless the prior mortgage is made a party to the suit of the puisne mortgagee and his rights are attacked and adjudicated upon adversely to him with reference to his prior mortgage the question of res judicata cannot arise in a subsequent suit between the same parties or those claiming through them : *A. I. R.* 1920 *P. C.* 81, *Rel. on.* [P 164 C 2]

P. L. Banerji—for Appellant.

Shiva Prasad Sinha — for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit instituted by him under the following circumstances:

One Achhuta Nand executed a mortgage-deed in 1905 in favour of Bhagwant and Bindeshri. Subsequently, on 29th June 1908, he executed another mortgage-deed in respect of the same property in favour of Asghar. The last named mortgagee brought suit No. 81 of 1917 on foot of his mortgage-deed for sale of the mortgaged property, impleading, among others, Bhagwant and Bindeshri the prior mortgagees. Copy of the

plaint of that suit has not been produced. It appears from certain recitals in the judgment that these persons together with some others were described in the plaint as subsequent transferees. In the written statement which they filed they appear to have claimed certain priorities. No copy of the written statement has been produced either. The judgment, which is the only document besides the decree, throwing light on the pleadings of that case, makes vague references to the pleas put forward by the prior mortgagees and to the decision given by the Court on their pleas. It mentions that

"defendants 32, 34, 36 and 37 allege that they have priorities against the plaintiffs."

Bindeshri was defendant 32 in that case. It does not clearly appear whether Bhagwant was a party at all. He does not, at any rate, appear to have filed a written statement. We must, therefore, take it that the question of priority was raised by Bindeshri alone. The Court framed issue 8 with reference to the rights claimed by defendants 32, 34, 36 and 37. It ran thus:

"Have defendants 32, 34, 36 and 37 any priority against the plaintiffs ?"

The finding on this issue is :

"Defendants 32, 34, 36 and 37 have given no proof of the priority of their claim. The issue is decided against them."

The suit was decreed on 30th April 1917, and the mortgaged property was sold in due course and purchased by Partap, the plaintiff-appellant before us, on 20th August 1919. In the meantime Bindeshri and Bhagwant the prior mortgagees instituted suit No. 890 of 1918 for enforcement of their own mortgage of 1905, impleading Achhuta Nand, the original mortgagor, Asghar, the subsequent mortgagee, and some others. A decree was passed in favour of the plaintiffs on 24th February 1919, which was affirmed on appeal. The mortgaged property was sold on 20th March 1925 and purchased by Bindeshri and Bhagwant, the mortgagees. A conflict thereupon seems to have arisen between Partap, the auction purchaser in suit No. 81 of 1917, and Bindeshri and Bhagwant, the mortgagees, auction purchasers, in suit No. 890 of 1918. The suit out of which the present appeal has arisen was then brought by Partap for a declaration that the decree passed in suit No. 890 of 1918 and the sale held in execution thereof were ineffective as against him. The claim was resisted by Bindeshri and Bhagwant mainly on the ground that, being purchasers in execution of a decree passed on foot of a prior mortgage their title must prevail against that of the plaintiff-appellant, who purchased in execution of a decree passed on foot of a subsequent mortgage. The plaintiff-appellant's rejoinder was that Bindeshri and Bhagwant being parties to suit No. 81 of 1917 and having omitted to disclose the existence of their prior mortgage and having failed to obtain recognition thereof in that suit, their present plea that they purchased in execution of a decree passed on foot of a prior mortgage is barred by res judicata. This contention found favour with the Court of first instance; but the lower appellate Court has held that no question of res judicata can arise in view of two inconsistent decrees last of which should be allowed to prevail. Accordingly it dismissed the plaintiff's suit. The present second appeal has been preferred by him from the decree passed the lower appellate Court.

The reasons given by the lower appellate Court in support of its conclusion may not be quite sound. Having examined the pleadings, such as we have before us of suit No. 81 of 1917 and the judgment of the Court in that case, we have no doubt that the plea of res judicata has no force. Under O. 34, R. 1, Civil P. C. a prior mortgagee is not a necessary party to a suit for sale brought by a puisne mortgagee. Whether he is a party or not, his rights are unaffected by any decree which may be passed in enforcement of the puisne mortgage. It is only if he is a party to the suit of the puisne mortgagee and his rights are attacked and are adjudicated on adversely to him with reference to his prior mortgage that a question of res judicata can arise. In *Radha Kishun* v. *Khurshed Hossein* (1) their Lordships of the Privy Council have held that

"to sustain the plea of res judicata it is incumbent on the Sahus (puisne mortgagees) in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own."

The plaintiff-appellant has failed to establish by producing copies of the plaint and the written statement in suit

(1) A. I. R. 1920 P.C. 81=47 Cal. 662=47 I.A. 11 (P.C.).

No. 81 of 1917 that the rights of Bindeshri and Bhagwant under the mortgage-deed of 1905 were impugned. Reference to priority mentioned in the judgment does not connect the controversy in that suit to the mortgage of 1905. It is possible that priority in question in that case was under some other document in which defendant 32, Bindeshri, alone was interested, an indication afforded by the circumstance that he alone and not Bhagwant is mentioned in relation to that matter. The judgment does not likewise show that the Court applied its mind to any question in reference to the mortgage of 1905. Under these circumstances, we are of opinion that the plea of res judicata must fail.

No other question having been argued before us, this appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 165

YOUNG AND SEN, JJ.

Gyasiram—Defendant—Appellant.

v.

Kishore and *others*—Plaintiffs — Respondents.

Second Appeal No. 1301 of 1926, Decided on 24th October 1929, from decree of Sub-Judge, Muttra, D/- 19th April 1926.

Malicious Prosecution — Damages—Assesment of—Where money for defence in malicious prosecution is not paid from own pockets damages cannot be claimed.

In a suit for damages for malicious prosecution where it is found that the plaintiff has not spent anything towards the expense of defence, the amount being paid by another person and there being no legal liability to repay the amount so provided, no damages can be awarded, the plaintiff having failed to prove that he had sustained any damages as the result of prosecution. So also no claim for damage can be made on ground that plaintiff's shop was shut during trial when no damage is proved from that cause. A mere statement that plaintiff pays a certain income-tax does not show that any part of it was earned in trading on a particular shop and does not serve as basis for damages. [P 165 C 2; P 166 C 1]

S. C. Das—for Appellant.

S. K. Dar—for Respondents.

Judgment.—In this case four plaintiffs brought an action against the defendant to recover damages for malicious prosecution.

The Munsif in the trial Court found that the plaintiffs had been prosecuted by the defendant and that the plaintiffs had been successful in their defence in that prosecution. He also found that the prosecution was without reasonable and probable cause and was malicious. The only matter he had left to enquire into was the question of damages. In the plaintiffs' claim they set out special damages to the amount of Rs. 1,942. They did not claim any general damages. The Munsif on a careful examination of the evidence came to the conclusion that a sum of Rs. 664-15-0 could have been recovered by way of damages by the plaintiffs, provided they had spent that amount of money out of their own pockets. He found on clear evidence, however, that the expenses of the defence had been met by one Kundan Lal, the uncle of two of the plaintiffs, and that not one of the plaintiffs had had to put his hand into his pocket for one pie. He, therefore, came to the very proper conclusion that the plaintiffs had failed to prove that they had sustained any damages as the result of the prosecution.

The learned Subordinate Judge, on appeal failed to find any fact on the question of damages, which binds this Court. He speculated as to whether, assuming it to be correct that Kundan Lal had paid the amount, the plaintiffs might not at some time or the other feel it their conscientious duty to repay Kundan Lal. That, of course, is no foundation for a decree for damages. The plaintiffs clearly have not suffered any damages, and the mere fact that possibly in the future they may or may not repay the amount which Kundan Lal had provided, there being no legal liability to repay, cannot found any claim for damages. There was one other item which should be dealt with. The Munsif found that the claim for damages on the ground that the plaintiffs' shop had been shut up during the time of the trial had not been proved. It is clear from the record that there is no evidence that the plaintiffs, or any of them, suffered any damages from this cause. They did not produce the books or any other evidence which might or might not have proved damages from this source. The learned Subordinate Judge, on the other hand, comes to the conclusion, on the basis of a statement that the plaintiffs paid certain amounts as income-tax, that he was justified in allowing a sum of Rs. 100 by way of

damages on this head. The basis suggested by the learned Judge cannot be used for this purpose. A mere statement that somebody pays a certain amount of income-tax, does not show that any part of it was earned in trading on a particular shop. There is no doubt whatever that the plaintiffs entirely failed to prove any damages. In that case the defendant's appeal here must be allowed. We accordingly allow the appeal, with costs, set aside the decree of the lower appellate Court and restore that of the first Court.

The cross-objection is dismissed with costs.

R.M./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 166

NIAMATULLAH AND BENNET, JJ.

(*Saheb*) *Dayal Singh*—Plaintiff—Appellant.

v.

Mahabir Singh and *others* —Defendants—Respondents.

Second Appeal No. 1727 of 1926, Decided on 14th November 1929, against decree of Dist. Judge, Benares, D/- 7th July 1926.

(a) Sepcific Relief Act, S. 21—Agreement to sell land cannot be enforced against subsequent purchaser with right of pre-emption.

Specific performance of an agreement to sale of land against a subsequent purchaser where the latter is entitled to a right of pre-emption against the person seeking to enforce the agreement for sale, cannot be enforced. [P 167 C 1]

(b) Practice—Appeal—Discretion to grant specific relief in second appeal can be exercised.

Discretion to grant or refuse specific performance can be exercised in second appeal: *A.I.R.* 1926 *Cal.* 1237, *Ref.* [P 167 C 1]

Haribans Sahai—for Appellant.

Shiva Prasad Sinha—for Respondents.

Judgment.—These are two second appeals, which have been disposed of in a single judgment of the lower appellate Court. We will first deal with second appeal No. 1727 brought by Saheb Dayal Singh against Mahabir Singh and Ram Dhari Singh. This was a suit for specific performance brought by Saheb Dayal Singh, alleging that Abdul Bari and three other cosharers executed a written agreement dated 23rd December 1922, undertaking to sell to him their 0-6-10 share in mahal Mohammad Taqi of mauza Ahmadpur. It is found as a fact by the lower appellate Court that Abdul Bari was not a party to that agreement to sell. On second appeal an argument has been addressed to us against this finding of fact to the effect that the lower appellate Court was mistaken in its construction of the sale-deed dated 4th September 1923, which, it is alleged, would conclusively prove that Abdul Bari also agreed to the agreement to sell on 23rd December 1922. We do not consider that the passage in question necessarily bears this interpretation, and even if it did, it is only one of the facts before the lower appellate Court, and the lower appellate Court was entitled to come to a finding on all the facts before it. Accordingly we consider that we are bound by the finding of fact that the agreement to sell was made only by the three other cosharers. It follows, therefore, that the subsequent sale-deed by Abdul Bari of his share to the respondents, Mahabir Singh and Ram Dhari Singh on 4th September 1923 is a valid transfer of the share of Abdul Bari. Accordingly from that date Mahabir Singh and Ram Dhari Singh have attained the status of cosharers in this mahal, and they would have a pre-emptive right against Saheb Dayal Singh if a sale-deed were now granted in favour of Saheb Dayal Singh as a matter of specific relief. Saheb Dayal Singh is admittedly not a cosharer in mahal Mohammad Taqi but only a cosharer in the other mahal of this village. Accordingly we consider that the lower appellate Court was correct, and we dismiss the appeal of Saheb Dayal Singh with costs.

Appeal No. 1710 is brought by Mahabir Singh and Ram Dahri Singh against a decree of the lower appellate Court granting specific performance to the plaintiff, Mt. Phulraji, of an agreement to sell made on 10th January 1923 by Mt. Sadiqa Bibi also of a share in mahal Mohammad Taqi. It is admitted that subsequent to this agreement on 4th September 1923 Mt. Sadiqa Bibi transferred her share by a sale-deed to the appellants Mahabir Singh and Ram Dhari Singh. It is claimed for the appellants, Mahabir Singh and Ram Dhari Singh, that by virtue of the sale-deed from Abdul Bari dated 4th September 1923, they have attained the status of cosharers in mahal Mohammad Taqi, and accordingly that any sale-deed now granted to Mt. Phulraji would be liable to defeat in a suit for pre-emption

brought by Mahabir Singh and Ram Dhari Singh. We have heard various possible grounds of defence to such a suit put forward by the learned counsel on behalf of Mt. Phulraji, but we consider that no possible ground of defence to such a suit has been shown. It was further argued that the discretion to grant or refuse specific performance should not be exercised on second appeal, but we find that the Calcutta High Court in the second appeal of *Habibur Rahman* v. *Ali Azhar* (1), held that it was inequitable for the lower appellate Court to decree specific performance of an agreement for sale of land against a subsequent purchaser where the latter was entitled to a right of pre-emption against a person seeking to enforce the agreement for sale; and the decree was set aside on second appeal. The lower appellate Court considered it probable that it might be proved in a pre-emption suit that Mt. Phulraji was only a benamidar for her relative Saheb Dayal Singh, and that Saheb Dayal Singh being a cosharer, it would be improper to give a final adjudication on the rights of parties. We must point out that Saheb Dayal Singh is not a cosharer in mahal Mohammad Taqi but in the other mahal, and accordingly Mahabir Singh and Ram Dhari Singh, who are cosharers in mahal Mohammad Taqi, by virtue of the sale-deed of 4th September 1923, have a pre-emptive right even though Saheb Dayal Singh were the actual vendee. As this was the only ground on which the lower appellate Court considered that the pre-emption suit might be resisted and that ground, in our opinion, is without any force, accordingly we consider that the pre-emption suit must undoubtedly prevail if brought. We allow the appeal of Mahabir Singh and Ram Dhari Singh and reverse the decree of the lower appellate Court which granted a decree for specific performance to Mt. Phulraji. Under the circumstances of the case we dismiss her suit for specific performance, but because the contract to sell with Mt. Phulraji was undoubtedly prior to the sale in favour of the appellants, we consider that this is a case in which the parties should pay their own costs throughout.

V.B./R.K. *Order accordingly.*

(1) A. I. R. 1926 Cal. 1237.

A. I. R. 1930 Allahabad 167

NIAMATULLAH, J.

Jit Singh—Applicant.

v.

Daulatia Tamta and *another*—Opposite Parties.

Civil Revn. No.224 of 1929, Decided on 20th November 1929, against order of Dist. Judge, Kumaun, D/- 10th April 1929.

(a) Civil P. C., O. 21, R. 89—Judgment-debtor making application under O. 21, R. 89 need not show name of auction purchaser in array of parties.

A judgment-debtor making an application under O. 21, R. 89 need not show the name of the auction purchaser in the array of parties noted in heading of application and that all that he is required to do is to deposit the required sum of money. This being done, it is the duty of the Court to issue notice to the person whom it has previously declared as auction purchaser to show cause against the sale being set aside: *A.I.R.* 1920 *All.* 593, *Foll.* [P 168 C 1]

(b) Civil P. C., S. 35—Case decided on rulings generally accepted—Appeal from decision decided on basis subsequently decided case, reversing lower Court's decision—Party successful in lower Court should not be saddled with costs.

Where a lower Court decides a case relying upon cases generally regarded as authority for the proposition accepted by the Court and subsequently a different pronouncement is made which either dissents from or explains away previous rulings and the decision is reversed on the basis of that ruling the party successful in the Court below should not be saddled with costs of the appeal or revision. [P 168 C 1]

B. L. Dave—for Applicant.

Nehal Chand Shastri—for Opposite Parties.

Judgment.—This is an application for revision from an order passed by the learned District Judge of Kumaun dismissing the application under O. 21, R. 89, Civil P. C. of the applicant, who was judgment-debtor in the proceedings out of which the revision has arisen and whose property had been sold in execution of decree. He deposited the entire decretal amount together with 5 per cent on the purchase money as compensation to the auction purchaser. The application, as it was drawn up, did not show the auction purchaser in the array of parties. It was not till after the expiry of 30 days allowed by law for an application under O. 21, R. 89 being made that the auction purchaser was impleaded. The learned District Judge has held relying on *Karamat Khan* v. *Mir Ali Ahmad* (1) and *Ali Gauhar* v.

(1) [1891] A. W. N. 121.

Bansidhar (2) that the application under O. 21, R. 89, is barred by limitation. It is not necessary to discuss the question in detail, as the latest case in point decided by a Bench of this Court and reported in *Dip Chand* v. *Shee Prasad* (3) is decisive. It has been held in the case last mentioned that the judgment-debtor making an application under O. 21, R. 89 need not show the name of auction purchaser in the array of parties noted in the heading of the application and that all that he is required to do is to deposit the required sum of money. This being done, it is the duty of the Court to issue notice to the person whom it has previously declared as auction purchaser to show cause against the sale being set aside. In this view of the matter this application for revision must succeed.

The learned advocate for the opposite party claims exemption from costs of this revision on the ground that the cases relied on by the learned District Judge were generally regarded as authority for the proposition accepted by him and that if subsequently, as is the case here, a different pronouncement is made by this Court, which either dissents from or explains away previous rulings, the successful party before the Court below should not be saddled with the costs of this revision. Under the circumstances of the case I am inclined to make the parties to this revision pay their own costs throughout.

For the reasons stated above, I allow this application for revision, and set aside the orders passed by both the Courts below and also the sale under O. 21, R. 92, Civil P. C. The parties shall bear their own costs throughout.

V.B./R.K. *Revision allowed.*

(2) [1893] 15 All. 407=(1893) A. W. N. 173.
(3) A. I. R. 1929 All. 593.

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* A. I. R. 1930 Allahabad 168

SULAIMAN AND NIAMATULLAH, JJ.

Mohammad Raziq-dad Khan—Defendant—Appellant.

v.

Haji Mohammad Zafaryab Khan and *others*—Plaintiffs—Respondents.

Second Appeal No. 771 of 1926, Decided on 10th June 1929, from decree of Dist. Judge, Bulandshahr, D/- 25th January 1926.

*** (a) Civil P. C., O. 9, Rr. 4 and 10 — Restoration of entire suit after dismissal for default and on application of one or more of several plaintiffs is not improper.**

Where a suit has been dismissed for default owing to non-appearance of all the plaintiffs and the application has been made by one or more of the several plaintiffs, the order of the Court restoring the entire suit in favour of all the plaintiffs is not improper and Court cannot be said to have acted beyond its jurisdiction: *A. I. R.* 1925 *Oudh* 403, *Rel. on.* [P 169 C 1]

(b) Agra Tenancy Act (3 of 1926), S. 264 —Set off.

Not set off can be allowed under Tenancy Act. [P 169 C 1]

G. Agarwala—for Appellant.

S. K. Dar—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for profits. Several points have been pressed before us. The first is that the restoration of the suit, after it had been dismissed for default owing to non-appearance of all the plaintiffs, was improper. The learned advocate for the appellant argues that it is open to him to raise this point now in second appeal in view of the provision of S. 105, Civil P. C. There is some difference of opinion as regards the interpretation of that section in the High Courts in India. Our attention has also been drawn to the remarks of Lindsay, J. in the Full Bench case *Ram Sarup* v. *Gaya Prasad* (1) (at p. 180 *of* 48 *All.*) dissenting from the view expressed in the Division Bench case *Nand Ram* v. *Bhopal Singh* (2). On the other hand, there is the case of *Tasaddaq Husain* v. *Hayatunnissa* (3), directly against the appellant. It seems to us unnecessary to decide in this case whether the words "affecting the decision of the case" in S. 105, sub-Cl. (1), necessarily mean the decision on its merits.

In the present case the suit had been instituted by Mohammad Zafaryab Khan and his nephew and two daughters. Mohammad Zafaryab Khan's mukhtariam looked after the case on his behalf as well as the other plaintiffs, and there were numerous hearings of the case. On 1st August 1923, the mukhtariam was absent from the Court room and the suit was dismissed for default on non-appearance of both the parties. An application signed by the two male plaintiffs, was filed for restoration of the case and the setting

(1) A.I.R. 1925 All. 610=48 All. 175 (F.B.).
(2) [1912] 34 All. 592=16 I.C. 1=10 A.L.J. 130.
(3) [1903] 25 All. 280=(1903) A.W.N. 39.

aside of the dismissal. The application was not actually signed by the daughters of Zafaryab Khan. The learned Assistant Collector was satisfied that there was good cause for non-appearance, and set aside the dismissal and restored the entire suit in favour of all the plaintiffs. It is contended before us that the Court had no jurisdiction to restore the suit of the plaintiffs other than those who had applied. The case fell under O. 9, R. 4, which does not expressly state that the dismissal should be set aside in favour of the plaintiff who applies. Moreover, R. 10 of the same order makes it clear that one out of several plaintiffs may appear on behalf of all and the non-appearance of the other plaintiffs may be excused. Having regard to all the circumstances, we are unable to hold that the Court acted beyond jurisdiction in restoring the whole suit : see *Maharaj Din* v. *Balbhaddar Prasad* (4). The restoration was a matter of discretion for the Court, and we cannot now say in second appeal that that discretion was wrongly exercised.

The Court below has pointed out that the total amount recoverable, including the rent for the year and the past arreare, were almost twice as much as the amount actually collected in those years. The defendant lambardar did not produce any evidence to show that he had taken any steps to make collections with proper energy. On these facts it has been inferred that the negligence has been established. We cannot say that the finding is wrong.

The last point urged is that the defendant should have been allowed a set off of the rents due from one of the plaintiffs to the defendant. No set-off can be allowed under the Tenancy Act S. 193 (g).

The appeal is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(4) A.I.R. 1925 Oudh 403=29 O.C. 14.

A. I. R. 1930 Allahabad 169

SEN AND NIAMATULLAH, JJ.

Ghazanfar Husain—Plaintiff—Appellant.

v.

Mt. Ahmadi Bibi and *others*—Defendants—Respondents.

Second Appeal No. 1287 of 1926, Decided on 11th November 1929.

(a) Contract Act, S. 16—Wife younger than husband—No presumption of influencing husband—Mahomedan Law—Wakf.

Where the wife is very much younger than the husband, there is no legal presumption that she is in a position to dominate the will of her husband. [P 171 C 1]

(b) Mahomedan Law—Wakf—Vital factor is transmutation of possession.

Where the settlor, after declaring the trust, appoints himself a mutawalli, the vital factor, which counts, is the transmutation of possession and where the character of the possession has altered by reason of the fact that possession is no longer held in the exercise of any right of ownership but vicariously for the benefit of the objects of the trust, the wakf prevails, in spite of the fact that there had been no mutation at all or that there was some delay in effecting the mutation. [P 172 C 1]

(c) Mahomedan Law—Wakf—Mutawalli—Mutawalli who is founder of trust can nominate successor by name or by class.

Under the Mahomedan Law, mutawalli who is not the founder of the trust, has no power whilst in health to appoint a successor or to formulate any scheme for succession to the office of the mutawalli, but this restriction does not apply to the founder of the wakf, who in reason and equity ought to have a free hand in the matter of nominating and appointing a mutawalli for the administration of the trust in praesenti and in laying down a detailed scheme as regards the succession to the office of the mutawalli. He is therefore competent to nominate the successors by name or to indicate the class together with their qualifications from whom the mutawalli may be appointed or to invest the mutawalli with power to nominate his or her successor after death or abandonment of office. And further the fact that the settlor appointed his wife as his successor to the tauliyat or invested her with power to appoint a successor from the male issue of her sister or from among any other proper person belonging to the founder's family who were particular about the roza and namaz and fulfilled the further condition of being najibultarfain is not a circumstance which in any way militates against the provision of the Mahomedan Law. [P 173 C 1, 2]

(d) Mahomedan Law—Wakf—If objects of endowment clear, wakf is not invalid merely because no specific portion has been dedicated to charity or religious or pious purpose of permanent character recognized by law.

There is nothing in the Mahomedan Law to invalidate a wakf, where the objects of the endowment are clear and certain, simply for the reason that no defined portion of the property or specified amounts of the usufruct have been dedicated to charity or other religious, pious or charitable purposes of a permanent character recognized by the Mahomedan Law : 23 *All.* 233 (*P. C.*) and *A. I. R.* 1928 *All* 660, *Dist.* [P 174 C 2]

(e) Mussalman Waqf Validating Act, S. 3 (A) — "Family" means persons descended from common progenitor and having common lineage.

Word "family" in the sub-S. 3 (A) includes only those persons residing in his house for

whose maintenance the author or the trust is mainly responsible and indicates persons descended from one common progenitor and having a common lineage: *A. I. R.* 1925 *Oudh* 201, *Dis. from.* [P 175 C 1]

(f) Musalman Wakf Validating Act, S. 3 (a)—Descendant means male and female descendants.

The word "descendants" in S. 3 (A) indicates persons descended from the settlor both in the male and the female line and so descendants in the female line not residing in the house of the settlor and not maintained by him are within the Act and cannot be excluded from its purview. [P 175 C 2]

(g) Musalman Wakf Validating Act, S. 3 (A)—Daughter-in-law living in same house as settlor and maintained by him is member of family. (*Obiter*).

A daughter-in-law living in the same house as the settlor and maintained by him is undoubtedly a member of the family of the settlor. [P 175 C 2]

K. N. Katju, Mahmadulla and *S. Majid Ali*—for Appellant.

Iqbal Ahmad and *Mushtaq Ahmad*—for Respondents.

Judgment.—This is an appeal from the judgment and decree of the learned District Judge of Benares affirming the decision of the primary Court in a suit for proprietary possession of certain shares in immovable property and for mesne profits. The propertyin suit consists mostly of shares in zamindari property, houses and miscellaneous property situate in the District of Jaunpur.

The property admittedly belonged to Mir Inayat Husain, who died on 6th January 1924, leaving a widow Mt. Ahmadi Bibi and .two stepbrothers Ata Husain and Ghazanfar Husain.

This action was commenced on 3rd April 1925, by Syed Ghazanfar Husain, his brother Ata Husain did not join in the suit and was impleaded as a defendant. The plaintiff claimed to recover a six-annas share in the estate of Syed Inayat Husain and founded his claim upon intestate succession under the Mahomedan Law.

The plaintiff repudiated a wakfnama, dated 7th April 1922, alleged to have been executed by Syed Inayat Husain under which Mt. Ahmadi Bibi defendant 1 claimed to be in possession of the entire estate of the deceased in her capacity as mutawalli of the trust.

The suit was mainly directed against Mt. Ahmadi Bibi, the widow. Ghulam Husain, defendant 2 is son of Fida Husain deceased, who was the brother of the plaintiff Dildar Husain and Faiaz Husain, defendants 3 and 4 are the sons of Ghaznafar Hussain plaintiff. The three defendants have been impleaded in the suit as they are beneficiaries under the deed of endowment.

If the wakfnama dated 7th April 1922, was a valid document as having been duly executed by Inayat Husain and if it did not contravene any mandatory provision of either the Mahomedan or Statute Law, the plaintiff's claim was bound to fail.

The plaintiff challenged the wakfnama on a variety of grounds, which gave rise to no less than 15 issues in the trial Court. The plaintiff denied that a wakfnama had ever been executed by Inayat Husain at all. It was urged that Inayat Husain was not the owner of the entire property covered by the deed of settlement, that the wakfnama was not validly registered, that the objects of the wakf were in no way lawful and religious, that a very small amount of the profits of the estate had been left apart for religious purposes and that the bulk of the income was intended to be for the benefit of Mt. Ahmadi Bibi who had obtained that document by fraud and undue influence with the object of depriving the heirs and of benefiting her sister and the members of her father's house.

Having regard to the allegations upon which the claim was founded and the frame of the suit, it is not surprising to find that the only defendant who contested the suit was Mt. Ahmadi Bibi, the widow. She contended that the wakfnama was duly and lawfully executed by Syed Inayat Husain.

The Court of first instance upheld the wakf and dismissed the plaintiff's suit. The lower appellate Court affirmed the decision: hence this appeal.

Most of the grounds upon which the deed of wakf was sought to be attacked in the trial Court were abandoned before the lower appellate Court. Only four pleas appear to have been advanced. These were repelled by the said Court which held that the deed of settlement had been duly executed and properly registered; that the said deed was a voluntary act of Inayat Husain and was not the result of importunity or pressure on the part of the wife and that the deed did not contravene the provisions of Mahomedan Law or any statutory

enactment relating to the creation of a wakf amongst Mussalmans belonging to the Hanafi sect.

Syed Inayat Husan, like his step-brothers, did at one time belong to the Shia sect. He appears to have recanted and embraced the Sunni creed. The exact time when this came about cannot be known from the record nor is material for the purpose of this case. He married Mt. Ahmadi Bibi when he was fifty years old. There is no clear evidence on the point but presumably his first wife was a lady of the Shia persuasion. There are circumstances which indicate that the change of tenets came about after the death of his first wife. Mt. Ahmadi Bibi admittedly belonged to a Sunni family and professed the Sunni creed. Admittedly Syed Inayat Husain was a Sunni at the time of this marriage.

There appears to have been some disparity in the age of this married couple. It may be assumed that the husband treated his wife with considerable tenderness and in various matters relating to the administration of the housheld, respected her wishes. It will be unsafe to deduce from these facts either that Mt. Ahmadi Bibi had a dominating personality or that by her importunities or pressure, she had obtained the deed of endowment from her husband for her personal benefit and for the advantage of certain people, belonging to her father's household.

Syed Inayat Husain at the date of the execution of the wakfnama was 60 years old. Though advanced in years he was in full possession of his mental faculties and was not lacking in bodily vigour. As owner of the property, he was quite competent to make a disposition thereof and to lay down conditions in conformity with his inclinations and wishes. If these conditions are more favourable to the wife or to the members of her sister's household, it cannot be inferred therefrom either as a proposition of law or as an inference of fact that the said conditions were the result of domination exercised by the wife upon the husband. Where the wife is younger than the husband, there is no legal presumption that she is in a position to dominate the will of her husband.

The Courts below, having examined and collated the entire evidence bearing upon the question of undue influence, have unhesitatingly arrived at the conclusion that the plaintiff had failed to substantiate the plea. The finding on this point must therefore stand.

The deed of endowment in question has been the subject of severe criticism and it has been urged that the wakf was illusory, the object of the wakf being not to consecrate the property for the service of God but to tie up the property in perpetuity for the benefit of the wife and certain relations belonging to her father's household.

If Mir Inayat Husain had it in his contemplation to transfer the property to his wife or his wife's relations, he was faced with no impediment or obstacle in giving affect to his wishes by a different kind of instrument altogether. The property was not subject to any encumbrance. Mir Inayat Husain was not in debt. He was the full owner of the property. According to the finding of the trial Court, the dower of Mt. Ahmadi Bibi was Rs. 21,000 and the whole of that amount was still unpaid. There was no legal bar to Mir Inayat Husain transferring the property to his wife with a view to wipe off the dower debt. Nothing stood in between to prevent Mir Inayat Husain from making a gift of his entire property to his wife or to his wife's relations. Again, there are no circumstances which affect the probability of a design on his part to create a wakf. He appears to have been a man, with a religious turn of mind. At the time of the execution of the document, he had reached the mature age of 60. He had no progeny in the shape of sons or daughters or their descendants. His brothers were Shias, whereas he was a Sunni and as the learned District Judge puts it :

"It is a well known fact that converts are the most perverse of all religionists."

The cumulative effect of these facts makes it extremely natural and probable that Mir Inyat Husain intended to execute a document of the nature and character which is now before us and that he, as a matter of fact, consciously executed the same with due deliberation and with full knowledge of its scope and legal effect.

No hostile inference can be drawn from the fact that there was some delay in the mutation of names. We already know that the document was executed

on 7th April 1922. The mutation was not effected till sometime in May 1923. Under the terms of the document the settlor declared, in unequivocal terms, that he had extinguished his proprietary interest in his entire property, had made a wakf thereof for the sake of God, had withdrawn his proprietary possession therefrom and had constituted himself a mutawalli for his lifetime. The finding of the lower appellate Court is that the wakif had satisfactorily divested himself of his interest in the property as a private individual and that certain payments had been made to the beneficiaries of the trust, notably to his nephews and to the Qurania school of Jaunpur. A delay in the mutation proceedings, under the circumstances, does not and cannot lead to the inference that the object of the settlor was not to create a trust. Where the settlor, after declaring the trust, appoints himself a mutawalli, the vital factor, which counts, is the transmutation of possession and where the character of the possession has altered by reason of the fact that possession is no longer held in the exercise of any right of ,ownership but vicariously for the benefit of the objects of the trust, the wakf prevails, in spite of the fact that there had been no mutation at all or that there was some delay in effecting the mutation.

In order to appreciate the arguments that the wakf was of an illusory character, it is necessary to summarise its essential features.

In the opening portion of the instrument, the executant states that he has made, in good faith for the sake of God, a wakf of his entire property detailed therein, without worldly object and in order to gain benefit in the next world and that he has withdrawn his properietary possession therefrom. The document closes with the words "I have therefore executed this deed of wakf etc."

The document proceeds to lay down a detailed scheme for the administration of the wakf property. The settlor has appointed himself as mutawalli for his lifetime. After his death Mt. Ahmadi Bibi, his wife, was to be the mutawalli. After her the tauliyat was to go to any child born of Mt. Ahmadi Bibi. In the absence of an issue the tauliyat was to vest in the eldest son in the lineage of the eldest male issue of Mt. Akhtari Bibi, who was the own sister of his wife, and the tauliyat was to continue in that line generation after generation. An option, however, was given to Mt. Ahmadi Bibi to nominate as mutawalli under a registered instrument any issue of her own sister's daughter Mt. Abdunnissa Bibi or any other proper person who must be najibuttarfain (that is, of good descent on both his father's and mother's side). In the latter case, however, the settlor places an important restriction; and the passage containing the said restriction may be reproduced:

"But in any case, the foremost and necessary condition is this that no one other than a Sunni, who is regular in saying his prayers and keeping fasts and who is a follower of Imam Abu Hanifa (may God bless him) of whom I, the executant, am myself a follower, shall and can be appointed a mutawalli."

The settlor further reserves to himself the power:

"to change or make alterations in the aforesaid line of males and adopt another method and appoint another mutawalli, if it seems reasonable in accordance with the conditions laid down in the instrument."

The wakfnama does not state what the net income of the property amounts to; but the Courts below have found that it comes to Rs. 1,500 per annum or Rs. 125 per mensem.

The wakfnama contains a detail of the objects upon which the income has to be spent and these details have been set out in the judgment of the trial Court and may be usefully reproduced with slight verbal variations:

(1) For providing the usual paraphernalia necessary for the upkeep of a mosque situate in Mohalla Fatehpura alias Mohalla Rasmandal and for paying the salary of the Muezzin and other expenses relating to the mosque.

(2) Rupees 5 per mensem ought to be paid to the Qurania school maintained in the Jumma Masjid, Jaunpur.

(3) For the annual celebration of Milad Sharif in a suitable manner and on a proper scale on 12th of Rabi-ul-awwal of every year.

(4) (a) For the repairs of the dedicated house.

(b) For personal expenses of the mutawalli,

(c) For help and support of the indigent and the poor.

(d) For other charitable and religious purposes.

(5) For the payment of a reader of Quran for the benefit of the soul of the donor.

(6) After the death of Mt. Ahmadi Bibi, for the payment of another reader of Quran for her benefit.

(7) Rupees 5 monthly or Rs. 60 per anunm to each of his three nephews namely Ghulam Hussain, Dildar Husain and Faiyaz Husain

and to their deecendants for ever. If any of them dies childless, the annual amount due to him shall be paid to the remaining aforesaid persons or to their male issue. In case of the absence of a male issue, it will be paid to a female issue. If perchance there remains none in their lineage at any time, the said amount shall be spent on other charitable deeds . . . . . should the said persons or any one of their children desire to get the amount in a lump sum in lieu of the said profit of his share for paying the debt to be due by him, I, the executant, and after my death every mutawalli shall have power to pay in cash at the rate of Rs. 1,000 for each annual amount of Rs. 60 aforesaid out of the income of the wakf property and obtain a deed of relinquishment of elaim."

It has been argued that on a proper construction of this document, the settlor, in fact, transferred the bulk of the property to his wife and after her, to the descendants of the wife's sister from generation to generation and the effect of the document was to create a perpetuity in favour of the descendants of the wife's sister of Mt. Obedunissa if Mt. Amadi Bibi so chose to elect.

The objects of the trust having been clearly defined in the instrument, it will be nothing short of a breach of trust on the part of the mutawalli not to fulfil those objects but to appropriate the usufruct for his or her personal benefit. No specific sum appears to have been set apart for the maintenance and support of the wakif in his character as wakif or in his character as mutawalli. It is, however abundantly clear from the scheme of the entire document that the wakif or the mutawalli had to maintain himself out of a portion of the usufruct of the property but that it was imperative on him to give effect to the other objects which have been circumstantially detailed in the instrument. Under S. 3, Mussalman Wakf Validating Act (Act 6 of 1913), it is lawful for a Hanifi Musalman to create a wakf inter alia of his own maintenance and support during his lifetime. It was to be remembered that the aforesaid Act is an enabling statute and apparently this portion of the enactment was made with the object of removing the disability resulting from the view taken by some of the Mahomedan jurists that it was not lawful for the wakif to "eat" out of the wakf property. Under the Mahomedan Law, a mutawalli who is not the founder of the trust, has no power whilst in health to appoint a successor or to formulate any scheme for succession to the office of the mutawalli. This restriction does not apply to the founder of the wakf, who in reason and equity ought to nave a free hand in the matter of nominating and appointing a mutawalli for the administration of the trust in praesenti and in laying down a detailed scheme as regards the succession to the office of the mutawalli. He is competent to nominate the successors by name or to indicate the class together with their qualifications from whom the mutawalli may be appointed or to invest the mutawalli with power to nominate his or her successor after death or abandonment of office. The fact that the settlor appointed his wife as his successor to the tauliyat or invested her with power to appoint a successor from the male issue of her sister or from among any other proper person belonging to the founder's family who were particular about their roza and namaz and fulfilled the further condition of being najibuttarfain is not a circumstance which in any way militates against the provision of the Mahomedan Law. It is patent that his brothers and the other male issues of the brothers' family were all Shias and the founder may well have had conscientious scruples in appointing them as mutwallis or in indicating them as a class from which a mutwalli might be appointed. In any case, the condition relating to the appointment of the mutwalli or the successor of the mutwalli is not indicative of the fact that the trust is illusory.

The gift is further assailed on the ground that the amount set apart for charity and other pious purposes is comparatively small in amount and is of an illusory character because of its uncertainty. Since the passing of the Mussalman Wakf Validating Act the matter is now beyond the reach of controversyithat the creation of an endowment for the maintenance and support wholly or partially of the family of the founder, of his children or descendants and for his maintenance and support during his lifetime is lawful, where the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognized by the Mohamedan law as a religious, pious or charitable purpose of a permanent character. The objects of

immediate benefit under the instrument are: the Qurania School, the celebration of Milad Sharif, the help of the poor, the payment of a reader of Quran, the repairs of the dedicated houses, the personal expenses of the mutawalli and payment of Rs. 60 per annum to each of the three nephews. There is no uncertainty about these objects. The provision regarding the carrying on of these objects is not optional but mandatory and as such binding upon the conscience of the mutawalli or trustee. It is true that the amounts for many of the objects named above have not been allocated or defined, but the fulfilment of those objects is compulsory and is not left to the discretion of the mutwalli. The indigent or the poor share in the immediate present with the other objects of the trust. There is also an ultimate reservation in express terms in favour of other charitable deeds if the trust in favour of the nephews fails by reason of the extinction of their lines. Our attention was drawn to the decision of the Judicial Committee *in re Mujibunnissa* v. *Abdul Rahim* (1). The legality and validity of a wakfnama executed by Munshi Sayed Meharban Ali in October 1889 was in controversy. The Privy Council held that no wakf was validly created as the document was not properly presented for registration by or on behalf of the settlor during his lifetime. The Privy Council further found that some of the conditions in the instrument were of an illusory character inasmuch as the wakif, during the term of his superintendence, and after him every mutwalli had the power to spend or withhold expenses from the various objects of charity enumerated in the document and

"it was to be optional to him to create new allowances, to reduce, enhance or to put a stop to the allowances of the persons receiving allowances. No other recipient of allowances or relative was to have power to take an account from the mutwalli."

The main object of the instrument was to create a family endowment and any liberality to religious and charitable purposes was left to an uncertain and discretionary amount. Apart from the fact that the instrument was created long before the Mussalman Wakf Validating Act, the terms of the document clearly indicated that the wakf was a family perpetuity in disguise. The conditions in the document in controversy now before us are essentially different. In *Mohammad Shafiq Ahmad* v. *Mohammad Mujtaba*, *A I.R.* 1928, *All.* 660 the principal question for determination upon which the appeal hinged was as to whether the wakf in dispute was a private trust or a public charitable trust within the meaning of S. 92, Civil P. C. It was held upon the authority of *Mujibnissa's* case (1) which has already been referred to and of *Mohammad Munnawwar Ali* v. *Razia Bibi* (2), that the trust in question was not a public charitable trust and that the trust in favour of charity was negligible and illusory. The following remarks clearly differentiate this case from the facts now before us:

"In the present case, there was no obligation on the wakif himself to spend any particular sum on charity. The amount to be spent by his successors is very small, both absolutely and relatively to the total amount of the income of the wakf and the discretion given to the mutwalli in spending it is as wide as can possibly be; so that, as I have said, it would be practically impossible to control him in dispensing it etc."

There is nothing in the Mahomedan law to invalidate a wakf, where the objects of the endowment are clear and certain, simply for the reason that no defined portion of the property or specified amounts of the usufruct have been dedicated to charity or other religious, pious or charitable purposes of a permanent character recognized by the Mahomedan law.

It has next been argued that the provision for the maintenance of the three nephews and of their descendants, generation after generation, offends against the rule against perpetuity and is opposed to the Mahomedan law as construed by the Privy Council in a series of cases like *Abdul Fattah Mohammad Ishaq* v. *Rasamaya Dhur* (3), and is not supported by S. 3, Mussalman Validating Act of 1913. It is contended that the word "family" in S. 3 (A) includes only those persons residing in the house of the settlor for whose maintenance he is mainly responsible; and reliance is placed upon a decision of the Chief Court of Oudh *in re*, *Abdul Maabud Khan* v.

(1) [1901] 23 All. 233=28 I.A. 15=7 Sar. 829 (P.C.).

(2) [1905] 27 All. 320=32 I.A. 86=15 M.L.J. 261 (P.C.).

Nawazish Ali Khan, *A.I.R.* 1925, *Oudh* 301. There is no doubt that this decision is an authority for the proposition contended for as would appear from the following extracts ; Family

" is a word which may no doubt have on occasions very wide connotation but we consider that its meaning is limited in the present instance by the words " children and descendants " with which it is associated, that is to say, that its application will not extend beyond persons whose maintenance can be required as more or less incumbent on the plaintiff in the nature of things so as to partake of the character of the fulfilment of a pious obligation. It is difficult to see how the maintenance of such distant collaterals as cousins in the fourth or fifth degree can be viewed in any such light and the extension of the term " family " to such would logically involve its extension to much more distant kindred. We consider that the correct meaning of the word " family " in the subsection is that it includes only those persons residing in his house for whose maintenance the author of the trust is mainly responsible. "

With great respect, we find it difficult to subscribe to the above view. We are of opinion that the word " family " was intended to be used in this section in a very large and extensive sense. The policy of the Act was to validate the creation of a wakf in perpetuity in favour of persons who happened to be the members of the family according to the popular acceptance of that term. Technically the word " family " may be taken to mean the collective body of persons who live in one house and under one head or manager ; and includes within its fold a household consisting of parents, children and servants and as the case may be lodgers or boarders. Popularly, however, the term indicates persons descended from one common progenitor and having a common lineage. The nephews of the settlor are in this sense members of his family. It could never have been the object of the legislature to exclude persons who were related by blood merely by reason of the fact that they did not reside in the house of the settlor or that the settlor was not normally responsible for their maintenance. There is nothing in S. 3-A to indicate that any such limitations were in the contemplation of the legislature. If these limitations are introduced, the result would be to considerably narrow down the scope and utility of the Act.

(3) [1895] 22 Cal. 619=22 I.A. 76=6 Sar. 572 (P.C.).

The word " descendants " in S. 3, Cl. A has some bearing upon the question under consideration. It clearly indicates persons descended from the settlor both in the male and the female line. A descendant is an individual irrespective of the sex proceeding from an ancestor in any degree. The daughters' sons and daughters' daughters do not reside in the same house as the settlor and have no claims upon his bounty. It is clear that descendants in the female line not residing in the house of the settlor and not maintained by him are within the Act and cannot be excluded from its purview.

According to the rules of Mahomedan Law as found in the authoritative texts it is lawful for a person to create a wakf in favour of his kindred (karabatdar or karabat or zu karabat) and no preference will be given to males over females (Amir Ali's Tagore Law Lectures, 1884, p. 328.) A nephew apparently is a karabatdar and as such a member of the settlor's family. In *Musharraf Begam* v. *Sikandar Jahan Begam* (4) at p. 1189 *of* 26 *A.L.J.*) it was observed that the word " female " had been used in the Mussalman Wakf Validating Act in its broad popular sense so as to include all relatives more or less dependant on the settlor, and that a daughter-in-law living with an Indian householder is undoubtedly a member of his family in that sense. A daughter-in-law living in the same house as the settlor and maintained by him is undoubtedly a member of the family of the settlor. It was not intended in this case to lay down the rule that where a person had community of lineage, being descended from a common progenitor, he was not a member of the family unless he resided in the same house as the settlor and was maintained by him and indeed, the point did not arise.

We dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

(4) A.I.R. 1928 All. 516.

A. I. R. 1930 Allahabad 175

YOUNG, J.

Nannhun—Defendant—Appellant.

v.

Halka—Plaintiff—Respondent.

Second Appeal No. 2283 of 1927, Decided on 25th October 1929.

(a) Stamp Act, Sch. 1, Art. 40—Mortgage with condition of usufruct contingent upon happening of event which may or may not happen—Proper stamp on mortgage deed is same as for simple mortgage deed.

A mortgage with a condition that if particular event did or did not occur, or term of it was or was not statisfied, the mortgagee would take possession, is a simple mortgage and the proper stamp for the mortgage deed is the same as for simple mortgage deed : 10 *Cal.* 274, *Foll.* [P 176 C 2]

(b) Part performance—Part performance cannot be invoked to make documents otherwise inadmissible as infringing S. 59, T. P. Act and Ss. 17 and 49, Registration Act, admissible.

Where a document which ought to be registered under S. 59, T. P. Act, has not been registered and is consequently not admissible in evidence under Ss. 17 and 49, Registration Act, the doctrine of part performance cannot be invoked to make the document admissible: *A.I.R.* 1914 *P. C.* 27, *Dist.*; *A. I. R.* 1928 *All.* 641 (*F.B.*), *Rel. on.* [P 177 C 1]

(c) Interpretation of Statutes — Equity—Equity cannot override statutory provisions.

Where there is direct statutory enactment no equitable doctrine can override it. [P 177 C 1]

K. D. Malaviya—for Appellant.

Iqbal Ahmad—for Respondent.

Judgment.—This is a defendant's appeal from the judgment dated 25th June 1927 of Mr. Sarup Narain, Subordinate Judge of Jhansi. The plaintiff brought a suit for the redemption of two houses, five trees, 24 plots of occupancy land and mesne profits, but the only matter for consideration now is the redemption of the 24 plots.

The facts as alleged by the plaintiff were that the plaintiff's father, one Har Gobind, in the month of December 1899 executed a mortgage for Rs. 199 in favour of the ancestors of defendants 1 to 4. It was a term of the mortgage that if the mortgage was not paid off in the course of one year then the mortgagees were to take possession as if it were usufructuary mortgage. The plaintiff's case was that the mortgagees did take possession on the failure of the mortgagor to pay off the mortgage and enjoyed the usufruct for many years, and that the amount of money thus recovered by the mortgagees greatly exceeded the principal and interest of the mortgage. He, therefore, prayed for redemption, possession and mesne profits.

Three of the defendants, who were relatives and descendants of the original mortgagees, admitted that they were in possession as mortgagees. One defendant alone, the present appellant, also related to the mortgagees, did not so admit. All the defendants, however, challenged the deed on the ground that it was inadmissible in evidence on various grounds :

1. That the mortgage deed was improperly stamped :

2. That it was a document which ought to have been registered under S. 59, T. P. Act, and that it had not been registered, and, therefore, under Ss. 17 and 49, Registration Act, was inadmissible in evidence ;

3. That under S. 91, Evidence Act, the deed itself being inadmissible no other evidence was admissible, and

4. That even if the document was admissible in evidence, it was not properly proved.

As regards ground 1, the document was originally a simple mortgage and not usufructuary. The provision as to the usufruct only became operative on the happening of a certain condition which might never have occurred. I, therefore, in agreement with the ruling reported in *Anonymous* case (1), hold that the document was properly stamped.

The chief point raised by the appellant is No. 2. The can be no doubt that by S. 59, T. P. Act, the deed must be registered, and that under Ss. 17 and 49 Registration Act, being unregistered, it is inadmissible in evidence. The matter standing thus, a very serious obstacle of course is put in the plaintiff's way if the mortgage deed itself cannot be proved. Unless the plaintiff could bring in aid some other evidence, his action for redemption must fail. Under S. 91, Evidence Act, the deed itself being inadmissible no other evidence is available to the plaintiff, but the plaintiff relied upon, and strenuously argued the doctrine of part performance as laid down in the leading case of *Maddison* v. *Alderson* (2), and relied upon the decision of the Privy Council in the case reported in *Mahomed Musa* v. *Aghore Kumar Ganguli* (3). The plaintiff urged that by this Privy Council decision the equitable doctrine of part performance was applicable to India, and that the contract having been performed by both the parties the deed was admissible to

(1) [1884] 10 Cal. 274.
(2) [1883] 8 A. C. 467=52 L. J. Q. B. 737=31 W. R. 820=49 L. T. 303.
(3) A. I. R. 1914 P. C. 27=42 Cal. 801=42 I. A. 1 (P.C.).

show the nature of the defendant's possession. I am of opinion that the case of *Mahomed Musa* (3) cannot be relied upon by the respondent in support of this point. That case, in my view, is distinguishable. It referred to a compromise entered into in 1873 at which date the Transfer of Property Act had not been passed, and, indeed, at that date the compromise need not have been in writing. Under such circumstances it was possible to bring in aid the doctrine of part performance. In the matter before me, however, there is direct statutory enactment and no equitable doctrine can override the provisions of statute law. I think that the observations of the Court made in the case of *Ramgopal* v. *Tulsi Ram* (4) which are those of a Full Bench of this Court, are applicable to this case. Point 2 must, therefore, be decided in favour of the appellant, and that being so, it is unnecessary to consider the other points raised by him.

I regret having to decide in favour of the appellant in this case because it is clear on the facts that he has no merits, and by this decision he will be enabled to keep possession of property which clearly is not his, unless the plaintiff can claim the property in some other action which will not be barred by statutory limitation.

The appeal is allowed with costs.

V.B./R.K. *Appeal allowed.*

(4) A. I. R. 1928 All. 641 (F.B.).

A. I. R. 1930 Allahabad 177

SEN AND NIAMATULLAH, JJ.

Onkar Prasad--Plaintiff—Appellant.

v.

Dhani Ram and *others*—Defendants—Respondents.

Second Appeal No. 432 of 1926, Decided on 5th November 1929, from decree of Addl. Dist. Judge, Agra, D/- 30th November 1925.

(a) Civil P. C., O. 21, R. 58—Controversy with regard to proceeding under R. 58 between decree-holder and third person claimant — Attachment withdrawn — There is no cause of action for suit contemplated by R. 63—Civil P. C., O. 21, R. 63.

In a controversy in proceedings under O. 21, R. 58 between the decree-holder and the claimant whose property is attached as belonging to the judgment-debtor, once the attachment is withdrawn, there is no longer any attachment or any proceeding in execution in which the order against the claimant can operate to his prejudice and consequently there is no cause of action for a suit contemplated by R. 63. If then the claimant brings a suit against a third person even though he may be the judgment-debtor whose property it was alleged by the decree-holder to be, the cause of action is altogether different from the cause of action which he had alleged against the attaching creditor in his suit under O. 21, R. 63: 45 *Bom.* 561 and 18 *Bom.* 241, *Rel. on.*

(b) Adverse possession -- Landlord and Tenant—Tenant for fixed period continuing to hold over becomes tenant at sufferance and time does not run unless tenancy at sufferance terminates—Limitation Act, Art. 139.

Where a tenant for fixed period continues to hold over on the expiry of the term of lease, he continues as a tenant at sufferance and time will not in such a case begin to run until the tenancy at sufferance thus coming into existence, terminates. [P 179 C 1]

Iqbal Ahmad and *G. Agarwala* — for Appellant.

N. P. Asthana and *B. N. Sahai*—for Respondents.

Judgment.—These connected appeals arise out of a suit for possession of a house brought by Onkar Prasad, appellant in Second Appeal No. 432 of 1926 and the contesting respondent in Second Appeal No. 523 of 1926. The suit was decreed for possession of one-third of the house in dispute by the Court of first instance whose decree has been affirmed by the lower appellate Court, the learned Additional District Judge of Agra.

The house in dispute belonged to one Sukh Lal, who sold it on 17th February 1908 to Babu Ram. One Banwari Lal obtained, on 4th August 1908, a simple money decree against Sukh Lal, in execution of which he attached the house in question. Babu Ram aforesaid had in the meantime died, and his son Onkar Prasad objected to the attachment relying on the sale deed in favour of his deceased father. The objection was disallowed on the ground that the sale was not followed by possession and was a fictitious transaction. Thereupon a regular suit was instituted by Onkar Prasad for a declaration that it was not liable to be attached and sold in execution of Banwari Lal's decree. Pirthi Raj, an uncle of Onkar Prasad, acted as his next friend in that suit, which was eventually "dismissed as compromised" on 3rd July 1911. The surrounding circumstances were somewhat unusual. Pirthi Raj, the next friend and guardian of Onkar Prasad, executed a sale deed on 1st July 1911 in respect of the house in

favour of Dhani Ram and Babu Lal, brothers of the vendor Sukh Lal. (Babu Lal should be distinguished from Babu Ram, the vendee under the sale deed of 17th February 1908). The consideration of the sale deed was directed to be paid to Banwari Lal in satisfaction of his decree. On the same date Dhani Ram and Babu Lal executed a deed of gift in favour of Mt. Bitola, the widow of Sukh Lal, and Raj Kishore, the son of Sukh Lal, in respect of a bala khana of the house in dispute.

On 29th February 1924, Onkar Prasad brought the suit out of which the present appeal has arisen for possession, basing his title on the sale deed, dated 17th February 1908, and impleading Dhani Ram and Babu Lal. He impugned the subsequent sale deed executed on his behalf by his guardian, Pirthi Raj as invalid in the absence of legal necessity for the alienation. Mt. Bitola and Raj Kishore were made parties at a subsequent stage. The suit having been brought on 29th February 1924, was more than 12 years from the date of the sale deed, dated 1st July 1911. It has been found by both the Courts below that the plaintiff attained majority on 6th March 1921, and the suit having been brought within three years from that date must be considered to be in time as against the defendants originally impleaded; but Mt. Bitola and Raj Kishore were impleaded on 11th July 1924, that is, more than three years after the plaintiff attained majority, and therefore the plaintiff's claim as against them is prima facie barred by limitation.

The defence was that the sale deed, dated 17th February 1908, founded on by the plaintiff, was fictitious. The finding of both the Courts below was in favour of the plaintiff on that question. The lower Courts also found that there was no legal necessity for the sale of 1st July 1911, executed by Pirthi Raj as guardian of the plaintiff, but that possession of Mt. Bitola and Raj Kishore was adverse for more than 12 years before they were impleaded. The suit was, therefore, dismissed as regards one-third of the house assumed to be in possession of Mt. Bitola and Raj Kishore. By an order of this Court dated 10th April 1929, two issues were remitted to the lower appellate Court. They related to the nature and extent of the right of Mt. Bitola and to the specific portion of the house which is said to have been in her adverse possession. The finding returned by the Court below is that the right of Mt. Bitola and Raj Kishore is by adverse possession and is confined to a bala khana.

On return of this finding arguments have been addressed to us on the issues remitted for finding and on other questions arising in the case which were not disposed of by the order of remand.

Mr. Asthana, on behalf of the defendants, contended that the plaintiff's suit was barred by Art. 11, Sch. 1, Lim. Act. It is contended that the claim of the plaintiff having been dismissed under O. 21, R. 63, Civil P. C., when the house was attached by Banwari Lal in execution of his decree and the regular suit, which was subsequently filed, having been dismissed, the order passed under O. 21, R. 63, became conclusive as regards the right of the plaintiff, which was not affirmed in any regular suit brought within a period of one year provided for by Art. 11, Sch. 1, Lim. Act. The present suit, if it be considered to be a regular suit brought to contest the order under R. 63, O. 21, Civil P. C., is long barred by limitation, which is only one year. We think that this contention is not well founded. The attachment, which had been objected to by the plaintiff and to which the order under R. 63, O. 21, Civil P. C., related, was withdrawn, as the decree was otherwise satisfied. Art. 11, Sch. 1, Lim. Act, ceased to have any application. Our attention has been drawn to *Manilal Girdhar* v. *Nathalal Mahasukhram* (1). The facts of that case are very similar to those before us. It was held that:

"once the attachment was withdrawn, there was no longer any atachment or any proceeding in execution in which the order against the plaintiff would operate to his prejudice."

An earlier case of that Court *Gopal Purshotam* v. *Bai Diwali* (2), was relied on in support of that view. We find ourselves in agreement with the view taken by the learned Judges in those cases. The controversy in proceedings under O. 21, R. 58, Civil P. C., is between the decree-holder and the claimant whose property is attached as belonging to the judgment-debtor. The suit contemplated

(1) A.I.R. 1921 Bom. 35=45 Bom. 561.
(2) [1894] 18 Bom. 241.

by R. 63 is one in which the right of the decree-holder to attach the property in question in execution of his decree is contested. As soon as his decree is otherwise satisfied and he withdraws the attachment in consequence, the cause of action for his suit of the nature contemplated by O. 21, R. 63, Civil P. C., to which Art. 11, Sch. 1, Lim. Act, applies, disappears. In a subsequent suit which may be brought by the claimant against a third person, even though he may be the judgment-debtor whose property it was alleged by the decree-holder to be, the cause of action is altogether different from the cause of action which he had alleged against the attaching creditor in his suit under O. 21, R. 63, Civil P. C. For these reasons, we think that the present suit is governed by the usual 12 years' rule, and not by Art. 11, Sch. 1, Lim. Act.

Another contention, put forward on behalf of the appellant is that Art. 139, Sch. 1, Lim. Act, applies and the suit is barred under that article. The facts on which this contention is based are these: After the sale deed dated 17th February 1908, executed by Sukh Lal in favour of Babu Ram, the latter (the vendee) executed, on 25th February 1908, a karayanamah in favour of Sukh Lal (vendor) and his brother, Gulzari Lal, for two years. It is argued that the cause of action for recovery of possession accrued on the expiry of two years in the lifetime of Babu Ram. The tenants and their heirs having continued in possession for more than 12 years after the expiry of the term limited by the lease, the lessor or his legal representative cannot recover possession after that period. We are unable to give effect to this argument. The term of the lease having expired, the lessees continued to hold over, not as tenants for a fixed period, but as tenants at sufferance; and the time will not in such a case begin to run until the tenancy at sufferance thus coming into existence terminates. This aspect of the question of limitation does not seem to have been raised in either of the Courts below and for aught that appears from the record the tenancy was continued by parties to the lease after the expiry of two years. There is nothing on the record to show that the tenancy terminated at a time more than 12 years before the institution of the present suit, but the tenants or their legal representatives withheld possession during that time. Under these circumstances, we hold that the suit is not barred by Art. 139, Sch. 1, Lim. Act.

It has been already mentioned that the Courts below decreed one-third of the house to Mt. Bitola and Raj Kishore on the assumption that they were in possession to that extent for more than 12 years. The findings that have now been returned to the issues remitted by this Court are specific in determining the nature and extent of the possession of these two defendants which was limited to the bala khana. Accordingly, they must be held to have been in adverse possession of that part of the house for more than 12 years so as to extinguish the right of the plaintiff in regard to it. We modify the decree passed by the Courts below so far that the plaintiff's suit shall stand dismissed as regards bala khana instead of undefined one-third of the house, as decreed by the Courts below. We direct, under the circumstances of the case, that the parties should bear their own costs throughout.

V.B./R.K. *Decree modified.*

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DALAL, J.

Aminullah Jamati—Plaintiff—Appellant.

v.

Makhdoom Beg—Defendant—Respondent.

Second Appeal No. 126 of 1928, Decided on 22nd November 1929, against decree of Addl. Dist. Judge. Cawnpore, D/- 22nd October 1927.

Agra Tenancy Act (3 of 1926), S. 264—Nankar cannot be set off against rent.

Nankar is a certain allowance which an exproprietor receives from a person purchasing his property while his tenancy rights do not depend on any exproprietary right. The origin of the two rights, the right for rent and right for nankar, being different, set off cannot be allowed in a suit for rent. [P 180 C 1]

M. A. Aziz and *Mohammad Hadi*—for Appellant.

Iqbal Ahmad—for Respondent.

Judgment.—The point in appeal is correct that a revenue Court cannot allow a set off. The authority of the revenue Court in such a matter is taken away by the provisions of S. 193 (g), Tenancy Act 2 of 1901. The plaintiff

sued for rent and the defendant desired to deduct his nankar allowance from the amount of rent. The two subordinate Courts have held that the true rent was arrived at by the deduction of the nankar from the rent. This opinion is based on a misunderstanding of nankar right. The two rights are wholly different. A nankar is a certain allowance which an ex-proprietor receives from a person purchasing his property, while his tenancy rights do not depend on any exproprietary right. The defendant ought to bring a separate suit to recover his nankar right. The origin of the two rights of recovery being different, it cannot be said that the real rent is the amount entered in the khatauni minus the amount of nankar. Reference was made to a judgment of a settlement officer who was of opinion that the provisions of S. 193 (g) did not apply. He was welcome to his opinion, but cannot bind this Court by expressing such an opinion. He may have had authority to fix rent. He, however, did not fix any rent by subtraction but based his decree on the wrong opinion that a claim for nankar was not a claim in the nature of a set off.

I decree the appeal. Parties shall bear their own costs.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 180

SEN AND NIAMATULLAH, JJ.

Shyam Behari Mal—Defendant—Applicant.

v.

Maha Prasad and *others*—Plaintiffs—Opposite Parties.

First Appeal No. 183 of 1928, Decided on 11th November 1929, against order of Dist. Judge, Azamgarh, D/- 11th September 1928.

(a) Transfer of Property Act, S. 128—To make donee liable under S. 128, gift must consist of the donor's whole property—Donee must be universal donee and nothing short of it.

Were the settlor is possessed of property which has not been either gifted or endowed, the donee of the property cannot be held to have become a universal donee under S. 128. The essential condition is that the gift must in such a case consist of "the donor's whole property." If any portion of the donor's property, no matter whether it is moveable or immovable, is excluded from the operation of the gift or the endowment, the donee is not a universal donee and the creditor is not entitled to the benefit of S. 128, against such a person. [P 182 C 1]

(b) Civil P. C., O. 41, R. 23—Case tried on various material issues—Case should not be remanded—If case be bad for multifariousness plaintiff should be put on election or defendants struck off but generally no remand should be ordered under O. 41, R. 23—Practice—Appellate Court.

It is not desirable to direct a remand in a case which has been tried on various issues not preliminary ones and has already involved parties in great labour, time and expense with regard to adducing evidence. If in such a case the appellate Court finds that the suit is bad for multifariousness the Judge should put the plaintiffs upon their election or strike out a particular party from the array of defendants and proceed with the trial of the appeal upon all questions of law and fact which are raised before him. [P 183 C 1]

(c) Civil P. C., O. 1, R. 9—Suit should not be dismissed for misjoinder of parties and causes of action though defect be patent—Plea must be raised at earliest opportunity.

Where a suit has been directed against a number of defendants and the allegations contained in the plaint disclose that the causes of action against the several defendants are not only separable but separate, it is not permissible for a Court of law to dismiss the suit. Substantial justice should in no case be allowed to be sacrificed to a mere technicality. Even where the defect of multifariousness is patent on the face of the pleadings, the plea cannot be entertained unless it was raised at the earliest possible opportunity. Safeguards have to be provided against the evil arising from multifariousness of suits which generally result in waste of time and waste of money. Unless the joinder of parties and causes of action is calculated to embarrass the trial, the Courts have a discretion to proceed with the case. The discretion of the Court is, however, fettered by certain rules of procedure, which a Court of law is not competent to ignore. [P 183 C 1]

(d) Civil P. C., O. 1, R. 3—Two essential conditions to be satisfied before joining persons as co-defendants laid down.

The first condition to be fulfilled before joining several persons as co-defendants in the same suit is that the right to relief sought in the suit must arise against all the defendants from the same act or transaction or from the same series of acts or transactions. The second condition to be fulfilled under the rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons: *Stroud* v. *Lawson*, (1898) 2 *Q. B.* 44, and 34 *Bom.* 358, *Foll.* [P 185 C 1, 2]

K. N. Katju and *A. P. Pandey*—for Appellant.

Shiva Prasad Sinha — for Respondents.

Sen, J.—This is an appeal from an order of remand and is connected with two other first appeals from order which

are numbered as 184 of 1928 and 217 of 1928. These three appeals arise out of three suits for recovery of money based on promissory notes against the same set of defendants.

In first appeal from order No. 183 of 1928, the suit was instituted by Shyam Behari Mal on 16th May 1927, in the Court of the Subordinate Judge of Azamgarh for recovery of Rs. 3,958-8-0 principal and interest on a promissory note dated 20th March 1926, which had been executed by Ram Ghulam Mal defendant 1 in plaintiffs' favour. Defendants 2 and 3 are the sons of defendant 1 and members of a joint family with him and the plaintiffs sought to fix the liability upon the sons upon the ground that the money was borrowed to meet a legal necessity. The other defendants were three idols of a Hindu temple namely Padam Nal, Sri Ramji, Lachhmanji and Jankiji. These were impleaded as defendant 1 was alleged to have executed in their favour a fictitious wakfnama of the entire property owned and possessed by him on 6th September 1926, with the intention of evading the payment of his just debts which were due to the plaintiffs and other creditors.

The relief claimed in the suit were only two. The plaintiff prayed for a decree for Rs. 3,959-8-0 principal and interest etc., against defendants 1, 2 and 3. The relief claimed against defendant 1 was to a certain extent particularised in so far that the plaintiff claimed that the amount be realised from the person and all the family property owned and possessed by defendant 1 and entered in the document known as the wakfnama dated 6th September 1926. The other relief was of a declaratory character and related to the wakfnama. The plaintiff prayed for a declaration that the document known as the wakfnama dated 6th September 1926, was vitiated by fraud and as such was null and void and that the property covered by the said instrument was liable to be attached and sold in satisfaction of the plaintiff's claim.

The suit which gave rise to first appeal from order No. 184 of 1928, was instituted by Oudh Behari Mal on 4th June 1927. The claim was for recovery of Rs. 3,980-10-0 on a promissory note executed by Ram Ghulam Mal in favour of the plaintiff on 30th October 1925. The sons were charged with liability on the ground of legal necessity and the wakfnama in favour of the idols was impugned on the ground of fraud. A decree for money was, therefore, claimed against all the defendants and a relief for a declaration that the wakfnama was null and void was also added.

First appeal from order No. 217 of 1928, arose out of a similar suit filed by Bir Bahadur Sahi for recovery of his money due on a promissory note dated 15th September 1925, executed by defendant 1 in his favour. The allegations upon which the suit proceeded and the reliefs claimed were similar to those in the last mentioned suit.

It will be seen from the above that in the suit first mentioned, no money decree was claimed against the idols. In the other two suits, the plaintiffs sought to recover their dues not only from defendants 1, 2 and 3 but also from the idols on the ground that the said idols filled the jural capacity of a universal donee and were liable under S. 128, T. P. Act, for all the debts due by the donor.

The suits were defended on a number of grounds, most of which are not material for the purpose of these appeals. It was contended that the money had been borrowed for the benefit of a certain firm known as Jagat Narain Maha Prasad of which Ram Ghulam Mal was one of the partners, that the money had not been borrowed by Ram Ghulam Mal on his own account or for the joint family of which he was a member, that Ram Ghulam Mal, on the date of the execution of the wakfnama and after, was possessed of considerable property which had not been made wakf of, that S. 128, T. P. Act, did not apply, that the Hindu idols were not liable for the debts and had been wrongly impleaded and that the plaintiff's suits were bad for misjoinder of parties and causes of action.

A large number of issues appear to have been raised including an objection as to the constitution of the action, which appears to have been taken at the earliest opportunity. Evidence was recorded upon the entire case. The learned Subordinate Judge did not decide the case upon a preliminary point but gave his findings upon all the issues.

The learned Subordinate Judge decreed the suit of Shyam Behari Mal

against defendants 1 to 3. He found that the claim was bad against the idols on the ground of misjoinder of parties and causes of action. He, therefore, disallowed the claim for the declaration relating to the wakfnama with permission to the plaintiffs to bring a fresh suit, if and when necessary.

The learned Subordinate Judge held as a matter of law that where a small portion of the property has not been included in the gift but the bulk of the property has been donated, the donee is nevertheless a universal donee under S. 128, T. P. Act. In this view and having regard to the fact that a money decree had been claimed by the plaintiffs against the idols, as also against defendants 1 to 3, the Subordinate Judge passed a decree in the other two suits against all the defendants.

On appeal, the learned District Judge was doubtful as to whether the idols answered the description of a universal donee as understood in the law of transfer. He observes:

"It is also very doubtful if defendant 4 can be regarded as the universal donee for unless it is proved that defendant 1 transferred all his property, moveable and immovable to him he cannot become the universal donee."

The learned District Judge did not determine the question whether as a fact defendant 4 was a universal donee and the reason assigned for not doing so is that:

"the question of multifariousness can be decided only on the allegations made in the plaint, and according to the plaintiffs all the property has been transferred to him."

The lower appellate Court was not justified in narrowing down the point under enquiry to the plea of multifariousness. Where the settlor is possessed of property which has not been either gifted or endowed, the donee of the property cannot be held to have become a universal donee under S. 128, T. P. Act. The essential condition is that the gift must in such a case consist of "the donor's whole property." If any portion of the donor's property, no matter whether it is moveable or immovable, is excluded from the operation of the gift or the endowment, the donee is not a universal donee. The creditor is entitled to the benefit of S. 128, T. P. Act against a person who is a universal donee and nothing short of a universal donee. If it turns out on the taking of evidence that the entire property belonging to defendant 1 has not been gifted to defendant 4, there has unquestionably been a misjoinder of parties and causes of action in the suit and the claim against defendant 4 must on that ground be dismissed. It may be permissible to the plaintiff to institute a separate suit against defentant 4 on the ground that the wakf of gift in his favour is a colourable transaction and is obnoxious to the provision of S. 53, T. P. Act. It may be equally open to defendant 4 to resist this or a separate action on the ground that the donor or settler was possessed of other properties which were sufficient to meet the liabilities of the settlor and that the instrument of trust was therefore not open to any challenge.

The trial Court held that the loan was taken from Oudh Behari Mal for the use of the joint family and from Shyam Behari Mal and Bir Bahadur Sahi for the firm Jagat Narayan Sahai Prasad, that the money was borrowed through the instrumentality of Ram Gulam Mal, defendant 1, who is the manager of the family but that the money was borrowed by him in his personal capacity and that therefore defendants 1 to 3 were jointly and severally liable for the same.

These findings were impugned by the defendants before the lower appellate Court but there was no adjudication of the issues raised.

The lower appellate Court held that the suit was bad for multifariousness and that having regard to the constitution of the action the suit could not proceed in the form in which it was brought and that the plaintiffs should be directed to amend their respective plaints. It accordingly allowed the appeal and ordered the case to be returned to the learned Subordinate Judge for trial on the merits after allowing the plaintiffs to amend the plaint under O. 6, R. 17, Civil P. C., on payment of Rs. 50 damages.

The plaintiffs contend in their appeal to this Court that the three suits were not vitiated by misjoinder of parties or by causes of action and that the order of remand passed by the lower appellate Court was illegal.

The trial Court not having disposed of these suits upon a preliminary point

within the meaning of O. 41, R. 23, Civil P. C., the order of remand was not justified. The case had been tried by the first Court on the various issues. The parties had devoted a lot of labour time and expense in adducing evidence. It was not desirable to direct a remand in such a case even if it might be permissible to do so. If the action in the form in which it is brought was bad for multifariousness, it was open to the Court to strike off a particular party or parties or to call upon the plaintiffs to make their election and make the necessary amendment before it. In view of all these circumstances of the case, a remand was neither necessary nor desirable.

The lower appellate Court is emphatic in its pronouncement that "there undoubtedly is multifariousness in the suit." This finding has been vehemently assailed by the appellant before this Court but there can be no doubt as to its correctness.

The rules relating to joinder of defendants and of causes of action pleaded against them are rules of procedure and are not those of substantive law. Where a suit has been directed against a number of defendants and the allegations contained in the plaint disclose that the causes of action against the several defendants are not only seperable but separate, it is not permissible for a Court of law to dismiss the suit. Substantial justice should in no case be allowed to be sacrificed to a wretched technicality. Even where the defect of multifariousness is patent on the face of the pleadings the plea cannot be entertained unless it was raised at the earliest possible opportunity. Safeguards have to be provided against the evil arising from multifariousness of suits which generally result in waste of time and waste of money. Unless the joinder of parties and causes of action are calculated to embarrass the trial, the Courts have a discretion to proceed with the case. The discretion of the Court is, however, fettered by certain rules of procedure, which a Court of law is not competent to ignore.

In dealing with the question as to whether any number of plaintiffs might join in a number of causes of action in a single writ, Lord Bowen is reported to have observed in *Hannay* v. *Smurthwaite* (1) that it was not the intention of the legislature in framing rules under the Supreme Court of Judicature Act of 1873 that a writ should be like an omnibus travelling on a certain route into which any number of persons may get in as passengers for the journey. Under the aforesaid rules, provision was made in O. 16 for the joinder of parties and in O. 18 for the joinder of causes of action. It was authoritatively laid down by the House of Lords in the aforesaid case on appeal from a decision of the Court of appeal that O. 16. R. 1 dealt merely with the parties to an action and had no reference to the joinder of several causes of action. This pronouncement led to the amendment of of O. 16, R. 1 on 26th October 1896. As the result of the amendment, the rule which related to the joinder of plaintiff took the following form :

"All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of, or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise ; provided that if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action the Court or a Judge may order separate trials, or make such other order as may be expedient and judgment may be given for one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to without any amendment. But the defendant, though unsuccessful shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief unless the Court or Judge in disposing of the costs shall otherwise direct."

The rule relating to the joinder of defendants was laid down in O. 16, R. 4 which ran as follows :

"All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative and judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities without any amendment."

The result of this rule was that several persons might be impleaded as defendants against whom any relief was alleged to exist, whether jointly, severally or in the alternative, and where the liability of a particular defendant was established the Court was competent to proceed to judgment against him without having any recourse to amendment.

(1) [1893] 2 Q. B. 422.

Order 18, R. 1 provided that :

"Subject to the following rules of this order the plaintiff may unite on the same action, several causes of action ; but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any such causes of action to be had or may make such other order as may be necessary or expedient for the separate disposal thereof."

Rule 8 of the last mentioned order enacted that any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together may at any time apply to the Court or a Judge for an order confining the action to such of the causes of action as may be conveniently disposed of together.

Under the old Civil Procedure Code (Act 14 of 1882), the provisions relating to the joinder of defendants and of the causes of action were enacted in Ss. 28 and 45. S. 28 provided that:

"All persons may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally or in the alternative, in respect of the same matter, and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities without any amendment."

The words "in respect of the same matter" were extremely vague and gave rise to a conflict of judicial pronouncement. "The same matter" was construed by some of the Courts to be equivalent to "the same cause of action" and by other Courts to mean "the same act or transaction." In other respects the rule as regards the joinder of defendants was in a line with the English rule of procedure.

Section 45 provided that:

"Subject to the rules contained in Chap. 2 and in S. 44, the plaintiff may unite in the same suit, several causes of action against the same defendant or the same defendants jointly; and the plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit; but if it appear to the Court that any such causes of action cannot be conveniently tried or disposed of together, the Court may at any time before the first hearing, of its own motion or on the application of any defendant, or at any subsequent stage of the suit, if the parties agree, order separate trials of any such cases of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof."

In the present Civil Procedure Code (Act 5 of 1908) O. 1, R. 1, relates to joinder of plaintiffs.

Order 1, R. 3, which in some respects is the converse of O, 1, R. 1, provides for the joinder of defendants and runs as follows:

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or of fact would arise."

This rule has evidently been moulded upon the rule relating to the joinder of defendants and causes of action which now prevail in the English Courts under the Judicature Act of 1873 and has been so expressed with a view to remove any ambiguity or conflict which arose from the corresponding sections in the Civil Procedure Code of 1882.

It ought to be remembered that the English rule has been judicially construed to include cases in which the cause of action is not the same *Child* v. *Stenning* (2). But the decisions do not stop short there. It has been held in a number of important judicial pronouncements that the rule does not support an action which is founded upon entirely disconnected acts: *Burstall* v. *Beyfus* (3) and *Gower* v. *Couldridge* (4).

Under the present Civil Procedure Code a number of different defendants may be charged on distinct grounds of liability founded upon separate causes of action and it shall not be necessary that every defendant shall be interested as to all the reliefs claimed in any suit against him (O. 1, R. 5). Judgment may be given without any amendment against such one or more of the defendants as may be found to be liable, according to their respective liabilities O. 1, R. 4.

Order 2, R. 3, Civil P. C. contains the provision regulating the joinder of several causes of action.

"Save as otherwise provided a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit."

(2) [1877] 5 Ch. D. 695=46 L. J. Ch. 523=25 W. R. 519=36 L. T. 426.
(3) [1884] 26 Ch. D. 35=53 L. J. Ch. 565=32 W. R. 418=50 L. T. 542.
(4) [1893] 1 Q. B. 348=67 L. J. Q. B. 251=14 T. L. R. 165=46 W. R. 214=77 L. T. 707.

There can be no pretence for joining a number of heterogeneous persons in the same suit as defendants upon the simple ground that the plaintiff claims a common relief against them.

The plaintiff to avail himself of the provision of O. 1, R 3, Civil P. C., has to satisfy the following two conditions:

(1) The right to relief alleged to exist in him arises out of the same act or same transaction or same series of acts or transactions and

(2) The suit is of a character that if separate suits were instituted against the defendants, any common question of law or fact would arise.

Both these conditions must co-exist, the two conditions not being in the alternative. Our attention has been drawn to the decision of the Court of appeal in *re, Payne* v. *The British Time Recorder Co. Ltd. and W. W. Curtis Ltd.* (5) in which it has been held that as a general rule where claims by or against different parties involve or may involve a common question of fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matter should be disposed of at the same time, the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.

Warrington, L. J.. makes the following remarks at p. 13 of the report:

"Turning to R. 1 in its new form, I find that the words inserted are of the nature of the restriction or qualification which, while they show that it is intended by the rule to deal with joinder of causes of action, at the same time puts some limitation on the joinder of causes of action which may be made under it."

The law on the subject has been clearly laid down by Davar, J., in *Uma Bai* v. *Bhau Balwant* (6). The learned Judge observes (p. 355):

"In reading this rule, it seems to me quite obvious that the word "same" which precedes the words "act or transaction" governs also the words "series of acts or transactions" and must be read before those words also."

It seems to me therefore that the first condition to be fulfilled before joining several persons as co-defendants in the same suit is that the right to relief sought in the suit must arise against all the defendants from the same act or transaction or from the same series of acts or transactions. The second condition to be fulfilled under the rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons. The above view is supported by the pronouncement of Vaughan Williams, J. in *Stroud* v. *Lawson* (7) in which he emphasizes upon the fact that the two conditions are not alternative conditions.

The claim against defendants 1 to 3 was founded upon a contract. Defendant 1, if he acted in his capacity as manager of a joint Hindu family, executed the promissory note on behalf of himself and the entire family of which he was the karta. If he borrowed the money on his own account or in his personal capacity upon his own responsibility, defendants 2 and 3 were liable for the same unless the loan was immoral. The Hindu idols which have been compendiously described in the judgments of the Courts below as defendant 4 were no party to the contract aforesaid. Defendant 4 was under no pious obligation to discharge the said debt. The liability of defendant 4 did not flow from the contract of debt entered into by defendant 1. The cause of action upon which the claim against defendant 4 was founded was distinct from that upon which liability was sought to be fastened against the other three defendants.

In appeal No. 183 of 1928, it was not even alleged in the plaint that the relief claimed against defendant 4 was in respect of or arose out of the same act or transaction or series of acts or transactions affecting the other defendants to the action. In the suit, which gave rise to this appeal no money decree was claimed against defendant 4 and all that was claimed was that the deed of wakf be avoided and that the plaintiff's claim be allowed to be satisfied out of the property embraced in the deed. It may be conceded that if separate suits were to be instituted against defendants 1 to 3 and against defendant 4, certain common questions of law or fact would arise but this fact by itself will not justify the joinder of all these defendants in the same action where no right to relief in respect of or arising out of the same act or transaction or

(5) [1921] 2 K. B. 1.

(6) [1910] 34 Bom. 358=3 I. C. 165=11 Bom. L. R. 499.

(7) [1898] 2 Q. B. 44=67 L. J. Q. B. 718=9 T. L. R. 421=46 W. R. 626=78 L. T. 729.

series of acts or transactions is alleged to exist.

In the other two suits, a money decree has been claimed against the idols jointly with the other three defendants but this does not in any way improve the situation. All the three suits stand upon the same footing, inasmuch as the right to the relief claimed against all the defendants are not in respect of or arise out of the same act or transaction or series of acts or transactions. In the other two suits, the liability of the idols is said to arise from the fact that defendant 4 is the universal donee under S. 128, T. P. Act. Even if defendant 1 transferred his entire property to the idols, the liability flowing from the transfer is absolutely disconnected with the liability which is the offspring of the contract. In agreement with the lower appellate Court I would hold that all the three suits are bad for misjoinder of parties and causes of action.

It has already been indicated above that the order of remand was not called for. The learned District Judge should proceed to hear the appeal. Upon the finding that there is a defect of multifariousness in the suits the learned Judge should put the plaintiffs upon their election or strike out a particular party from the array of defendants and proceed with the trial of the appeal upon all questions of law and fact, which are raised before him.

I would therefore allow the appeal, set aside the order of remand and direct that the case should go back to the learned District Judge to be heard and determined according to law. Costs here and heretofore shall abide the event.

Niamatullah, J.—I concur.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 186

MUKERJI AND NIAMATULLAH, JJ.

Chhedi Lal and *others* — Plaintiffs — Appellants.

v.

Punnu Lal and *others*—Defendants—Respondents.

Second Appeal No. 1581 of 1926, Decided on 7th November 1929, against decree of Dist. Judge, Allahabad, D/- 9th June 1926.

(a) Companies Act (7 of 1913), S. 4 — To determine purpose of association primary and original object has to be looked into, not subsequent circumstances.

In determining the purpose of the association the primary and original object of the association has to be looked into and no regard should be paid to the circumstances that developed later on and so if a perfectly legal association be formed and if later on, some of the members of the association should commit a breach of trust that fact should not render the original association an illegal one. [P 187 C 2]

(b) Companies Act (7 of 1913), S. 4 (2)—Object to dispose of gain on charitable object—Company must be registered if constituted of more than twenty persons.

A company may be formed for several objects, and if one of the objects be the acquisition of gain, and the members constituting it number more than twenty the mere fact that the members of the company either singly or jointly purpose to dispose of the gain on some charitable object will not exclude the company from falling within the purview of S. 4. [P 187 C 2]

Shiva Prasad Sinha for *Jang Bahadur Lal* and *K. Verma*—for Appellants.

Haribans Sahai and *K. N. Malaviya* —for Respondents.

Judgment.— This appeal and the connected second appeal No. 1590 of 1926 arise out of the same suit. The suit was brought for accounts and recovery of some money as the share of the plaintiffs. There is a large number of defendants. Some of them, including Ram Narain, who support the plaintiffs' appeal, contended that the plaintiffs were entitled to succeed in the suit and these defendants also were entitled to a share of the profits after accounts had been taken. The suit was mainly contested by defendant 1 Punnu Lal.

The facts which were alleged in the plaint are briefly these: In the year 1912, an association of more than 20 persons was formed with the object that a business should be started and with the gain of that business education should be imparted to the children of the members of the caste to which the members of the association belonged. The money was also to be spent on other charitable purposes. If after the charitable purposes had been met, there remained any surplus, it was to be distributed among the members of the association. The father of the defendant 1, Girdhari Lal, was the manager of the business, and on his death defendant 1 took up the manage-

ment. Later on, the charitable portion of the objects of the association was not carried out, and a large sum of money accumulated in the hands of defendant 1 as the profits of the business. The plaintiffs wanted a share in the profits after settlement of accounts. The defence, which has prevailed before the Court below, namely the association was an illegal one, having been formed in contravention of S. 4, Companies' Act, and therefore the suit could not be maintained, was not taken in the written statement. The suit was decreed by the Court of first instance, and defendant 1 was called upon to furnish accounts. Defendant 1 thereupon filed an appeal to the District Judge. In the meanwhile the preliminary decree culminated in a final decree, and a second appeal was filed in the Court of the District Judge by defendant 1. The learned District Judge, after taking some evidence, came to the conclusion that in the circumstances, which were placed before him, the company should have been registered under S. 4, Companies Act and that not having been done the suit was not maintainable. The learned Judge accordingly dismissed the plaintiffs' suit, with the result that both the appeals were allowed. In this Court two appeals have been filed by the plaintiffs against the two decrees made by the learned District Judge.

The only point which we have to determine is the construction of the language of S. 4, Companies Act. The learned Judge found that when the company was started and for some years after that the profits were devoted to the welfare of the community to which the members belonged, but, later on, after the breaking of the war, probably because large profits were made, the charitable object of the association was given up and profits were appropriated by the defendants. The learned Judge thought that, although in the beginning the object of the association was a charitable one, later on the object became a pecuniary one and therefore, it was not open to the parties to carry on the business without having registered the association. Being of this opinion, as we have said, the learned Judge dismissed the suit.

In this Court, it has been argued, and with a good deal of force, that primary and original object of the association has to be looked into and no regard should be paid to the circumstances that developed later on. The argument went on that if a perfectly legal association be formed and, if later on, some of the members of the association should commit a breach of trust, that fact should not render the original association an illegal one. We think that this argument is sound and although we are going to uphold the decrees of the Court below we are going to do so on an altogether different ground.

The whole question is whether people numbering more than twenty can form an association, without registering themselves, with the object of starting a business, the ultimate view being that the gain of the business should be devoted to charitable purposes. No authority has been quoted before us, and we think that the interpretation to be put is really a matter of first impression. The interpretation which we are going to put is also supported in our view by the object with which the S. 4, Companies' Act, was enacted.

The language of para. 2, S. 4, is as follows:

> "No company, association or partnership consisting of more than twenty persons shall be formed for the purposes of carring on any . . . business that has for its object the acquisition of gain by the company, association or partnership . . ."

The question is whether the words "gain by the company" mean an ultimate pecuniary gain by the company or whether the fact that the business started brings in profits and therefore "gain" would bring in the company within the purview of S. 4. A company may be formed for several objects, and if one of the objects be the acquisition of gain, the mere fact that the members of the company either singly or jointly, propose to dispose of the gain on some charitable object, will not exclude the company from falling within the purview of S. 4. If we look to the objects of the framers of S. 4 we shall at once see that this is the correct interpretation. Where a large number of people combine to enter into a business, the legislature thought it fit to lay down certain rules for controlling that business. If that be the object of registration of a company it will be seen

that whatever may be the use to which the gains of the company are to be put, so long as money is to be gained by business, the object of the legislature in intervening will remain. If the object of the legislature is as we think it to be that it should have some voice in the management and some check over the affairs, that object has to be carried out even if the members of the company be charitably disposed.

In the result, we think that the suit of the plaintiffs was rightly dismissed. The appeal fails and is hereby dismissed with costs. The costs will be recovered only by defendant 1 in the Court of first instance, namely, Punnu Lal.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 188

SEN AND NIAMATULLAH, JJ.

Dharamdeo Rai—Plaintiff — Decree-holder.

v.

Jwala Prasad and *another* — Defendants—Objectors.

Execution Second Appeal No. 1298 of 1928, Decided on 18th October 1929, against decree of Addl. Sub-Judge, Ballia, D/- 24th April 1928.

(a) Limitation Act, Art. 182—Application in accordance with law is sufficient — Intention is immaterial.

Provided the application for execution is made in accordance with law the question of the decree-holder's intention in applying for execution being bona fide, or otherwise is immaterial : *A.I.R.* 1929 *All.* 625 (*F.B.*), *Foll.*; *A.I.R.* 1926 *All.* 95, *not Foll.* [P 189 C 2]

(b) Civil P. C., O. 21, R. 106 (Allahabad High Court)—Application otherwise in accordance with law and presented to proper Court cannot be dismissed for non-observance of R. 106 — If within reasonable time certificate is furnished process should issue.

An application otherwise in proper form and not wanting any particulars required to be mentioned therein by O. 21, R. 11, and presented to a proper Court, in itself cannot be regarded as one not in accordance with law in consequence merely of the non-observance of R. 106 added by the Allahabad High Court to O. 21 under its rule making powers conferred by S. 122. The omission to file a certificate required by that rule will not entitle the decree-holder to have process issued on his application ; but the application will not on that account cease to be in accordance with law and entail consequence of dismissal. If within reasonable time such certificate is furnished the process prayed for in application for execution may issue. [P 189 C 2]

(c) Civil P. C., O. 21, R. 15—Non-compliance with requirements of R. 15 can be remedied by amendment of application in relation to matters required.

Although under R. 15 there is no duty cast upon the Court receiving the application for execution to examine the application in so far as the requirements of the rule are concerned and to have the defects remedied, it does not follow that if any requirements of R. 15 are not complied with by inadvertence or otherwise, the Court when its attention is drawn to the defect subsequently cannot allow amendment. Court is perfectly justified in allowing such amendment without infringing any provision of law ; and this can be allowed at later stages even before the Court of appeal : 4 *P. L. J.* 575, *Dist.* [P 191 C 1,2]

N. Upadhiya—for Appellant.

Baleshwari Prasad, *Janaki Prasad* and *Jwala Prasad Bhargava*—for Respondents.

Judgment.—This is an appeal from an order of the learned Additional Judge of Ballia reversing that of a Munsiff of that district and dismissing the appellant's application for execution of his decree on the grounds (1) that it was barred by limitation, and (2) that it was made by one only of two decree-holders without certain formalities being observed. The appellant challenges the correctness of the view taken by the lower appellate Court on both the grounds.

The circumstances leading to the application in question may be briefly stated. A decree under O. 34, R. 6, Civil P. C., was passed on 29th May 1920 in favour of Dharamdeo Rai, the appellant, and Chhatarsal Rai against Raj Ballabh Sahai for a sum of Rs. 1,074-4-0. The first application for execution was made on 29th May 1921 : but it was dismissed for want of prosecution after a protracted proceeding lasting for several months. The lower appellate Court has discussed the circumstances which led it to believe that :

"that application was not a bona fide application with the intention of obtaining execution and was therefore in effective to save limitation."

The second application was made on 4th January 1924. It prayed for attachment and sale of the immovable property belonging to the judgment-debtor, who had since died, and the execution proceedings were directed against his legal representative. As the decree was over a year old and the application for execution was made against the legal representative of the original judg-

ment-debtor, notice was issued under O. 21, R. 22, Civil P. C. Several attempts were made to effect service on the legal representative of the judgment-debtor but for some technical reason or other, which it is not necessary to mention in detail, notice remained unserved and the application was eventually dismissed on 13th January 1925. The learned Additional Judge has held that this application, like the first, was not a bona fide application for execution and was, besides, not in accordance with law in so far as it was not accompanied by a certificate from the registration office in regard to incumbrances on the property sought to be attached and sold. It has been pointed out by the learned Judge that this application was made more than three years after the date of the decree, though within three years from the date of the first application. If, therefore, the first application did not give a fresh start to limitation, the second application was barred by time, even if it be otherwise a good application.

The third and the last application, which has given rise to this appeal, was made on 20th December 1926. In view of his opinion that the first application was not a bona fide one and that the second application was barred by limitation besides not being in accordance with law, the limitation for the third application was counted from the date of the decree and therefore, it was held to be barred. Another ground on which the learned Judge threw out the last application is that Dharamdeo Rai, the appellant, alone applied for execution :

"without showing that Chhatarsal Rai (the cc-decree-holder), had died and without impleading his legal representative."

This was supplemented by another observation made later in his judgment that the decree-holder had omitted to state in the application that the execution was sought for the benefit of himself and of the legal representatives of the deceased decree-holder, and therefore, the provisions of O. 21, R. 15 (1), Civil P. C., were infringed.

We are unable to agree with the lower appellate Court in the view he has taken and which has resulted in the dismissal of the appellant's application for execution of the decree. We are relieved of the necessity of examining the circumstances under which previous applications were made and dismissed, to determine if they, or any of them, had been made with the bona fide intention of obtaining execution of the decree as the latest Full Bench case *Kayastha Co. Ltd.*, v. *Sita Ram* (1), has definitely laid down that the question of the decree-holder's intention in applying for execution being bona fide or otherwise is immaterial. The view expressed in *Sheo Prasad* v. *Narain Bai* (2) is no longer good law. The first application, already referred to, was, therefore, a good application to save limitation. This being so, the second application, which was made within three years of the date of the 1st application, should be deemed to have been in time. We have to consider the the further question whether it was in accordance with law. It is not disputed that it was in proper form and gave all the particulars required by O. 21, R. 11, Civil P. C., and was made to a proper Court. The learned Additional Judge characterises it as one not in accordance with law on the ground that it was not accompanied by a certificate from the registration office showing incumbrances, if any, as required by R. 106 added by this Court to O. 21, Civil P. C., under its rule making powers conferred S. 122 of that Code. We are of opinion that an application otherwise in proper form and not wanting in any particulars required to be mentioned therein by O. 21, R. 11, Civil P. C., and presented to a proper Court in itself cannot be regarded as one not in accordance with law in consequence merely of the non-observance of R. 106, already referred to. The omission to file a certificate required by that rule will not entitle the decree-holder to have process issued on his application ; but the application will not, on that account, cease to be one in accordance with law. If within a reasonable time such certificate is furnished, the process prayed for in the application for execution should issue. In this view the second application also was a good application so as to entitle the decree-holder to reckon the period of limitation from its date in making a later application.

There is another ground not noticed by the Court below which the decree-

(1) A. I. R. 1929 All. 625 (F.B.).
(2) A. I. R. 1926 All. 95=48 All. 463.

holder can avail of to make his last application within time. The learned Additional Judge has mentioned in his judgment, and indeed it is not disputed, that notice under O. 21, R. 22, Civil P. C., was issued on the 2nd application for execution being made. Under Art. 182 (6), Lim. Act, which has been since replaced by a differently worded article by Act 9 of 1927, a fresh start is given to limitation from :

"the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him when the issue of such a notice is required by the Code of Civil Procedure, 1908."

Such a notice was necessary under O. 21, R. 22, Civil P. C., because the original judgment-debtor had died and also because the decree sought to be executed was over a year old. It was accordingly issued on some date after the second application made less than three years before the last application, which should, therefore, be considered to be within time.

The learned Judge has dismissed the last application on the additional ground that only one of the two decree-holders applied for execution without making it appear on the face of it that it was made for the benefit of the legal representatives of his deceased co-decree-holder. In taking to this course the learned Judge has allowed his mind to be influenced by too technical a consideration which is devoid of all substance and in utter disregard of the ends of substantial justice. He admits that :

"on the top of p. 2 of the present application for execution the decree-holder has shown that he alone was executing the decree for the benefit of all the decree-holders,"

because he should have said that the decree was sought to be executed for the benefit of himself and "the legal representatives of the deceased." It cannot be disputed that, if the other decree-holder had not died, the statement that it was for the benefit of the applicant and other decree-holders would have fulfilled the requirements of O. 21, R. 15, Civil P. C. Stress is laid on the wording of the last mentioned rule, which enacts that :

"where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased."

The Court of first instance had granted the application for execution. The question was not raised in the memorandum of appeal. It was, however, allowed to be argued by the lower appellate Court. On the decree-holder applying for amendment of the application it refused to allow amendment at that stage. It was merely a verbal amendment that was necessary : instead of "for the benefit of other decree-holders" the application was desired by amendment to state :

"for the benefit of the surviving decree-holders and the legal representatives of the deceased decree-holder."

It should be borne in mind that the provisions of O. 22, Civil P. C., which relates to substitution of legal representatives for a deceased party, do not apply to execution proceedings, and no question of abatement of any proceeding could arise. At best omission to mention "legal representatives of the deceased decree-holder" instead of "decree-holder was a mere irregularity, to which no exception had been taken in the Court of first instance nor in the grounds of appeal before the lower appellate Court—an irregularity which could not vitiate the order of the Court of first instance directing execution to issue and which was in question in appeal. The case was clearly covered by the provisions of S. 99, Civil P. C., as the irregularity, if it be one, did not affect the merits of the case or the jurisdiction of the Court, whose order was questioned in appeal.

The reason for disallowing the amendment which the appellant desired to make in his application for execution as regards reference to "other decree-holders" instead of "the legal representatives of the deceased decree-holders," as given by the learned Judge of the Court below, was that "the defects in the requirements of Rr. 11 to 14 are only of a formal character, whereas R. 15 goes to the root of the execution of the decree itself and the application for execution was, therefore, not a valid application for execution of the decree. The learned Judge felt overpowered in adopting this view by the case of *Meik* v. *Midnapur Zamin-*

dari Co., Ltd. (3) which proceeds on the peculiar facts of its own where the decree-holder professed to act for himself alone in applying for execution of a decree in favour of himself and another person and did not state that the execution of the decree was desired for the benefit of all the decree-holders. The Court omitted to record its permission, as it ought to have done under O. 21, R. 15 (2), that it allowed the decree to be executed by one only of several decree-holders and to make any orders, which again, it ought to have done, for protecting the interests of the co-decree-holders who had not joined in the application. Under these circumstances, the Court of appeal was entitled to treat the application for execution as not a valid one on which process could issue. It should be noted that the Court of first instance had held in that case that a joint decree-holder had an unqualified right to execute the whole decree. This was obviously an incorrect view. An application for amendment was made before the High Court so as to make it appear that the application was for the benefit of all decree-holders, and in that connexion it was observed that a defect in the requirements of Rr. 11 to 14 could be amended, but not those of R. 15 a remark which was based on R. 17. With great respect to the learned Judges who made that observation, we would point out that there is nothing in R. 17 which deprives the Court of its powers to allow amendments in relation to matters required to be mentioned by R. 15. R. 17 runs thus:

"On receiving an application for the execution of a decree, as provided by R. 11 (2) the Court shall ascertain whether such of the repuirements of Rr. 11 to 14 as may be applicable to the case have been complied with; and if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it."

It will appear that the duty of examining the application for execution, in so far as particulars required by Rr. 11 to 14 are concerned and to have the defects remedied if necessary has been cast on the Court receiving the application. The utmost that can be said with reference to R. 15 is that no similar duty has been cast on the Court receiving the application; but it does not follow that, if any requirements of R. 15 have not been complied with by inadvertence or otherwise, the Court, when its attention is drawn to the defect subsequently, cannot allow amendment. If, for instance, shortly after the application is presented and admitted, the applicant intimates to the Court receiving the application that there are other decree-holders besides himself and that execution of the decree is sought for the common benefit of them all, a fact which did not appear on the face of the application by inserting a note to that effect, we do not doubt that the Court would be perfectly justified in allowing such amendment to be made without infringing any provision of law. There is no difference in principle if the application is made at a later stage, even before the Court of appeal. The delay in making the application may influence the Court in exercising its discretion to allow amendment, but there can be no question that the Court has power to allow such amendments to be made in proper case. For these reasons, we are not disposed to accept the dictum of the learned Judges of the Patna High Court as of general application and apart from the facts of the particular case before them.

Lastly, we have to consider the question whether the third application was not in accordance with law inasmuch as the certificate of the registration office as regards incumbrances was not filed with it but somewhat later. The learned Judge of the Court below thinks that if an application for execution is not accompanied by such a certificate, it is no application in law and the subsequent production of the required certificate cannot cure the defect. We have already indicated our views on this question in dealing with the validity or otherwise of the second application. We are clear that the omission to produce the certificate with the application does not necessarily entail the consequences of dismissal of the application for execution. The certificate was furnished in this instance within a reasonable time, and the process of execution was directed to be issued by the Court of first instance. It is not suggested that the last application was not in proper form or omitted to give any particular which

(3) [1919] 4 Pat. L. J. 575=53 I. C. 803=(1919) P. H. C. C. 349.

O. 21, R. 11, Civil P. C., requires. We hold that it was in accordance with law.

Having regard to the conclusions arrived at by us on the questions decided adversely to the appellant by the lower appellate Court, this appeal must succeed. It is accordingly allowed with costs. The order of the lower appeallate Court is set aside and that of the Court of first instance restored. The appellant will have his costs in all the Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 192

YOUNG AND SEN, JJ.

Durjan—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 728 of 1929, Decided on 4th September 1929, against order of Sess. Judge, Cawnpore, D/- 17th July 1929.

Evidence Act, S. 30—Retracted confession—It must be relied in whole and not in part where it is sole evidence against accused.

In cases where the sole evidence against the accused is that of a retracted confession such confession if it is relied on must be relied on as a whole and not only in part. [P 192 C 2]

Narain Sahai—for Appellant.

U. S. Bajpai—for the Crown.

Judgment.—Durjan the appellant in this case, along with two others, all sweepers, were charged under S. 302, I. P. C., with murdering one Khilla before the Sessions Judge of Cawnpore. Manian and Lallu were acquitted, but Durjan was convicted and sentenced to death.

We are not satisfied with the evidence in this case against the appellant. On 28th January of this year a dead body was discovered near village Baragaon. The dead body had wounds upon it and clearly there had been a murder committed. Part of the face of the corpse had been burnt. It is alleged that the dead body was that of Khilla who was missing from the village.

We are not satisfied in the first place that this corpse was that of Khilla. No proceedings were taken for nearly two months after the discovery of the corpse. A photograph had been taken, however, of the corpse. The wife of Khilla was quite unable to identify the photograph as that of her husband. We have carefully examined this photograph and we are certainly of the opinion that if the corpse had been that of Khilla, the wife ought to have been able to identify the photograph of her husband's body.

The Judge, however, relies upon the identification of a dhoti and a shirt which were found upon the corpse. These articles are common articles and we do not think it satisfactory that the identification should solely be upon these particular articles of clothing.

We are not satisfied that there was any motive for the murder. The Judge himself says that he is in a difficulty about this point. There is no direct evidence that Durjan murdered Khilla. There was nothing found in Durjan's house to incriminate him. The only evidence that exists upon the record against Durjan is his own retracted confession. As to this we are not satisfied that the proper procedure was adopted in taking this confession. The learned Magistrate who recorded it is clearly confused in his evidence, and does not even remember whether he recorded this statement in his Court or at his bungalow. He says on cross-examination that:

"If he records a confession at his bunglow he generally sends away the constables to the Mall Road."

This is extremely unsatisfactory, and the learned Magistrate in question ought to be very much more careful in recording these important statements.

As regards the confession, the learned Sessions Judge finds that, as regards an important part of it, it is not reliable. The confession records that Khilla was killed with a spear. The medical evidence, given after a careful examination of the body, is to the effect that the murder was committed with a heavy weapon like a gandasa or kulhari. In cases where the sole evidence against the accused is that of a retracted confession, we think it clear that if such a confession is relied on, it must be relied on as a whole and not only in part.

We are satisfied that the evidence therefore in this case is insufficient to support the conviction. We, therefore, set aside the conviction and sentence and direct that the appellant be set at liberty provided he is not required for any other offence.

R.M./R.K. *Conviction set aside.*

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* A. I. R. 1930 Allahabad 193
Full Bench

SULAIMAN, MUKERJI, BOYS, KENDALL AND KING, JJ.

Mt. Ananti—Plaintiff—Applicant.

v.

Chhannu and *others*—Defendants—Opposite Parties.

Miscellaneous Case No. 570 of 1929, Decided on 18th December 1929, on reference under S. 267, Agra Tenancy Act 3 of 1926.

(a) Agra Tenancy Act (1926), Ss. 99 and 230—Suit falling under S. 99—Joining relief for injunction does not take the case out of revenue Court.

If a suit for possession and mesne profits substantially falls under S. 99 and is cognizable by a revenue Court, the mere fact that a relief for perpetual injunction has been asked for will not take the case out of the jurisdiction of the revenue Court. [P 194 C 1]

*** (b) Agra Tenancy Act (1926), Ss. 99 and 230—(Per *Full Bench*)—Suit by alleged tenant against trespasser—Trespasser pleading tenancy—Suit is still maintainable in civil Court :** 118 *I.C.* 588=1929 *A.L.J.* 940, *Overruled* : (Per *Boys* and *King*, *JJ.*, contra.)

Per *Full Bench*.—The jurisdiction of the Court is to be initially determined by the allegations made in the plaint and the allegations made in the written statement cannot oust that jurisdiction unless and until the allegations of fact have been gone into, tried judicially and found to be true, and the plaintiffs' allegations have been found to be false. Where, therefore, a plaintiff alleging himself to be a tenant sues a defendant treating him as a trespasser, for possession and compensation regarding a holding or a part thereof and the defendant pleads tenancy, the suit is maintainable in the civil Court even after having regard to Ss. 99 and 230 : (*Boys* and *King*, *JJ.*, contra.); **118 I.C. 588=1929 A.L.J. 940, Overruled** : 15 *All.* 387 (*F.B.*) and *A.I.R.* 1924 *Pat.* 267, *Rel. on.* [P 198 C 1]

(c) Agra Tenancy Act (1926), S. 99—Per *Full Bench*—Interpretation : (*Boys* and *King*, *JJ.*, contra.)

Per *Full Bench*.—Section 99 being susceptible of two interpretations the Court should prefer the interpretation which leaves the law unchanged, to the one which drastically alters it. (Per *Boys* and *King*, *JJ.*, contra.)[P 197 C 2]

Gadadhar Prasad—for Applicants.

A. P. Pandey—for Opposite Parties.

Opinion

Sulaiman, Mukerjee and Kendall, JJ.—This is a reference under S. 267, Agra Ten. Act of 1926. The matter came up before two learned Judges of this Court., They found that they were unable to accept the view taken in the case of *Nandan Mallah* v. *Mohammad Ali* (1), and, accordingly, referred the matter to a larger Bench.

(1) [1929] A.L.J. 940.

The facts relating to the case are set forth in the order of reference and may be, very briefly stated as follows. The plaintiff instituted the suit, out of which this reference has arisen, in the Court of the Munsif of Haveli, Benares, on the allegation that her husband, Jangi, separated from his brother, Deo Saran, 25 years prior to the institution of this suit, that the plaintiff's husband died more than 10 years before the suit, and that for the last 10 years the plaintiff had been in possession of her husband's occupancy holding as his heir. She added that the defendants who were the descendants of Deo Saran, interfered with the crops grown by her on her own land and, eventually took possession of her holding. She sued for recovery of possession and for recovery of mesne profits.

The defendants in their written statement contended that Deo Saran and the plaintiff's husband Jangi were joint, that Jangi having died as a joint member of the family, the defendants were the tenants of the holding and the plaintiff had no right. They also pleaded that the suit was not cognizable by the Munsif's Court.

The Munsif's difficulty was that if the allegations in the plaint were accepted the suit would be cognizable by the civil Court, but if the defence, as mentioned in their written statement, could be considered without an inquiry as to its truth or otherwise, the suit would be cognizable by the revenue Court, having regard to the provisions of Ss. 99 and 230, Agra Ten. Act, 1926. He accordingly framed two questions and made the reference. The two questions are as follows :

1. Where a plaintiff alleging himself to be a tenant sues a defendant treating him as a trespasser, for possession and compensation regarding a holding or a part thereof, and the defendant pleads tenancy, then having regard to Ss. 99 and 230 of the Act (3 of 1926), is the suit maintainable in the civil Court?

2. Where a tenant on being dispossessed from his holding or part thereof, sues a person for compensation and possession, and also asks for an injunction to restrain the defendants from doing any act prejudicial to the plaintiff's interest, what is the effect, upon the jurisdiction of joining the relief of injunction with that of possession and com-

pensation? Is the suit cognizable by the civil or the revenne Court?

Now, as to question 2, it is concluded by the provisions of S. 230, Agra Ten. Act of 1926. The explanation to that section lays down that if the cause of action on which a suit is to be brought be one in respect of which adequate relief could be obtained by a suit or application in the revenue Court, the mere fact that some relief has been asked for, which the civil Court alone might grant, will not oust the jurisdiction of the revenue Court from hearing the suit or application. This was the view of the law taken by this Court even before the passing of the Tenancy Act of 1926. If this suit for possession and mesne profits be cognizable by the revenue Court, the mere fact that a perpetual injunction has been asked for will not take the case out of the jurisdiction of the revenue Court. This is our answer to the question No. 2 framed by the learned Munsif.

The first question which is the more important one, is:

"whether a suit, which is framed as one against a trespasser, pure and simple, and which has been rightly brought in the civil Court because it is a suit against a trespasser, will cease to be a suit against a trespasser and become cognizable by the revenue Court, simply because the defendant, in appearing to answer the suit, pleads that he and not the plaintiff is the tenant of the holding and not the plaintiff?"

It has not been contested before us that the initial right of choosing the forum is with the plaintiff. He is to see in which Court his suit would lie, having regard to the facts of his case, which means the allegations in his plaint, and the valuation of the suit. When the plaintiff has chosen his forum, it will be for the Court in which the suit has been filed or application has been made to see whether, on the allegations made in the plaint or application it is cognizable by it. If the plaint or application be cognizable by that Court, the defence, whatever it may be, will not oust the jurisdiction of the Court to try this suit. It may be that on the facts alleged and established by the defendant, it will be found that the plaintiff's allegations, as made in the plaint, are incorrect or false and that the real relief, which the plaintiff is entitled to get (if any) is not within the jurisdiction of the Court, which is seised of the case, to grant, in such circumstances, the suit will be dismissed, on the ground that the Court is not in a position to grant the relief. This initial position has not been contested before us. In fact the rule is so well established that it is impossible to controvert it. If any authority were needed we might quote two; in *Tarapat Ojha* v. *Ram Ratan Kuar* (2), a Full Bench of five Judges of this Court held that the question of jurisdiction would, initially, depend on the allegations made in the plaint or petition. If the Court found, on these allegations, that it had no jurisdiction to entertain the plaint or petition it would return the same for presentation to the proper Court; if, on the other hand, the allegations made in the plaint or petition gave jurisdiction to the Court to hear it and the defendant appeared to controvert those facts, then the defence would only raise an issue for the Court to determine. At pp. 390 and 391 of the report, their Lordships said:

"In cases to which S. 93 or 95 of Act 12 of 1881 (old Tenancy Act) applies, a denial by a defendant that the relationship of landlord and tenant exists between the parties is immaterial, except in so far as it raises an issue for the revenue Court to determine."

The case of *Jageshwar Kuer* v. *Tilak Dhari Singh*, *A.I.R.* 1924 *Pat.* 267 was a suit which, as framed, was cognizable by the civil Court, because it was one to eject a trespasser. On a trial of the suit, it was found that the defendants were not trespassers but non-occupancy tenants. The civil Court, according to the provisions of the Chota Nagpur Tenancy Act (B. C. 6 of 1908), could not grant a decree for ejectment against the tenants. It was accordingly, held that the plaintiff's suit should be dismissed and that the plaint could not be returned for presentation to the proper Court because the suit, as framed, was not for the ejectment of a tenant.

This being the ordinary state of the law the question is whether there is anything in S. 99, Agra Tenancy Act of 1926, which reverses the well established rule of law described above.

By S. 230, Agra Tenancy Act of 1926, all suits (among others) which fall within the purview of S. 99, Tenancy Act could be heard and determined only by the revenue Court; S. 99, therefore,

(2) [1893] 15 All. 387=(1893) A.W.N. 164 (F.B.).

contains a description of suits. If a plaintiff finds that his suit comes within the purview of S. 99, he is to go to the revenue Court only. Section 99 on the face of it, contains only a description of the suit and nothing else. The language employed, nowhere, lays down that, in certain circumstances, a suit, which is clearly within the jurisdiction of one Court, and which has been rightly presented there, is to be removed from that Court and taken into another Court. Now let us proceed to examine the language of S. 99, so far as it may be applied to this case. We have to remember that the plaintiff says that she is a tenant of a certain holding and that the defendants, without the least semblance of right, have dispossessed her. The defendant's case is that they, and not the plaintiff, are the tenants of the land. Having regard to these facts we will omit that portion of S. 99 from our quotation which does not deal with tenants. Section 99, therefore, reads as follows :

"Any tenant . . . ejected from . . . his holding . . . (a) by his landholder or any person claiming as landholder to have a right to eject him, or (b) by any person claiming through such landholder, or person, whether as tenant or otherwise, may sue the person so rejecting him . . . ."

In order to file his suit in the revenue Court a person, who claims to be a tenant, has to find out whether, in his proposed suit, the proposed defendant fulfils or not the character of the defendant as described in S. 99, Cl. (1), sub-Cls. (a) and (b). If the proposed defendant be, under Cl. (a), the tenant's landholder, or if the proposed defendant be any person claiming as a landholder to have a right to eject the tenant, or, in Cl. (b), be any person, claiming through such landholder or person, the plaintiff would be obliged to bring his suit in the revenue Court. This will be the natural meaning of Cl. (1), S. 99, having regard to the language employed. But we are asked to read the rule as if the words "claiming as" in Cl. (a) means "pleading in the suit, in his written statement, to be." In other words, where the word "claiming" has been used under Cl. (a), we are expected to read it as meaning "pleading in his defence in the suit that he claims." Similarly in Cl. (b) it is expected of us to read the word "claiming" as meaning "pleading, in the defence of the suit, brought against him, that he is claiming." In our opinion such interpretations cannot possibly be admissible. If such interpretations were allowed the position of the plaintiff would be entirely precarious. He would not know what was the defence which the proposed defendant was likely to raise in Court. He (the plaintiff) might very well know, in his own mind what was the position of the proposed defendant when he, the plaintiff, has to choose the forum. For instance, a tenant might have been dispossessed by a person claiming to be his usufructuary mortgagee (who has paid his mortgage money) and not claiming through the landholder. Why should the plaintiff be compelled to allege falsely that the defendant is claiming through the landholder and to go the revenue Court, where the defendant may deny the allegation? In such a case, if the plaintiff comes to a civil Court with true allegations, is he to be sent to the revenue Court merely because the defendant chooses now to plead that he is a tenant?

The plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts, he will get his relief from the forum chosen. If as happened in the *Patna* case quoted above, he frames his suit in a manner not warranted by the facts, and goes for his relief to a Court which cannot grant him relief, on the true facts, he will have his suit dismissed. Then there will be no question of returning the plaint for presentation to the proper Court, for the plaint, as framed, would not justify the other kind of Court to grant him the relief. But we are told that although the plaintiff has chosen his forum rightly, the defendant, if he so wishes, may, merely by saying something in his defence—something the correctness of which he need not take the trouble to establish—oust the jurisdiction of the Court and compel the plaintiff to go to another Court.

Where the plaintiff chooses his forum and the defendant denies the jurisdiction of the Court to hear the case two questions arise, viz.:

1. Whether, on the allegations made in the plaint, the suit is cognizable by the Court? and

2. Whether, on the true state of facts, on facts alleged and established by the defendant, the suit should be tried by the Court?

Where it is found that, on the allegations made in the plaint, the suit is cognizable by the Court, it will have to proceed to find whether the facts alleged in the plaint are established or not. If it is found, on a trial on the merits so far as this issue of jurisdiction goes, that the facts alleged by the plaintiff are not true and the facts alleged by the defendant are true, and that the case is not cognizable by the Court, there will be two kinds of orders to be passed. If the jurisdiction is only one relating to territorial limits or pecuniary limits, the plaint will be ordered to be returned for presentation to the proper Court. If, on the other hand, it is found that, having regard to the nature of the suit, it is not cognizable by the class of the Court to which the Court belongs, the plaintiff's suit will have to be dismissed in its entirety. The reason will be that on the unamended plaint the revenue Court would have no jurisdiction to hear this suit. Of course, if the Court allows the plaintiff even at a late stage of the case, to amend his plaint so as to convert the suit into one against a person claiming as a landholder or through a landholder, the plaint can be returned for presentation to the revenue Court.

It has been suggested that S. 99 introduces a change in the law and in the procedure, and it directs that the plaint shall be returned for presentation to the revenue Court, if, on the defence set up in the suit itself, it be found that the suit would be cognizable by the revenue Court. We have already examined the language of S. 99 and have found that such could not be the import of the words used.

Let us now consider the plaintiff's allegations. The plaintiff's suit is that the defendants are trespassers. Her husband died separate, 10 years ago. If her husband was not separate from his brothers and nephews, the plaintiff's suit would be dismissed by the civil Court, according to our view of the case. On the other hand, if the plaintiff succeeds in proving that her husband was a separated member of the family and had a separate holding and his widow, the plaintiff, succeeded him 10 years ago and has been holding it on for the last 10 years as the tenant and the defendants are really trespassers, the civil Court would grant her a decree. If the mere filing of the written statement on behalf of the defence, to the effect that the defendants and not the plaintiff is the tenant, will result in the plaint being ordered to be presented to the revenue Court, what would happen is this: Suppose, the plaintiff goes to the revenue Court and, there, she establishes that her husband died 10 years ago as a separate member of the family, that she succeeded to the tenancy, that she was recognized as the tenant by zamindars and that she was without the least justification dispossessed from her holding by the defendants, who have no title to the property, a year and a half before the institution of the suit. Will the revenue Court be in a position to decree the suit? There can only be one answer and that is in the negative. If the revenue Court grants a decree for ejectment, it will assume jurisdiction which it does not ordinarily possess, viz; one to eject trespassers. There may be many reasons why a plaintiff prefers to sue a trespasser in a civil suit rather than unnecessarily admit that he is claiming through the landholder and sue in a revenue Court. For instance he can get mesne profits for three years with interest through the civil Court, whereas he can only get compensation for six months in a revenue Court. Further, the question of limitation may come in many cases, viz., where a suit has been instituted more than six months after the accrual of the cause of action. The limitation for a suit instituted under S.99, Agra Tenancy Act of 1926, is six months: see Sch. 4, group B, Cl. 12. It has been urged that the plaintiff in such a case, would be entitled to the application of S. 14, Lim. Act and also of S. 231 of the Act, which extends S. 5, Lim. Act, to suits. S. 14, Lim. Act, will be of no use to the plaintiff, if he happened to come to Court more than six months after the accrual of his cause of action. If S. 231 be applied the delay may be condoned, but then the plaintiff will have no absolute right to the application in his favour of S. 231, Agra Tenancy Act of 1926. S. 5, Lim. Act, lays down:

"An appeal or application (and by S. 231, Tenancy Act, a suit) may be admitted when the

appellant (or the plaintiff) satisfies the Court that he had sufficient cause for not prefering the appeal (or filing his suit). . . . ."

It will be seen that the plaintiff, in any civil Court, filing his suit within the ordinary 12 years' period of limitation for ejecting a trespasser, is under no obligation to satisfy the Court that he had sufficient cause for not filing his suit earlier. All that he need prove is that he came within 12 years of the accrual of his cause of action. Supposing that the plaintiff is unable to give to the revenue Court any satisfactory explanation beyond this, that he knew that he had to sue a trespasser and he had 12 years within which to sue, Will that explanation satisfy the Court, in every case? If it does, what is the good of having a rule which requires the Court to be satisfied at all? The rule of law as enacted under S. 231, Agra Tenancy Act, of 1926 will be reduced to an absurdity. This would be, therefore, a very good ground for supposing that the interpretation sought to be put on behalf of the defendants is not sound.

There are a good many other considerations why the interpretation sought to be put on S. 99 on behalf of the defendants should not be accepted, where it is intended that, on a defendant raising a certain plea, a particular procedure has to be followed, the Tenancy Act has expressly used the word "to plead." In S. 273 it is provided that in any suit instituted in a civil Court, relating to an agricultural holding, when the defendant "pleads" that he holds such land as the plaintiff's tenant, the Court is to frame an issue and send the record to the proper revenue Covrt for decision of that issue. Tbe legislature, therefore, being aware of the significance of the word "to plead" would be expected to use the same word in S. 99, if it meant to convey the same meaning. There would have been no difficulty for the legislature in saying, for example:

"Where in a suit by a tenant against any person, the defendant pleads that he is the plaintiff's landholder, or that he claims through the plaintiff's landholder, an issue shall be framed and referred to the revenue Court, or the plaint itself shall be returned for presentation to the revenue Court."

The legislature not having expressed itself so clearly, it would not be right to accept the defendant's interpretation of S. 99. Again, the proviso in S. 99 itself goes to show that it contemplates a case where a tenant sues the actual landlord and not merely a trespasser who professes (but fails to prove) that he is the landlord.

Looked at from any point of view, the interpretation sought to be put by the defendants is, in our opinion, inadmissible. We need not at all mention the worry and trouble to which an honest plaintiff would be put, if we accept the principle that although he, the plaintiff, has done his best to choose a forum in which he has a right to institute a suit on the allegations made by him, yet, on a mere statement by the defendant of certain facts, without any enquiry whether the defendant's statement of facts or the plaintiff's statement of facts is the correct one, the plaintiff is to be ordered to go to another Court, engage another set of counsel and fight out his suit in the second Court. We do not deny that if the legislature chose that such far reaching consequences should happen, it could legislate to that effect, but the question is :

"Does the language of S. 99, Ten. Act, 1926. warrant the inference of such an intention on the part of the legislature ?"

Under the law as it stood before the Agra Tenancy Act of 1926 came into force, the civil Court admittedly had jurisdiction to entertain a suit against a trespasser, and the jurisdiction of the Court was primarily determined by the allegations in the plaint and not by those in the written statement. We do not think that the legislature could have intended to alter the law in both respects by the use of language which is capable of two interpretations ; and even if we were to allow that both interpretations are possible, we should have to hold that the one which leaves the law unchanged is to be preferred to the one which drastically alters it. It has been said that the object of the legislature was to attract to the revenue Court all suits in which any question of tenancy rights is involved. We may accept this ; but we may also insist that the question must be a real one, and not merely a litigious allegation. If there is a real question, the plaintiff will be aware of it ; and he will either set it out in his plaint and have it tried by the revenue Court, or he will conceal it, and find that his suit is dismissed by the civil Court.

We are of opinion that the jurisdiction of the Court is to be initially determined by the allegations made in the plaint and the allegations made in the written statement cannot oust that jurisdiction unless and until the allegations of fact have been gone into, tried judicially and found to be true, and the plaintiff's allegations have been found to be false. We would direct the Munsif in this particular case to proceed with the suit.

Boys, J.—This case has been referred to a Bench of five Judges to consider the effect of S. 99, New Agra Tenancy Act 3 of 1926. Plaintiff sued in the civil Court alleging that her deceased husband had separated from the remainder of the family 25 years prior to the suit, that she had been for the past ten years since his death in possession and occupation of certain agricultural tenancies, and that the defendant had ousted her. She asked for possession, mesne profits and an injunction. The defendants in their written statement alleged that the family was joint, denied that the plaintiff had ever been in possession and alleged their own possession and cultivation of the plots in suit. Though the actual pleadings may have been, as is usual, loosely worded it is common ground that the correct interpretation is that the plaintiff was claiming as a tenant in possession who had been ejected by the trespasser defendants, while the defendants replied that it was they and not the plaintiff who were the tenants, and that they had always been in possession.

The learned Munsif was in doubt whether in face of this plea of the defendants and S. 99, a civil Court had jurisdiction to entertain the suit, and he accordingly referred to this Court under S. 267, Agra Tenancy Act 3 of 1926, the question whether upon seeing the plea of the defendants his proper course was to return the plaint forthwith or whether he should proceed to decide an issue as to the fact of defendants' tenancy.

The case came before the present Acting Chief Justice and Pullan, J., and as they "entertained some doubts" as to the correctness of a previous decision of this Court *Nandan* v. *Muhomad Ali* (1), the matter was referred to the present Bench. In the case quoted it was held by Bennett, J., and myself that in such a case it was the revenue Courts that alone had jurisdiction.

Admittedly the ordinary rule is that the jurisdiction of the Court to entertain a suit will primarily be determined on the basis of the plaint. The question here is what is the effect of Cl. 1, S. 99, and more particularly of para. (b).

The Munsif has framed the following two questions for expression of an opinion by this Court:

"(1) Where a plaintiff alleging himself to be a tenant sues a defendant treating him as a trespasser, for possession and compensation regarding a holding or part thereof, and the defendant pleads tenancy, then, having regard to Ss. 99 and 230, Act 3 of 1926, is the suit maintainable in the civil Court?

(2) Where a tenant on being dispossessed from his holding or part thereof, sues a person for compensation and possession, and also asks for an injunction to restrain the defendant from doing any act prejudicial to the plaintiff's interest, what is the effect upon the jurisdiction by joining the relief of injunction with that of possession and compensation; is the suit cognizable by the civil or the revenue Court?"

I proceed to discuss the first question.

First, then, what is the meaning of the word "claiming" in the phrase "claiming through such landholder or person?"

Does the word "claiming" mean "asserting a right" or does it mean:

"asserting a right which must be taken to exist, either because it has already been proved prior to the suit or because it is admitted or because it has been the subject of inquiry, i.e., of an issue in the suit itself, and found to exist?"

If it means merely "asserting a right" which may or may not exist, then the section creates an exception to the general principle (that the allegations to be found in the plaint constitute the primary test of jurisdiction and allegations by the defendant will not be sufficient until established to oust jurisdiction) and as soon as the civil Court finds the assertion of the right to be made, even though such assertion is by the defendant, it must return the plaint for presentation to the revenue Court.

If it means the "asserting of a right which must be taken to exist," then, if the right has not been established prior to the suit or is not admitted, the civil Court must try the preliminary issue as to its existence and, if it finds it to exist, then and then only return the plaint for presentation to the revenue Court or dismiss the suit, which of these two latter steps would be the

correct one being a question we are not called upon in this reference to determine. We have only to consider whether it should forthwith refuse to proceed immediately on the assertion being made by the defendant or whether it must be satisfied that the assertion is truly founded.

I can find no adequate reason for giving to the word "claiming" when applied to persons, any other than its ordinary meaning, the assertion of a right without any implication as to whether the right is well founded or baseless. There are no doubt cases in which the word "claims" is used as meaning "has right to," such as "your son claims," i. e. has a claim on or a right to your attention, but there can be no doubt that where a man says "I claim that property" he ordinarily means "I assert my right to that property."

It is suggested that the acceptance of the view that mere assertion by the defendant of a right will exclude the jurisdiction of the civil Court is to graft an exception on to the ordinary rule that the question of jurisdiction must primarily be determined by the allegations in the plaint without reference to the defendants' pleas. Granted that this is so, I am of opinion that there is nothing deterrent in this consideration.One object of the alterations made in this section from the form it took in the Act of 1901 was to include within its scope ejection by a tenant and this has been expressly done. If that had been the sole object of amendment, it would have sufficed to say :

"by (a) his landholder (b) by any person holding through such landholder whether as tenant or otherwise."

But one general purpose of the new Act was, amongst others, to endeavour to settle vexed questions of jurisdiction. How was this to be effected ?

It necessarily happens that among all the variant features in different cases a particular fact can be selected in one case which is more suitable for trial in a civil Court; a particular fact in another case or even in the same case more suitable for trial in a revenue Court. Upon the basis of such isolated facts no guiding principle could be founded.

A dividing line, however, might well be drawn by bringing within the jurisdiction of the revenue Court all questions where any contention as to tenancy rights was involved whether or no any particular other issue might, separately regarded, be more suitable for determination by a civil Court.

Already a case where the plaint disclosed that tenant rights were in dispute was by virtue of the first part of the amendment within the jurisdiction of the revenue Courts. There is nothing strange in the legislature having in accordance with its general purpose, held that it was just as desirable to confine to the revenue Courts cases where a dispute as to tenant rights was disclosed by the defendant and to have realised that here, in disclosure by either party of a dispute as to tenant rights, was a feature on which could be based a general principle. This principle was then embodied bythe further amending of the section to include all cases where the allegation of dispute as to tenant rights was made by the defendant as well as when made by the plaintiff. This then is my view of the purport of the words in question and the purpose with which they were deliberately inserted.

It is suggested that the word "pleads' is used in S. 173, and that if the legislature meant by "claiming" only "asserting a right" it could have used instead of the word "claiming" the phrase "pleading that he is entitled." Such a "phrase manifestly multiplies words unnecessarily. But I do not think that in any case much weight should be allowed to this suggestion in view of the fact that the new Act is an Act amending the old and it is obvious that in amending a particular section it is not possible, whatever may be desirable theoretically, for the draftsman to have always in mind the exact word that has been used elsewhere in the Act to express the same idea.

But there is yet a further consideration which destroy the force of this suggestion. To have used the phrase "pleading that he is entitled" would not have covered a case where the plaint itself disclosed, before the defendant was even called upon to file a written statement, i. e., to plead that the defendant had at the time of the ejectment "claimed" to be a tenant though the plaintiff had alleged him to

be a trespasser, and yet it would be consistent with the general purpose of the Act already noted to include such a case There is affirmative ground therefore for deliberately using the word "claiming".

Next it has been suggested that it would be strange to hold that a defendant by merely asserting a right could by force of that assertion only, without any enquiry into it and proof of its correctness oust the jurisdiction of the civil Court. For two reasons again I think there is no force in this suggestion. Admittedly the ordinary rule is that the question of jurisdiction is primarily determined by the pleas in plaint. But this is a rule of convenience, and there is no radical reason why the plaintiff's plea should be treated as any more effective than the defendant's plea.

In the present case there is a definite object to be attained as I have already shown in this judgment, by giving equal effect to the defendant's plea. But further is this suggestion weakened by a reference to the very section to which reference has already been made, S 273. The simple plea of the defendant that he is tenant of the plaintiff is thereby made sufficient to oust the jurisdiction of the civil Court to try the particular issue of tenancy. There is nothing strange, therefore, in allowing in an appropriate case the plea of the defendant to oust the jurisdiction of Court altogether.

I come now to the plaint, which was argued with great vehemence, and to which it was claimed throughout the hearing that great force must be allowed. This concerns a question of limitation. It was suggested that a plaintiff, who believed a defendant to be a trespasser, was entitled to twelve years within which to bring his suit that it would be possible if that suit were brought after the lapse of six months for a defendent who had not the least justification for setting up a question of tenancy to raise the pleas referred to in S. 99 ; that the Court would there by be compelled to send the plaintiff to the revenue Court and that he would there be met by a plea of limitation which the Court would have to accept without any enquiry into the truth or falsity of the defendant's plea.

This if it is a correct view of the consequences that would follow, is indeed a grave consideration and while it would not justify a wrong interpretation of the law as it stands it would call for the instant attention of the legislature.

When at the commencement of the hearing I suggested the possibility of the plaintiff taking advantage of S. 14, Lim. Act, it was replied that S. 14, Lim. Act, did not apply to proceedings in a revenue Court and the argument proceeded to a close on this assumption. At the close of the argument however I invited support for the suggestion that S. 14 was inapplicable to revenue Courts and asked to be referred to any case in which the subject had been considered. The most that could be said was a reference to S. 168, Act 2 of 1901. It is manifest that that did not prohibit the application of S. 14.

This led to a reference to S. 231 of the present Act 3 of 1926. The only suggested justification it is not really a justification for reading that section as excluding S. 14 is the fact that it expressly refers to S. 5, Lim. Act, and the suggestion apparently is that because there is specific application of S. 5, therefore, it must be assumed that S. 14 does not apply. But this is to omit to note that S. 231 does not merely apply S. 5, Lim. Act but specifically extends the scope of it. S. 5, Lim. Act only applies to appeals and certain applications. It does not apply to suits. S. 235 expressly extends the scope of S. 5, Lim. Act to all suits and other proceedings under the Tenancy Act. There is therefore special reason for the mention of S. 5, and no inference from the special mention of that section can even be suggested that such special mention would imply the non-applicability of other sections. The preamble to the Limitation Act may also be considered. I am of opinion, therefore, and nothing is shown to the contrary, that the operative sections of the Limitation Act apply to all suits whether in the civil or the revenue Courts, while of course the schedules only refer to the particular matters there dealt with, and for the limitation affecting particular matters with which the Tenancy Act is concerned we must look to the Tenancy Act for the period of limitation.

I am, therefore, of opinion that there is no reason for not giving to the word "claiming" its ordinary meaning, and I would therefore answer the question propounded by the learned Munsiff in the affirmative directing him that his proper course is to return the plaint with a direction to the plaintiff to file it, if he so wishes, in the appropriate revenue Court with such prayer for amendment or with a copy of the order of the Munsiff and an application under S. 14, Lim. Act, as he may see fit.

King, J.—This was a suit for possession of an agricultural holding. The plaintiff alleged that she was the sole tenant of the holding and that the defendants, who were mere trespassers, had forcibly dispossessed her. She sued in the civil Court for possession, compensation and an injunction.

The defendants pleaded that they were in rightful possession of the holding as tenants and that the civil Court had no jurisdiction to try the suit. The first question for our determination is whether the jurisdiction of the civil Court is barred by S. 99 read with S. 230, Agra Tenancy Act, 1926.

The question turns upon the interpretation of S. 99 (1) which runs as follows (omitting words unnecessary for the purpose of this case :

"Any tenant ejected from his holding, otherwise than in accordance with the provisions of this Act, by (a) his landholder or any person claiming as landholder to have a right to eject him, or (b) any person claiming through such landholder or person, whether as tenant or otherwise may sue the person so ejecting him etc."

The main controversy centres round the meaning which should be given to the word "claiming" in the expression "claiming through such landholder etc." in S. 99 (1) (b). Now the word "claiming" is not a technical expression when it occurs in a United Provinces Act and must therefore be given its popular, or plain and ordinary, meaning. The ordinary meaning of "claiming" in this context would be "asserting a title." It does not carry with it any implication that the assertion must be true. A claim may be true or false. It is hardly necessary to appeal to a dictionary on this point. I take it then that the word "claiming" in the expression under consideration has its ordinary or popular meaning of "assertion of a title" whether the assertion be true or false.

The next question is whether a defendant who raises a plea of tenancy in his written statement is a "person claiming through such landholder or person as tenant" within the meaning of S. 99 (1) (b). In my opinion the answer is clearly in the affirmative. The word "claiming" is wide enough to cover a claim made in a written statement. Indeed it would ordinarily be the written statement to which we should look for a statement of the defendant's claim.

In the referring order the learned Judges did not suggest that the word "claiming" had any unusual meaning, but suggested that the claim to tenancy should have been put forward at the time of ejectment, and if the defendant did not put forward his claim at the time then he could not be allowed to oust the jurisdiction of the civil Court by a claim made in his pleadings. I am unable to accept this view. In the first place I see no justification for cutting down the meaning of the word "claiming" to "claiming at the time of ejectment." In the second place parties do not usually make any clear statement of the grounds of their respective claims (so far as my experience goes) at the time of wrongful ejectment. Let us take a typical case. The defendant goes and starts cutting the crops or ploughing the land, as the case may be. The plaintiff hears of it and rushes to the spot, probably armed with a lathi. A vulgar brawl ensues, the conversation on each side consisting mainly of abuse and threats. The gist of the defendant's remarks could probably be summed up as follows: "This field is mine, you clear out." I do not believe the legislature requires the Court to ascertain exactly what the defendants said in such circumstances and whether his statements amounted to "claiming through such landholder or person as tanant." It would be hardly possible to get satisfactory evidence of the defendant's statements on such an occasion when the parties are quarrelling if not fighting. In my opinion, therefore, a defendant who sets up a claim to tenant's rights in his written statement is a person "claiming through such landholder as tenant" within the meaning of S. 99 (1) (b).

It has been suggested that the word "claiming" in Cls. (a) and (b), S. 99 (1) cannot possibly mean "pleading in the defence of the suit brought against him that he is claiming." This view apparently implies that "claiming" does not even include "asserting a title in the form of a plea." I have already given reasons for holding that the latter meaning is included in the word "claiming" although that word would also include asserting a title on previous occasions, if such assertion is admitted or can be proved. But if this interpretation of the word "claiming" is wrong, the question arises what is the correct interpretation? No alternative has been clearly put forward.

It is contended that the defendant's plea of tenancy rights cannot oust the jurisdiction of the civil Court unless the defendant's allegations of fact have been tried judicially and found to be true, and the plaintiff's allegations have been found to be false. In other words, the defendant is not to be considered to be "claiming" tenancy rights unless his allegations are found to be true. This implies that the word "claiming" in S. 99 (1) (b) should be interpreted as meaning not "asserting a title" but "having a title." In my opinion this is putting a very strained interpretation on the word. It is not in accordance with its plain and ordinary meaning. Moreover, we have to consider the meaning of the same word in S. 99 (1) (a) "claiming as landholder." In my opinion it is quite impossible to construe this expression as equivalent to "having a title as landholder" because a person "claiming as landholder" is expressly contrasted with "his landholder." I think "claiming" in Cl. (a) can only mean "asserting a title" as landholder and when we find the same word "claiming" used in the very next clause of the same subsection it would be contrary to all rules of statutory interpretation if we did not give the same meaning to the same word in each case.

Moreover, a distinction is sought to be made between an assertion of title mentioned in the plaint and an assertion of title mentioned in the written statement. It is conceded that if the plaint discloses the fact that the defendant asserts tenancy rights then he is "claiming through such landholder as tenant" within the meaning of S. 99 (1) (b) whether his assertion be true or false and the jurisdiction of the civil Court is ousted. If, on the other hand, the assertion of the defendant's title is found only in the written statement, then it is contended that he cannot be held to be "claiming through such landholder as tenant" unless and until the assertion is proved to be true. I find no justification for giving such different interpretations to the word "claiming" with reference to assertions of title mentioned in the plaint and in the written statement respectively.

I must now consider certain arguments advanced in support of the view that the defendant's plea of tenancy rights will not oust the jurisdiction of the civil Court. It is urged that the general rule of law is that the question of jurisdiction depends initially on the allegations made in the plaint. I grant this. The civil Court had jurisdiction to take cognizance of the suit as framed because it did not disclose the existence of any claim to tenancy rights on the part of the defendant.

Then it is said that if the defendant can oust the jurisdiction of the civil Court by a mere claim of tenancy, in the form of a plea in his written statement, that the plaintiff's position would be precarious and he might be forced to change his forum simply by the defendant's false or frivolous plea. This objection is perfectly sound, but I do not think it is so weighty as to justify us in holding that the legislature could not have contemplated a procedure involving such consequences. Take an extreme case. A tenant, *P* is wrongfully dispossessed by a rank trespasser *D*. *P* takes pains to ascertain that *D* had no right, and does not even profess to have any right, as a tenant. *P* accordingly files his suit in the civil Court treating *D* as a trespasser. *D* in his written statement raises a false and frivolous claim to tenancy. This ousts the jurisdiction of the civil Court which thereupon permits *P* to amend his plaint by adding a paragraph to the effect that as *D* claims tenancy rights (although quite falsely) the suit is triable by the revenue Court, and returns the plaint to *P* for presentation to the revenue Court. This is no doubt troublesome and annoy-

ing but, after all, causes little harm. The revenue Court can be trusted to dispose of *D's* false and frivolous claim at least as expeditiously as the civil Court could do.

Granting that the law, as I interpret it, involves some disadvantages, let us see whether the contrary view does not involve even greater disadvantages. According to that view the plaintiff is given an unfettered discretion not merely to choose his forum initially but to have his suit tried on its merits in whichever forum he wishes. The plaintiff is expected to consider the strength of the claim to tenancy rights which may be set up by his rival, the defendant. If the plaintiff considers his rival's claim to be merely a litigious allegation then he will say nothing about it in his plaint and will have the suit tried by the civil Court on the allegation that the defendant is a mere trespasser If, on the other hand, the plaintiff thinks that his rival has a good claim then he may mention it in his plaint, if he thinks fit, and thus have his suit tried by the revenue Court. Clearly then the plaintiff is to have absolute discretion whether he will have the suit tried by the civil Court or by the revenue Court. He can compel the civil Court to try the issue of tenancy by merely omitting to state in the plaint that the defendant has a claim to tenancy rights. He is in no way bound to make such a statement in his plaint, nor is he bound to deny that the defendant claims tenancy rights; so he has a free hand to have his suit tried in whichever forum he wishes. Moreover, the plaintiff stands to lose nothing by selecting the civil Court. If the plaintiff fails to prove his allegations then the suit will be dismissed, whether it is tried by the civil or by the revenue Court, so the plaintiff is likely to select the civil Court.

If it is considered objectionable to let the defendant oust the jurisdiction of the civil Court by a mere plea of tenancy rights, then I think it is at least equally objectionable to give the plaintiff absolute discretion in the choice of the forum, even in a case when he knows well not merely that the defendant has a claim to tenancy rights but that he has a perfectly bona fide and strong claim. It also seems to me objectionable to give the plaintiff the option of a period of limitation for his suit extending to 12 years when the intention of the legislature is that suits between rival tenants for wrongful ejectment should be brought within six months from the date of wrongful dispossession.

Another and more serious consequence of accepting that view is that the apparent intention of the legislature, to reserve questions of tenancy rights for the decision of the revenue Courts, will be defeated. I think it is clear that the legislature did intend that questions of tenancy rights should be determined exclusively by the revenue Courts. S. 79 Agra Tenancy Act 1901, gave the revenue Courts exclusive jurisdiction in suits for wrongful ejectment by a tenant against his landholder only. Suits between rival tenants (e. g. suits like the present one in which each party claims mutually exclusive rights of tenancy) were therefore triable by the civil Courts which had to determine which party was entitled to possession as tenant. Evidently the legislature considered this position unsatisfactory, and by the enactment of the present S. 99, the classes of suits for wrongful ejectment triable exclusively by the revenue Courts, have been greatly expanded. S. 99 (1) (b) was intended in my opinion to bring within the exclusive jurisdiction of the revenue Courts suits between rival tenants, including suits (such as the present one) where each party claims mutually exclusive tenancy rights. When the main issue for decision is whether the plaintiff or the defendant is entitled to possession as tenant then it is an issue for the revenue Court to decide. I understand this to be the principle underlying S. 99 (1) (b). This view finds strong support from the provisions of S. 273, new Tenancy Act. That section shows that even if a suit relating to an agricultural holding is in other respects triable by a civil Court, nevertheless, if an issue of tenancy is raised, the civil Court has to submit the record to the revenue Court for deciding that issue. This provision is only intelligible upon the hypothesis that the policy of the legislature was to reserve the decision of an issue of tenancy to the revenue Court. It would be very anomalous if the civil Court is prohibited from trying an issue of tenancy under S. 273 but

is permitted to try and decide an issue of tenancy in a suit between rival tenants.

It has been suggested that if S. 99 is susceptible of two interpretations then we should prefer the interpretation which leaves the law unchanged to the one which drastically alters it. I do not think that there can be any presumption in respect of S. 99 that the legislature intended to leave the law unchanged. On the contrary, we find that the legislature has deliberately made drastic amendment in that section and it is safe to assume that the intention was to change the law drastically. It would be most astonishing if the result of the amendments is to leave the law unchanged so that suits between rival tenants are still to be tried by the civil Courts, if the plaintiff so desires. If the plaintiff fails to institute his suit within six months from the date of wrongful dispossession he will obviously prefer to have his suit tried by the civil Court.

It is also urged that it would be very anomalous if the defendant were empowered to oust the jurisdiction of the civil Court by a mere plea into the truth of which the civil Court could not enquire. Ordinarily, no doubt, when a defendant raises a plea of want of jurisdiction he does so by making allegations of fact which have to be gone into and it would be contrary to the ordinary procedure if the defendant could oust the jurisdiction of the Court by merely making a claim without proving the facts upon which it is based. I am, however, unable to interpret the language of the section except in the sense already explained above and I must conclude that the legislature deliberately intended to introduce an exceptional procedure. The dominating principle seems to have been to reserve questions of tenancy rights for the exclusive jurisdiction of the revenue Courts. As soon as the civil Court finds that an isssue of tenancy has been raised then it should not decide that issue, or make any enquiry into its merits, but simply return the plaint (after permitting necessary amendment) to the revenue Court for deciding the issue of tenancy. There are other indications in the Act that the legislature really did intend questions of jurisdiction to be determined simply by the defendant's plea. S. 273 clearly shows that a mere plea of tenancy made by the defendant in his written statement is enough to oust the jurisdiction of the civil Court to decide the issue raised by that plea. In the converse case, to which S. 271 is applicable, we find that a mere plea of proprietary right made by a defendant compels the revenue Court to frame an issue on the question of proprietary right and to submit the record to the civil Court for the decision of that issue. When an issue of tenancy rights is raised in a suit for wrongful ejectment by a tenant against a rival tenant then the issue is so vital that the civil Court does not merely frame the issue for the decision of the revenue Court, but has no jurisdiction to proceed further with the suit. That is the explanation of the provisions of S. 99 (1) (b) as I understand them.

But, it is argued, the language of S. 273 and S. 99 (1) (b) is different. In S. 273 we find express provision for an issue of tenancy raised by the defendant's plea. In S. 99 (1) (b) instead of the word "plea" we find the word "claiming" and the very fact that the word "plea" is not used shows that the claim did not include an assertion of title set forth in the plea. I do not find much force in this argument. The word "claiming" seems to me wide enough to include setting up a claim in the form of a plea in a written statement. I have already tried to show that it would seldom be possible to ascertain the exact nature of the defendant's claim, if any, until he formulates it in his written statement. "Claiming" is, however, wider than claiming in the form of a plea. If the plaintiff admitted in his plaint that the defendant claimed tenancy rights there would be no need for the civil Court to require the defendant to plead, since the civil Court's jurisdiction would admittedly be ousted on the allegations in the plaint alone. So there is a reason, as observed by Boys, J. for using the word "claiming" in preference to "pleading a title" or words to that effect.

The next argument advanced in support of the contrary view is as follows: It is said that if the defendant's claim to tenancy made in his written statement, results in the suit being tried by the revenue Court, and if it is there

established that the defendant is a mere trespasser and has no tenancy rights, then the revenue Court would not be competent to decree the suit because a revenue Court cannot eject a trespasser.

This argument seems to involve a logical fallacy. If the revenue Court tries the suit then it will do so on the hypothesis (which I believe to be correct) that it has exclusive jurisdiction to try a suit for wrongful ejectment where the defendant rightly or wrongly claims tenancy rights. If the Court finds the defendant's claim to be false I see no reason why the Court should not decree the suit. If the Court has jurisdiction to try the suit it has jurisdiction to pass the decree. Ex hypothesi it is the defendant's claim to tenancy rights which give exclusive jurisdiction to the revenue Court, whether the claim be true or false. Moreover the acceptance of this argument involves the surprising result that the plaintiff, in a suit like the present one, cannot possibly be successful in the revenue Court. If the plaintiff proves his case up to the hilt then his suit will be dismissed on the ground that the defendant is a trespasser who cannot be ejected by the revenue Court. If on the other hand, the defendant establishes his claim to possession as a tenant then the suit will be dismissed upon the merits. There is no alternative when each party claims mutually exclusive tenancy rights. The plaintiff, therefore, is bound to lose, whatever the finding may be. I find it impossible to believe that the legislature intended to put the plaintiff in such a hopeless position. It is also worth noting that it is wrong to assert, as a general proposition that the revenue Court has no jurisdiction to eject trespassers. S. 44 expressly empowers the revenue Court to eject a trespasser on the suit of the landholder. There is, therefore, nothing strange or anomalous in the view that the revenue Court, in trying a suit under S. 99 (1) (b), can eject a defendant who claims tenancy rights but is proved to be a trespasser.

A further argument is advanced on the subject of limitation. The learned Munsiff who made the reference was much influenced by the supposed hardship caused to the plaintiff if he returned the plaint for presentation to the revenue Court. He thought that S. 14, Lim. Act, (which lays down that the time taken by the plaintiff in bona fide prosecution of the suit before another Court shall be excluded from the period of limitation) does not apply to the procedure of revenue Courts and therefore the plaintiff's suit would be time barred in the revenue Court and she would be left without any remedy. Prima facie he is mistaken in supposing that S. 14 would not apply to suits under the Tenancy Act. Under S. 29 (2) (a), Lim. Act, S. 14 of that Act would apply to suits under the Tenancy Act, if not expressly excluded. There is no express exclusion. Boys, J. has clearly shown that S. 231, Tenancy Act cannot possibly be taken as excluding S. 14, Lim. Act, even by implication. The present suit was instituted within six months of the acrual of the cause of action, so the plaintiff would not be faced with any difficulty due to limitation if her plaint were returned (after amendment) for presentation to the revenue Court. The argument from hardship due to limitation breaks down therefore completely.

A further argument is based on the proviso to S. 99 (1). It is said that the proviso shows that the section contemplates a case where a tenant sues the actual landlord and not merely a trespasser who professes, but fails to prove that he is the landlord. I must frankly confess that I am unable to appreciate the force of this argument. Undoubtedly the section does contemplate a suit against the actual landholder, but it also undoubtedly contemplates a suit against a person claiming as landholder. I see nothing in the proviso to show that this claim must be true. Moreover, it is conceded that if the defendant's claim is mentioned in the plaint then it is immaterial, for the purpose of jurisdiction, whether the claim is true or false. I remain unconvinced therefore by the arguments against the interpretation which I would put upon S. 99. In my opinion the decision of a Division Bench of this Court in *Nandan Mallah* v. *Muhammad Ali* (1929 *A. L. J.* p. 904) which is on all fours with this case, was perfectly correct.

On the second question, whether the question of jurisdiction is affected by adding a prayer for an injunction to the prayers for possession and compensation we are fortunately all in agreement. In

my opinion the revenue Court can give adequate relief by decreeing possession and compensation, so the jurisdiction of the revenue Court is not affected by the prayer for an injunction. This is my answer to the second question.

I would answer the first question as in the terms proposed by Boys, J.

By the Court

The answer to the first question in the affirmative.

The answer to the second question is that if the suit substantially falls under S, 99, the joining of a relief for an injunction would make no difference and the suit would be cognizable by the revenue Court.

R.K. *Reference answered.*

** A. I. R. 1930 Allahabad 206
Full Bench

BOYS KING AND SEN, JJ.

Emperor

v.

Kanver Sen and *others*—Opposite Parties.

Criminal Misc. Case No. 384 of 1929, Decided on 6th November 1929.

**** (a) Criminal P. C., S. 526 (6-a)—Words "any person" explained.**

The words "any person" in S. 526 (6a) are comprehensive enough to include (1) the Crown or the Local Government, (2) any private individual who has an interest in the subject matters of the complaint, as also (3) all or any one of the accused persons. [P 208 C 1, 2]

**** (b) Criminal P. C, S. 526 (6-a)— Application for transfer rejected as being frivolous or vexatious—Government opposing application is entitled to recover costs from applicants.**

Where an application for the transfer of a case has been made to the High Court and has been thrown out on the ground that it is frivolous or vexatious, the Local Government opposing the application is entitled to recover its costs from the applicants. [P 209 C 1]

(c) Criminal P. C., S. 526 (6-a)—Rule that Crown neither pays nor receives costs is not without exceptions.

There is not and there cannot be a cast iron rule that the Crown neither pays nor receives costs. Exceptions may be grafted upon this rule by local statute. The peculiar circumcumstances of a case may also necessitate a departure from the said rule: *Johnson* v. *Reg*, (1904) *A. C.* 817, *Rel. on.*; 36 *Mad.* 601, (*P.C.*), *Ref.* [P 209 C 1]

(d) Criminal P. C., S. 250—S. 250 is applicable even to case of Crown—*Obiter.*

Obiter.—There is nothing in the language of S. 250 to make that section non-applicable to the case of the Crown. [P 209 C 1]

U. S. Bajpai—for the Crown.

A. P. Pandey—for the Opposite parties.

Sen, J.—Kanver Sen, Ram Lal, Sat Narain, Gopal Krishna Consul, Kashi Ram, Madan, Kishanchand and Beliram, who, with two others, are on their trial before a Magistrate of the First Class of Benares under S. 420, I. P. C. applied to this Court under S. 526 (1), Criminal P. C. for the transfer of the case to some other criminal Court of equal jurisdiction on the ground that a fair and impartial trial could not be had in the Court where the case was pending.

The learned Government Advocate was instruced by the Local Government to oppose the application. The applicants were represented by counsel. The parties were heard and the application was eventually dismissed on the ground that it was frivolous and vexatious.

The learned Government Advocate moved this Court to exercise the power contained in the provision of S. 526 (6-a), Criminal P. C. On behalf of the Crown, an affidavit was filed by Mohammad Fariduddin, which showed that the costs incurred by the Local Government in opposing the application amounted to Rs. 585-1-6.

It was not controverted that the application for transfer was opposed by the Crown nor was it disputed that the costs claimed had been reasonably incurred by the Crown in consequence of the application for transfer.

Two arguments appear to have been advanced on behalf of the applicants. It was argued that the words "any person who has opposed the application" in S. 526 (6a) Criminal P. C., are not of sufficient amplitude to include either the Crown or the Local Government having regard to the context of the entire section. It was further argued that S. 526, Criminal P. C., must be taken to have been founded upon the doctrine of the English Common Law according to which the Crown neither receives nor pays costs in criminal matters.

The question which has been referred to this Bench for determination is: Does the word "person" in S. 526, Cl. 6 (a), Criminal P. C., include the "Local Government?" If the answer to this question be in the negative there is an end of the matter and the case need not

be canvassed any further. If the answer to the question be in the affirmative, the consequence of our finding will be that we must direct the applicants to jointly and severally pay a sum of Rs. 585-1-6 to the Local Government being the costs of opposing the application for transfer, which has already been adjudicated upon as frivolous and vexatious.

Applications for transfer generally fall either under one or other of three categories. Cases do occur at times which fit in with the provisions of S. 526 (1), Criminal P. C. Justice demands that in such cases, this Court should be moved to step in and make an order of transfer. There may also be some cases not exactly on the border line but in which either the complainant or the accused person may be under a bona fide apprehension that the trial was likely to be affected by either pre-possessions or prejudices on the part of the tribunal having the seisin of the case but that in truth and in fact, his alarms were not justified and there were no sufficient or valid reasons to necessitate a transfer. The grounds for the application may have been insufficient and yet the application may well have been an arguable one. An application belonging to this class cannot be described as either frivolous or vexatious. In these two classes of casees, this Court has always been studiously careful in not interposing any barrier in the way of the applicants, which directly or indirectly may have the effect to either discourage or have a tendency to discourage such applications. The third class of cases stands upon a different footing altogether. These applications, not uncommonly, are founded upon actual and sometimes patent falsehoods or contain either half truths or even grave distortion of facts. Not uncommonly, the object of the application is to procure an adjournment of the trial to enable the party concerned to parley with witnesses, to try tricks with them and even to tamper with their evidence or in the expectation that the particular Magistrate may be transferred. When applications of this class are made to this Court and are opposed by the Government, ex facie, it appears to be reasonable in the highest degree that the Government successfully opposing the application should be entitled to recover their costs.

In Act 5 off 1898, as originally passed, there was no provision corresponding to S. 526 (6a) of the present Criminal P. C. The aforesaid clause was placed upon the statute book under the Amending Act 18 of 1923. This amendment led to consequential changes in S. 526 (5) of the original section.

Section 526 (6a), Criminal P. C., provides as follows:

"Where any application for the exercise of the power conferred by this section is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of costs to any person who has opposed the application any expenses reasonably incurred by such person in consequence of the application."

It has been argued that the Crown or the Local Government is not a "person" within the meaning of that term in the Criminal Procedure Code, that the legislature consciously intended to exclude the Crown or the Local Government from the operation of Cl. (6a) and that where it contemplated that the Crown or the Local Government should be referred to, the words used in the text are "a party interested," Reliance has been strongly placed upon Cl. (3) which provides that

"the High Court may act either on the report of the lower Court or on the application of a party interested or on its own initiative."

It is not denied that the expression "a party interested" is wide enough to include the Crown or the Local Government. But it is contended that the words "any person who has opposed the application" are not of such wide significance as the words "a party interested" so as to include the Local Government and that if the legislature intended to allow costs to the Government for opposing the application it ought to have introduced in Cl. (6a), S. 526, Criminal P. C. the words "to any party interested" and "such party" in place of the words "any person" or such "person" occurring in the said clause.

We are clearly of opinion that the word "person" in S. 526, (6a), Criminal P. C. is of a wider import than the words "a party interested" in sub-S. (3).

In criminal law, as a branch of public law in jurisprudence, the Crown is a necessary party in view of the immediateness of the public interest involved. Unlike private law, individual interests are not allowed to predominate; but the

public interest balances or in some cases even outweighs the private. The commonwealth can be directly represented by the proper officers of the State and vindicated by them in the name of the State or of its titular head. It is in the highest degree fallacious to consider that the State or the Local Government is an obstruction.

The term "person" has not been defined in the Criminal P. C. but S. 4, sub-S. (2), of the Code Provides that

"all words and expressions used herein, and defined in the Indian Penal Code and not hereinbefore defined shall be deemed to have the meanings respectively attributed to them by that Code."

Section 11, I. P. C. provides that

"the word "person" includes any company or association or body of persons whether incorporated or not."

Under S. 17, said Code, the word "Government" denotes

"the person or persons authorised by law to administer executive Government in any part of British India."

The Government which evidently means the Local Government is therefore either a person or persons with a definite function. Where there is a constituted authority consisting of a person or a number of persons, having a definite function it would be impossible to hold that the said authority has for some inscrutable reason ceased to be a person within the meaning of S. 526 (6a), Criminal P. C. In all serious offences, it is the Government which is the actual prosecutor. Even in minor offences, theoretically, the Government is the complainant. Where an application for transfer is made, the Government is vitally concerned in the result and S. 526 (6) is imperative that notice of such application shall be given to the Public Prosecutor. The Public Prosecutor has a right to oppose the application and in many cases, the application is opposed by the Local Government through its Crown Officer. In a great majority of cases, more specially in cases of serious magnitude, the only party which steps in to oppose the application is the Crown. In enacting S. 526, (6a) Criminal P. C. the legislature could not have intended to shut out from its purview the one party, which was materially interested in opposing the application. We are of opinion that the word "any person" in the subsection aforesaid is comprehensive enough to include (1) the Crown or the Local Government (2) any private individual who has an interest in the subject matters of the complaint as also (3) all or any one of the accused persons.

The words "any person who has opposed the application" are general enough to include the Local Government can also be inferred as the result of the amendment of the original sub-S. (5). This subsection, as it originally stood, ran as follows :

"When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor."

By the Amending Act, 1893, the words "convicted, pay the costs of the prosecutor" were substituted by the words :

"so ordered, pay any amount which the High Court has power under this section to award by way of costs to the person opposing the application."

There can be no manner of doubt that the scope of this subsection has been considerably enlarged by the amendment, and the substitution of the words "person opposing the application" in place of the words "the prosecutor" clearly indicates that it was intended to extend the benefit of the subsection to persons opposing the application who need not necessarily be the prosecutor.

Our attention was drawn to a large number of sections of the Penal Code with the intention of establishing the postulate that the word "person" had been used in those sections in contradistinction to the word "party." We do not think it necessary to examine this part of the argument in detail. The word "person" in the various sections that we were referred to is bound to have the meaning as given in S. 11, unless the said meaning is repugnant to the subject or context.

It may be observed, in passing, that if the argument of the learned advocate for the applicants be accepted in its entirety and pushed to its logical conclusion, it would be beyond the province of the criminal Court to enforce the production of a vital document from the possession of the Local Government under S. 94, Criminal P. C., if Local Government was not a "person" in whose possession or power such a document was believed to be.

As a last resort, the applicants took their stand upon what is generally

known as the common law rule that the Crown neither pays nor receives costs; and our attention was drawn to certain observations of Lord Atkinson, *In re, Vaithinatha Pillai* v. *Emperor* (1). In this case, the applicant by special leave had appealed to the Privy Council against the order of the Additional Sessions Judge of Tanjore convicting him of the abetment of the murder of his daughter-in-law and sentencing him to death. On the appeal being allowed, Sir Robert Finlay for the appellant made a motion for costs in favour of the successful appellant. This motion was disallowed and reliance was placed upon the headnote of *Johnson* v. *Reg* (2) (at p. 825) which runs thus :

"In future the Board will adhere to the practice of the House of Lords; and their rule as to costs in cases between the Crown and a subject will be that the Crown neither pays nor receives costs unless the case is covered by some local statute or there are exceptional circumstances justifying a departure from the ordinary rule."

It is clear from this pronouncement that the common law rule is not of such wide import as claimed by the applicants and that there is not and there cannot be a cast iron rule that the Crown neither pays nor receives costs. Exceptions may be grafted upon this rule by local statute. The peculiar circumstances of the case may also necessitate a departure from the said rule. In England, this common law rule has been trenched upon by the Costs in Criminal Cases Act (1908, 8th Edn. 7 C. 15), S. 6 of which provides that :

"The Court by or before which any person is convicted of an indictable offence may, if they think fit, in addition to any other lawful punishment, order the person convicted to pay the whole or any part of the costs incurred in or about the prosecution and conviction including any proceedings before the examining Justices as taxed by the proper officer."

Under the Judicature Act, 1925, S. 25 (3) the Court has the power to award costs on the hearing of an appeal from Quarter Sessions, both in the appellate Court and the primary Court, though such power did not exist prior to the Judicature Act of 1894.

In this country, where we have got statutory provisions relating to costs, payable in a criminal case, we cannot go by the English Common law rule even if the rule had been quite as general as has been claimed for it. There is nothing in the language of S. 250, Criminal P. C., to make that section non-applicable to the case of the Crown. We mention the aforesaid section, not because it has any application to the point under our consideration but because it was referred to us in the course of the argument. The language of S. 526 (6 a), Criminal P. C., appears to us to be clear, explicit and unequivocal. From a consideration of the plain language of the context and the policy underlying the frame work of the entire section, we unhesitatingly come to the conclusion that where an application for transfer of a case has been made to this Court and has been thrown out on the ground that it is frivolous or vexatious, the Local Government opposing the application is entitled to recover its costs from the applicants. Our answer to the reference is in the affirmative, and we hold that the word "person" in S. 526 Cl. (6a), Criminal P. C., includes "the Local Government." We direct that Kanver Sen and seven others referred to above by name jointly and severally do pay a sum of Rs. 585-1-6 to the Local Government.

V.S/.R.K. *Answer accordingly.*

Advocate High Court
Allahabad & Kashmir
Srinagar

(1) [1913] 36 Mad. 501=21 I. C. 369=10 I. A. 193 (P.C.).
(2) [1901] A. C. 817=53 W. R. 207=73 L. J. P. C. 113=20 T. L. R. 697.

A. I. R. 1930 Allahabad 209

MUKERJI AND NIAMATULLAH JJ.

Kajori Mal Kalyan Mal of General-Ganj, Cawnpore, In the matter of.

Misc. Case No. 6 of 1929, Decided on 5th April 1929, Reference from Commr. of Income-tax.

Income-tax Act (11 of 1922), S. 22 (2)—Notice under S. 22 (2)—Denial of minimum time of 30 days vitiates notice and makes it illegal.

Under S. 22 (2) the Income-tax Officer must give the proposed assessee at least thirty days time within which to file a return. If this minimum is denied the notice becomes entirely illegal and no subsequent extenion of time will cure the defect that initially lay in the notice issued. [P 210 C 2]

K. N. Katju and *M. N. Kaul*—for Kajori Mal Kalyan Mal.

U. S. Bajpai—for the Crown.

Judgment.—This is a statement of the case by the Commissioner of Income-tax under S. 66 (2), Income-tax Act, 1922.

The facts are given in the statement and very briefly are these. There is a joint Hindu family of which Lala Kalyanmal seems to be the head. He was called upon by the Income-tax Officer to furnish a return of the income by a notice which was served on Lala Kalyanmal on 13th April 1928. The notice was under S. 22 (2) of the Act and called upon the proposed assessee to make his return of income by 12th May 1928. It will be noticed here, for this is a very important matter, that the proposed assessee had only 29 days within which to comply with the order. Kalyanmal failed to comply with the order, and on 19th May 1928, the Income-tax Officer called on Lala Kalyanmal, by means of a notice issued under S. 22 (4), to submit his account books on 28th May 1928. On that date, Lala Kalyanmal did appear with the account books. He was able to persuade the Income-tax Officer to grant him five days' more time to file a return of his income. Time was granted up to 2nd June 1928. On that date, Lala Kalyanmal did not turn up, nor did he furnish any return of the income. What he did, however, was that he sent a Civil Surgeon's certificate to the effect that his son had left Cawnpore because his (son's) wife was suffering from consumption and that he himself was suffering from a toothache. His application was disallowed and on 2nd June 1928, an assessment to the best of the judgment was made by the Income-tax Officer under provisions of S. 23 (4) of the Act.

Lala Kalyanmal thereupon made an application to the Income-tax Officer to give him a fresh opportunity to file his return. His application was made under S. 27 of the Act. It was rejected by the Income-tax Officer and an appeal to the Assistant Commissioner of Income-tax was also rejected by that officer. Lala Kalyanmal thereupon made an application to the Commissioner of Income-tax to state the case to this Court. Lala Kalyanmal formulated nine questions of what he thought were points of law. The learned Commissioner has stated those points in the statement of the case and has remarked that these questions were either questions of fact or they did not arise at all. One of the questions, namely (7) was in the following language :

"Was the serious illness of a female member of the joint Hindu family which involved male members into perplexity and anxiety, and petitioner's illness from toothache. . . . . not sufficient cause for the purpose of S. 27 or adequate reason for granting further extension of time."

As regards this point, the Commissioner was of opinion that it was a question of fact and not a question of law. Having, however, said so much, the learned Commissioner formulated the following question for determination by this Court :

"Was the assessee prevented by sufficient cause from making the return required by S. 22 ?"

The question as framed by the learned Commissioner is a mixed question of fact and law, but the question of law can be answered only when the facts have been determined. If the facts be as is stated in question 7, formulated by Lala Kalyanmal and if those facts be accepted as true, then a question might arise, whether those facts might be treated as a sufficient cause, in law, within the meaning of S. 27 of the Act. We find that the Commissioner himself, the Assistant Commissioner of Income-tax and the Income-tax Officer, have all discredited the allegation as to illness and as to whether the alleged facts prevented any interruption of Lala Kalyanmal's business. In the circumstances, we are of opinion that no question of law, as framed, arises in the case.

Having, however, said so much, we have found that there is a very substantial question of law raised in the statement of the case.

We have already held, in another case, that it is open to the High Court to formulate questions of law that really arise in a case and to answer them for the benefit of the Commissioner and the parties. The substantial question of law that arises in this case is whether the notice that was issued to Kalyanmal under S. 22 (2) of the Act was at all a legal notice. Under that rule of law the Income-tax Officer must give the proposed assessee at least thirty days' time within which to file a return. Even this minimum was denied to Lala Kalyanmal and in our opinion, the notice was entirely illegal. The fact that subsequently five days' time was granted to Lala Kalyanmal (from 28th May 1928, to 2nd June 1928) will not cure the defect that initially lay in the notice is.

sued. Our opinion is that the notice issued being illegal, there could be possibly be no valid statement of Income-tax under S. 23 (4).

We may mention here that we have heard the learned Government Advocate on the point and our decision has been arrived at after hearing him on this point. We direct that a copy of this opinion be sent under the seal of the Court to the Commissioner of Income-tax. We direct that the parties pay their own costs, in view of the fact that this point, namely the illegality of the notice, was never raised before. We allow the Government Advocate to file certificate of fees for Rs. 100 within the allotted period of thirty days.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 211 (1)

MUKERJI AND NIAMATULLAH, JJ.

Emperor.

v.

Kajori Mal Kalyan Das—Opposite Party.

Misc. Case No. 6 of 1929, Decided on 8th July 1929, for review of order of High Court made by same Judges reported in *A. I. R.* 1930 *All.* 209.

Income-tax Act, S. 66-A—Judgment by High Court on reference—No review can be made.

There is no review of a judgment in an income-tax case under S. 66-A. [P 211 C 2]

U. S. Bajpai—for the Crown.

K. N. Katju and *M. N. Kaul*—for Opposite Party.

Judgment.—This is an application by the learned Government Advocate asking us to revise our judgment delivered in an income-tax case on a statement made by the Commissioner of Income-tax under S. 66, Income-tax Act of 1922.

The ground on which the review is sought is this. In our judgment we found the fact stated in the "statement of the case," that a certain notice was issued to the assessees directing them to submit a return on a particular date. We said that this period allowed was less than 30 days the minimum period allowed by law. We therefore declared the assessment to be bad.

The learned Government Advocate now states that it was the practice the of the Income-tax Officer concerned to state in notices issued that in the case of the period allowed proving to be less than 30 days, the assessees would have 30 days within which to make a return.

Dr. Katju on behalf of the assessees has taken a preliminary point that no review lies.

Mr. Bajpai has not been able to point out to us any rule of law by which we can entertain an application for review of judgment. He read out to us a few sentences from Lord Halsbury's Laws of England, but those sentences do not help him at all. There it is definitely said that where a judgment of the Court has been sealed, the judgment was not liable to be corrected except for accidental slips etc. These very provisions are contained in the Civil Procedure Code of India.

Mr. Bajpai then argued that S. 98, Civil P. C., having been applied to the income-tax cases by S. 66-A of the Act, the provisions of the Civil Procedure Code are attracted. If that be so his case does not come under S. 114, Civil P. C., for our judgment is neither a decree nor an order.

We hold that no application for review is maintainable and we dismiss the application with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1930 Allahabad 211 (2)

DALAL, J.

Shahzad Singh—Plaintiff—Appellant.

v.

Ram Ugrah Singh and *others*—Defendants—Rospondents.

Execution Second Appeal No. 1937 of 1928, Decided on 25th November 1929, against decree of Dist. Judge, Ghazipur, D/- 15th September 1928.

Civil P. C., O. 22, R. 3 (2) and R. 11—One of several appellants dying pending appeal—Appeal abates only so far as deceased appellant is concerned.

Where several plaintiffs or defendants jointly appeal against a decree, and on the death of one of such appellants if no legal representative of the deceased appellant is brought upon the record within limitation, it can only have the effect of causing the appeal to abate so far as the deceased appellant was concerned; it cannot have the effect of causing the appeal as a whole to abate : 25 *All.* 27 and 22 *Bom.* 718, *Rel. on* ; *A.I.R.* 1926 *All.* 234, *Expl.* 53 *I.C.* 543, *not Foll.* [P 212 C 1

K. N. Katju, K. Verma and *S. N. Verma*—for Appellant.

N. U. A. Siddiqui, P. L. Banerji and *N. Upaddhiya*—for Respondents.

Judgment. —The plaintiff Shahzad Singh applied for the execution of a decree for possession granted by the Court of first appeal. His suit was to recover possession of 20 bigas of land which had been leased to him by Mathura Singh, Ram Ugrah Singh, Raja Ram Singh, Baldeo Singh and Balbhadar Singh. From the decree which has been put in execution the five defendant-lessors had appealed to this Court and the appeal had been decreed with the result that the plaintiff's suit was dismissed. It so happened, however, that when the decree was passed Mathura Singh had died beyond the period of limitation previously. The decree-holder's contention is that Mathura Singh having died the entire appeal abated and a decree passed after automatic abatement was a nullity. The opinion of the Calcutta High Court was quoted that the decree would be a nullity, because if it were not so held there would be two conflicting decrees of two Courts of competent jurisdiction, one in favour of the plaintiff and one against him—*Balram Pal* v. *Keuysha Majhi* (1). For one thing, the ruling is not reported in the recognized Indian Law Reports; for another, it is in conflict with a Bench ruling of this Court passed as far back as 1902 *Ram Sewak* v. *Lambar Pande* (2). This ruling was delivered prior to the passing of the present Civil Procedure Code. It laid down, that where several plaintiffs or defendants jointly appeal against a decree, and on the death of one of such appellants, if no legal representative of the deceased appellant is brought upon the record within limitation, it can only have the effect of causing the appeal to abate so far as the deceased appellant was concerned; it cannot have the effect of causing the appeal as a whole to abate.

The learned Judges had support of a Bombay ruling in *Chandrasang* v. *Khimabhai* (3). This view appears to have been accepted by the legislature which enacted under O. 22, R. 3 (2) that, where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned. Under R. 11 the word "plaintiff" includes the appellant. This alteration was pointed out by Sulaiman, J. of this Court in *Narain Das* v. *Sheo Din* (4). The learned Judge based his judgment on the supposition that prior to the enactment of the new Code of 1908 the generally accepted rule was that the entire appeal abated. Apparently, the learned Judge's attention was not called to the ruling reported in *I. L. R.* 25 *Allahabad*. The entire appeal, therefore, in this Court did not abate and the decree of this Court, so far as Ram Ugrah Singh, Raja Ram Singh, Baldeo Singh and Balbhadar Singh are concerned is not a nullity. The learned Judge of the lower appellate Court has gone further and held that as regards Mathura Singh also the appeal is effective. I do not agree with that opinion. Mathura Singh specifically appealed and the appeal as regards him having abated the decree in his favour would be a nullity.

Mr. Banerji on behalf of the respondents pleaded that a decree against Mathura Singh cannot be executed against his sons who were members of a joint Hindu family at the time of the execution of the lease. That is a point still to be determined. On the other hand it was argued on behalf of the plaintiff-appellant that the decree being a joint one it should be executed against every one of the defendants.

For the reasons given above such a position is not tenable. The plaintiff may execute the decree as against Mathura Singh for whatever it may be worth.

I set aside the decrees of both the subordinate Courts and remand the application for execution of Shahzad Singh to th eexecuting Court to treat it as an application for execution against Mathura Singh alone. His legal representatives will be permitted to put forward objections to the execution. The appeal is dismissed as against Ram Ugrah Singh, Raja Ram Singh, Baldeo Singh and Balbhadar Singh. They shall receive their costs of all the Courts.

V.B./R.K. *Appeal dismissed.*

(1) [1919] 53 I. C. 548.
(2) [1902] 25 All. 27=(1902) A. W. N. 171.
(3) [1898] 22 Bom. 718.
(4) A. I. R. 1926 All. 234=48 All. 251.

A. I. R. 1930 Allahabad 213

DALAL, J.

Fazlul Rahman Khan--Plaintiff—Appellant.

v.

Barumal and *others* — Defendants—Respondents.

Second Appeal No. 835 of 1927, Decided on 1st February 1929 against a decree of Addl. Sub-Judge of Saharanpur D/- 1st February 1927.

(a) Landlord and Tenant—Abadi—Mahajan in possession of village site—In his case also presumption arises that possession was with leave and license.

A Mahajan is as much necessary to village economy as a lohar or a barber. For the purchase and sale of grain and for the advance of money at the right time to agriculturists he is a village necessity, and, therefore, in his case also the presumption arises that he is in possession of the abadi site of his shop by leave and license of the zamindar. 33 *All.* 757 (*F.B.*), *Rel. on.* [P 213 C 2]

(b) Landlord and Tenant—Abadi—Lease for 99 years in absence of custom is invalid.

Where no custom prevailed in a hamlet of the transfer of the right of residence by raiyats, a lease for 99 years was held invalid as a lease for 99 years practically amounted to a sale. [P 214 C 1]

Mushtaq Ahmed—for Appellant.

Ambica Prosad Dubey for *P. L. Bannerji*—for Respondents.

Judgment.—The plaintiff is zamindar of the village. As it pleases a plaintiff better to come on wrong allegations than to come on right ones he made out a wrong case for the ejectment of Baru Mal and Kashmiri Das from a shop situated in a hamlet of which he is zamindar. His allegation was that he had let Baru Mal into possession of the shop and subsequently Baru Mal denied his title and took a lease for 99 years from Kashmiri Das. On this ground he sued for ejectment. The truth was that Kashmiri Das was occupant of the shop and had leased the shop to Baru Mal. Kashmiri Das obtained the shop in 1915 as successor-in-interest of one Parbhu Lal who had obtained the shop on partition in 1904. Putting aside the false allegations of the plaint the questions which arise are :

(1) Whether Kashmiri Das had obtained proprietary title to the site of the shop by adverse possession ; and

(2) Whether there was a custom of transfer in this particular hamlet of the right of residence.

It is not contended that Kashmiri Das was the owner of the site by purchase. As to adverse possession, the Full Bench case was quoted of *Incha Ram* v. *Bande Ali Khan* (1). Chamier, J. in his judgment pointed out that the circumstances of that case were peculiar. His observations were (p. 765)

"There can be no doubt that in the case of a suit by a zamindar for possession of land in an abadi which has been occupied by an agricultural tenant or by a person belonging to the village community such as the village lohar, the barber and the like, the zamindar is entitled to rely on the presumption, the strength of which varies with the circumstances of the case, that such person held possession by leave or license of the zamindar. This presumption may, perhaps, be made in other cases also. Where such a presumption can be made, the burden of proving adverse possession lies on the defendant, and even when the presumption cannot be made, very little evidence is required in some cases of the kind to shift the burden of proof on to the defendant."

The place where the shop is situated is not even a village. It is a hamlet. It was pointed out that the respondents are mahajans, and, therefore, not ryots. I disagree with that opinion. A mahajan is as much necessary to village economy as a lohar or a barber. For the purchase and sale of grain and for the advance of money at the right time to agriculturists he is a village necessity. In his case also the presumption would be that he was in possession of the site of a shop by leave and license of the zamindar. Inquiry was made what proof there was of the payment of rent. No ground rent is recovered in a village where it is as much to the interest of the zamindar as of the ryot that the ryots of different classes should occupy houses in the village. If any further proof of possession were needed, this plot No. 105, was specifically allotted to the plaintiff on partition between the zamindars in 1904 and 1912. This is clear evidence that the zamindars considered the site to belong to them. Under the circumstances it was necessary for the defendant to point to any overt act which started adverse possession and limitation against the plaintiff-zamindar. The shop has been allotted on partition to different members of a family. That would mean the superstructure and the right of residence and not the site which admittedly was never purchased by the family. I hold that the

(1) [1911] 33 All. 757=11 I. C. 52=8 A. L. J. 877 (F. B.).

plaintiff had a subsisting right in the site of the shop when the suit was instituted.

The other defence is clearly untenable. No custom is proved of the right of a license-holder to transfer the right of residence and occupation. No sale deed was produced and the transfer under consideration by a lease for 99 years practically amounted to a sale. Out of the 18 kabuliats produced eight were for one year, four for three years, five for two years and one for seven. As to the one for ten years of 17th December 1915, it is the one by Parbhu Das in favour of another person in respect of another shop and was executed within twelve years of the institution of the suit. In my opinion the trial Court has effectively summed up the evidence on the subject of custom :

"Not a single sale deed has been produced in support of the alleged custom. The defendants have produced several kabuliats to show that residents of this village can lease their houses and shops, and they have been doing so, but many of these kabuliyats are not for more than one year, and they are without pattas, and, consequently, cannot be considered to be transfers within the meaning of the Transfer of Property Act."

The learned Judge of the lower appellate Court does not discuss the evidence in detail or with care. I hold that no custom prevails in this hamlet of the transfer of the right of residence by ryots.

I set aside the decrees of both the subordinate Courts and decree the plaintiff's suit with costs of all the Courts.

R.K. *Decree set aside.*

A. I. R. 1930 Allahabad 214

DALAL, J.

Kamlapat—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn No. 628 of 1929, Decided on 25th November 1929 from order of Sess. Judge, Cawnpore, D/- 21-8-1929.

(a) Factories Act (12 of 1911), S. 26—Men working outside time fixed for employment—Owner is guilty under S. 26.

Where men work during a time which is admittedly outside the time fixed for employment of each person employed in the factory, the owner of the factory is guilty under S. 26.

[P 215 C 1]

(b) Factories Act (12 of 1911), S. 2 (2) (d)—Interruption must be taken in connexion with each individual and the section to be interpreted with regard to actual work.

Interruption must be taken in connexion with each individual employed and not confined to the general cessation of work and it is more reasonable to interpret the section as meaning actual work and not merely residence in the factory for a certain number of hours.

[P 215 C 1]

K. N. Katju and *R. K. Malaviya*—for Applicant

M. Waliullah—for the Crown.

Judgment.—Mr. Kamlapat, owner of a factory in Cawnpore, has been convicted under S. 41 (a), Factories Act. The charge is divided into two heads with respect to four workmen Puran, Gopal Singh, Badri and Bhagwat. The first charge is under S. 26, Factories Act, that the manager employed these four men during hours beyond the time fixed for the employment of each person employed in the factory. The second charge is that three of the men Puran, Gopal Singh and Badri were employed in the same factory for more than eleven hours on the particular day about which a report was made by the Chief Inspector of Factories and Boilers.

The argument here was that these four men were piece workers and not regularly employed and that therefore the provisions of the Act did not apply to them. No ruling was quoted on this subject, so that matter has to be decided on the ordinary interpretation of words in S. 2 (2) (d) :

"A person who works in a factory, whether for wages or not, in cleaning or oiling any part of the machinery, or any other kind of work whatsoever, incidental to, or connected with, the manufacturing process or handicraft, or connected with the article made or otherwise the subject of the manufacturing process of handicraft therein, shall be deemed to be employed therein."

There can be no denying that these four men were winding yarn which was performing a process of handicraft connected with the manufacturing process carried out in the factory and whether they were regular workers per day or according to the work turned out by them they were employed in the factory. The hours of work in the factory as fixed by Mr. Kamlapat were 7 a. m. to noon with a break of one hour and after that from 1 p. m. to 6 p. m. The Chief Inspector found the four men working at 8 minutes past 7 when he went to the factory and presumably because of the astonishing ignorance of law of the men in charge of the factory the work went on till 7-53 p. m. in spite of the presence of the Chief Inspector on the premises. The four men admittedly worked from

6 p. m. to 7-53 p. m., that is during a time which was outside the time fixed by Mr. Kamlapat for the employment of each person employed in his factory. He was guilty under S. 26, with respect to all the four cases.

The consideration of S. 28 is rendered difficult by both the subordinate Courts overlooking the provisions of S. 52 of the Act. I have already held that the three men Puran, Gopal Singh and Badri were employed in the factory, but the term of eleven hours is subject to a rider that in computing the hours referred to in S. 28 any interval by which work is interrupted for half an hour or more shall be excluded. The learned Assistant Government Advocate argued that the interruption would connote the cessation of work of all the workers such as by the break-down of the machinery. In this case also no ruling was quoted and one is left to interpret the words of the two Ss. 28 and 52 without any indication as to how they have been interpreted in similar cases in any large city where there may be factories. S. 28 describes individual employment and is not worded like S. 26 for general employment. For that reason I am of opinion that the interruption must be taken in connexion with each individual employed and not confined to the general cesssation of work as for example the interval between noon and 1 p. m. It will be noticed from the statement of Puran that he did not take the general interval for rest between noon and 1 p. m. but went on working till 2-30 p. m. as he had work in hand between noon and 1 p. m. In that particular case, therefore, there was no interruption even though there was interruption of work for the entire factory. It seems more reasonable to interpret the section as meaning actual work and not merely residence in the factory for a certain number of hours. The analogy given by the learned Sessions Judge is misleading because if that analogy were applied the employment of every factory hand it would extend for twenty four hours as in general terms a factory-hand would be stated to be employed in the factory just as a gardener is employed for the garden of a house. This analogy does not clear up the doubt as to the interpretation of the word "interrupted" in S. 52. It is quite true that it would not be an interruption if a worker rests for a minute or two. That is why the period of interruption fixed is half an hour or more. In the three cases it has been accepted that every one of them did not do any work for two and half or three hours. If that period is deducted they had not been employed in the factory having regard to the provisions of S. 52 for more than eleven hours.

For these reasons I uphold the conviction in all the four cases under S. 26 and set aside the conviction and sentence under S. 28. It was pleaded that a fine of Rs. 200 was excessive. Personally I think that a very severe fine is necessary where the proprietor of a factory employs for superintending purposes men who are entirely ignorant of the provisions of the Factories Act. Possibly an expense of Rs. 800 by way of fine, together with payment of counsel in various Courts, will induce Mr. Kamlapat to purchase vernacular copies of the Factories Act for the guidance of the superintendents of his factory. The days of doing everything by rule of thumb without bothering one's head with the written word have long passed. The fine, if any recovered in excess, shall be refunded.

V. B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 215

DALAL, J.

Konmal and *another*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 701 of 1929, Decided on 6th December 1929.

Criminal P. C., S. 231—No duty on Court to ask accused if he wishes to recall or re-examine any witness.

There is no duty laid on the Court under S. 231 to ask the accused if he wishes to recall or resummon prosecution or defence witnesses and so there is no breach of any provisions in S. 231 if the Court does not so enquire. It is essential that the accused should ask for permission: *A. I. R.* 1924 *All.* 665, *Ref.* [P 216 C 1]

Saila Nath Mukerji—for Applicants.

M. Waliullah—for the Crown.

A. Sanyal—for Opposite Party.

Judgment.—The plea is raised for a fresh trial, because it is alleged that after the trial Court altered the conviction from S. 323 to S. 325, I. P. C., the applicants were not allowed to recall or resummon prosecution and defence

witnesses and examine them with reference to the alteration of the charge and were further not allowed to call more witnesses whom the Court may think material. The reader has gone through the record and has not discovered any application of the applicants to be permitted to call witnesses. There is no affidavit by any legal practitioner appearing in the trial Court that an oral request was made to recall previous witnesses or to summon new ones. There has, therefore, been in my opinion no breach of the provisions of S. 231. It would be instructive to compare those provisions with the provisions of S. 256 where duty is laid on the Court to ask the accused to state at a particular period of the trial whether he wishes to cross-examine any and, if so, which of the witnesses for the prosecution whose evidence has been taken. No such duty is laid on the Court under the provisions of S. 231, and so to make those provisions applicable there must be some evidence that the Court refused the request of the complainant or the accused to recall or summon witnesses. Reference was made to the case of *Mohan Lal* v. *Emperor* (1). In that case also the learned Judge has not stated that any duty lay on the Court to enquire of the accused whether they would recall previous witnesses or summon new ones.

Most of the injuries were simple, and the grevious hurt was not of any moment. It further appears that the complainant tried to make up a false charge of theft against the applicants. Taking these facts into consideration I reduce the substantive sentence of six months to two months, otherwise the application is dismissed. The applicants shall surrender to undergo the balance of their sentence. The fine and imprisonment in default are maintained.

V.B./R.K. *Order accordingly.*

(1) A. I. R. 1924 All. 665.

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* A. I. R. 1930 Allahabad 216

NIAMATULLAH, J.

Bansi and *others*—Defendants—Appellants.

v.

Hukam Singh — Plaintiff — Respondent.

Second Appeal No. 1008 of 1928, Decided on 17th December 1929.

(a) Damages—Joint assault entails joint liability for damages.

Where all the defendants had a common object and proceeded to assault the plaintiff, all of them are responsible for damages resulting from their joint action, although only three out of them took more prominent part than the others and caused injuries to him. [P 217 C 1]

*** (b) Tort—Malicious prosecution—False accusation to knowledge of prosecutor—Inference of malice irresistible—Malice means indirect or improper motive.**

Where the accusation is false and false to the knowledge of the prosecutor, absence of reasonable and probable cause is obvious. The inference of malice is likewise irresistible where the object of launching a false prosecution is to provide defence in a connected case in which the prosecutor is the accused. In this connection malice does not necessarily mean enmity or hatred but any indirect or improper motive. Prosecuting another person on a groundless charge for the purpose of establishing false defence in another case is actionable. [P 217 C 2]

Baleshwari Prasad—for Appellants.

Damodar Das—for Respondent.

Judgment.—The above appeals arise out of two suits, which relate to circumstances which can be more conveniently considered in one judgment. Hukam Singh, the plaintiff in the two suits, alleges that he and some men of his party were beaten by Gobind Prasad, Gajadhar, Adha Ram and seven others. Criminal proceedings were instituted by both parties. The defendants' party was convicted and Hukum Singh's party, who received serious injuries, were acquitted. Hukum Singh brought suit No. 464 of 1927 against the ten defendants for damages amounting to Rs. 662 for assault and beating. The Court of first instance decreed the suit and awarded damages to the extent of Rs. 50. On appeal by the defendants the lower appellate Court enhanced the amount of damages to Rs. 200. Second appeal No. 1008 has been preferred by the defendants against the decree of the lower appellate Court in that suit.

The defendants, Gobind, Gajadhar and Adha Ram, had instituted criminal proceedings against Hukam Singh and others on a charge of unlawfully rescuing cattle which Gobind's party were taking to the pound. Hukam Singh and his party were acquitted. Suit No. 439 of 1927 was brought by Hukam Singh and others against the defendants, Gobind, Gajadhar and Adha Ram, for damages amounting to Rs. 715 for malicious prosecution. It was decreed by the Court of first instance against Adha Ram only

for a sum of Rs. 215. The lower appellate Court upheld the decree. Second appeal No. 1143 of 1928 has been preferred by Adh Ram against the decree of the lower appellate Court in that suit.

Several grounds have been taken in the memorandum of appeal No. 1008. It is argued that appellants 1 to 7 did not take part in the actual beating and that they were not responsible for any damages sustained by the plaintiff in consequence of the injuries inflicted on him in course of the "marpit." I am unable to give effect to this contention. If all the defendants had a common object and proceeded to assault the plaintiff, all of them were rightly held responsible for damages resulting from their joint action, although only three out of them took more prominent part than the others and caused injuries to him. It has been found as a fact by the lower appellate Court that the appellants did not act in the exercise of their right of private defence but were throughout the aggressors.

It is also contended that the damages awarded to the plaintiff (Hukam Singh) are too remote. It is difficult to appreciate an argument of this kind, under the circumstances of the present case. The injuries and the loss of occupation, for which damages have been awarded, were the direct result of the appellants, highhanded action, and cannot, in any sense, be considered too remote, nor can the amount of damages for malicious prosecution by the appellants, awarded in the connected case, be taken into consideration in assessing the amount of damages due to the plaintiff in respect of the injuries and the loss of occupation, already referred to.

In one respect the decree passed by the lower appellate Court requires modification. It appears that the defendant-appellant Bansi urged before the lower appellate Court that he was no party to the assault. The learned Subordinate Judge has specifically dealt with his case as follows:

"The case of Bansi is doubtful. He may have gone to Karhal, where his sister was under treatment, or he may have got back that day to take part in the "marpit." Hukam Singh, Bansi and respondents 1, 3 and 4 had been at logger heads for sometime, and there had been several instances, in which one or the other had given evidence against each other."

In the concluding part of the judgment no notice was taken of Bansi's case, and a decree was passed against all the defendants. I think it was by an oversight that Bansi was not exempted from liability. In view of the finding arrived at by the lower appellate Court that it was doubtful as to whether Bansi took part in beating the plaintiff, no decree can be passed against him.

On the conclusions arrived at by me, this appeal is dismissed with costs, except as regards the appellant Bansi, who will be exempted from liability to pay damages to the plaintiff-respondent. The decree of the lower appellate Court in Appeal No. 1008 is accordingly modified.

As regards appeal No. 1143, the finding of fact arrived at by the lower appellate Court that:

"the evidence on the record fully justifies the conclusion that only "marpit" took place, and the story of rescuing the cattle was invented simply to help the defence in the criminal case. This was not, however, believed. As the case was found false, malice, shall be presumed to have been the motive, which actuated Adha Ram in filing it."

is decisive. Where the accusation is false and false to the knowledge of the prosecutor, absence of reasonable and probable cause is obvious. The inference of malice is likewise irresistible, as the object of launching a false prosecution was to provide defence in a connected case in which the prosecutor was the accused. In this connexion malice does not necessarily mean enmity or hatred but any indirect or improper motive. Prosecuting another person on a groundless charge for the purpose of establishing false defence in another case is obviously actionable. The view taken by the lower appellate Court is perfectly correct. The appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 217

MUKERJI AND BENNET, JJ.

Ajai Verma—Applicant.

v.

Baldeo Prasad—Opposite Party.

First Appeal No. 206 of 1928, Decided on 17th December 1929, from order of Dist. Judge, Shahjahanpur, D/- 13th September 1928.

Civil P. C., O. 41, R. 17 — Pleaders or counsel should be sent for when parties appear by them before dismissal for default —Civil P. C. O. 9, R. 7.

No doubt peon's calling out at the door of the Court very often proves sufficient, but when there are pleaders, the ordinary practice of sending for them should not be discontinued. In appeals especially, it is not absolutely necessary that parties should be present in person when there are constituted agents in the shape of counsels in Court and so it is conducive to good work that they should be sent for. [P 218 C 1, 2]

Shiva Prasad Sinha—for Applicant.

Ram Nama Prasad—for Respondent.

Judgment.—This appeal and the connected appeals Nos. 207 to 209 are against four orders by which the learned District Judge of Shahjahanpur refused to restore four different appeals then pending before him, all of which he had dismissed on an earlier date, for default of the appearance of the appellant.

An affidavit was filed before the learned District Judge by the general agent of the appellant, one Munawar Beg and it was to this effect. Munawar Beg attended the Court and was looking after the appeals. He had gone out to attend a call of nature and during his temporary absence the cases were called out and were dismissed for default. There is nothing to rebut this evidence before the learned Judge. The learned Judge says in his order that he waited between 10 to 15 minutes and nobody turned up. He also noted the fact that the applications for restoration were made a few days later and not on the very day the appeals were dismissed.

We have looked into the order sheet and we have looked at the original order dismissing the appeals. There is nothing to suggest that the two pleaders who had been engaged in the appeals were ever sent for. As a matter of practice, when there are pleaders in a case, they are always sent for by the Court and this is a salutary practice. No doubt the peon calls out at the door of the Court and that proves very often sufficient; but when there are pleaders, the ordinary practice of sending for them should not be discontinued. This practice is followed even in the High Court. In appeals especially, it is not absolutely necessary that parties should be present in person when there are constituted agents in the shape of counsel, in Court. Counsel would be busy in several Courts and it is conducive to good work that they should be sent for. In the circumstances, we are of opinion that the appeals should have been restored by the learned District Judge.

We allow the appeals, set aside the orders of the learned Judge and we direct the Court below to restore the appeal and to decide it according to law. The appellant, who was in default, will pay the costs incurred by the respondent in this Court, which we assess at Rs. 6-4-0 in each of these cases. We direct that the appeal in the Court below will be restored on condition of the appellant paying to the respondent or his counsel the sum of Rs. 6-4-0 in each case. The payment must be made within one month of the receipt of the record in the Court below.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 218

SEN AND NIAMATULLAH, JJ.

Bhageshwari Singh— Plaintiff — Appellant.

v.

Hingu and *others*—Defendants—Respondents.

Second Appeal No. 1771 of 1926, Decided on 12th December 1929, from decree of Addl. Sub-Judge, Mirzapur, D/- 25th May 1926.

Civil P. C., S. 100—Inference from facts when question of law and when question of fact stated.

An inference from facts admitted or proved may, under certain circumstances, be a question of law, but is not necessarily a question of law and where the conclusion arrived at by the Court below is one which hinges upon a balance of evidence produced in the case, the said conclusion is one of fact and not of law. [P 219 C 1]

S. C. Goyel, S. B.L. Gaur and *Krishna Murari Lal*—for Appellant.

U. S. Bajpai and *Gadadhar Prasad*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for ejectment of the defendants from a house situate in Kachhwa Bazar, taluqa Majhwa, district Mirzapur.

The plaintiff alleged that one Sondat was the last male holder of his property. He died, leaving a widow, Mt. Punia, a daughter, Mt. Tulshi, and three grandsons, namely, Sat Narayan, Manhgu and Ram Narayan. The property vested in Mt. Punia with the

limited estate of a Hindu widow. She executed a deed of gift in favour of one of her grandsons, Sat Narayan. Sat Narayan, in conjunction with two of his brothers, executed a sale deed of the house in favour of the plaintiff appellant on 16th March 1923. Mt. Punia died six or seven years before the suit. About two years before the institution of the suit, the plaintiff's vendors are alleged to have let out the house to the defendants as their tenants. The usual notice was served on the defendants to vacate the house. They refused to vacate it. Hence the suit.

The suit was resisted upon various grounds but with many of the pleas put forward by the defendants we are not concerned in this appeal. The principal pleas upon which the case went to trial is the one contained in para. 2 of the additional pleas :

"Sondat and the answering defendants, who are his own nephews, belong to one family, as it will appear from the pedigree given below. During their lifetime, Sondat and the father of the answering defendants, together with the answering defendants, lived as members of a joint Hindu family, and all affairs and property were joint. Accordingly, after the death of Sondat, Balgovind, father of these defendants, became the owner and possessor of the aucestral property in dispute as the surviving member of the joint Hindu family. After the death of Balgovind, these defendants entered into proprietary possession and occupation of the property in the same way and are still in possession."

The Court of first instance repelled the pleas put forward by the defendants and decreed the plaintiff's suit.

The lower appellate Court has reversed its decision and arrived at a clear and categorical finding that Sondat died as the member of a joint family and the defendants had got the property through their father by right of survivorship. This is a rank finding of fact. It is not vitiated by misapplication of substantive law or by an error of procedure. An inference from facts admitted or proved may under certain circumstances, be question of law, but is not necessarily a question of law and where the conclusion arrived at by the Court below is one which hinges upon a balance of evidence produced in a case the said conclusion is one of fact and not of law. We have not the slightest doubt that the finding reached by the Court below is a finding of fact. The result is that the appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 219

MUKERJI AND NIAMATULLAH, JJ.

Sheikh Chamru— Plaintiff — Appellant.

v.

Bhaggan—Defendant—Respondent.

Misc. Reference No. 610 of 1929, Decided on 22nd November 1929, made by Munsiff of East Allahabad.

Agra Tenancy Act (3 of 1926), S. 37—Scope.

The term "holding" in S. 37 refers to the engagement under which land is taken and so if subsequently part of the land originally taken for agricultural purposes has been converted into abadi with or without consent of landlord, there is no interference with the original engagement and a suit for division will consequently lie in revenue Court.

[P 220 C 1]

N. U. A. Siddiqui—for Appellant.

S. B. Joyari and *Sarup Chandra*—for Respondent.

Judgment.—This is a reference by the learned Munsiff of Allahabad asking for the opinion of this Court as to whether he or the revenue Court should try the suit.

It appears, on the facts found both by the revenue Court and the civil Court, that, initially, there was an occupancy holding belonging to the parties to the present reference and consisting of four plots of land. Two of these plots, 1275 and 1276, are still under cultivation. Two other plots, which are much smaller in area, are no longer under cultivation, and on a portion of one of these plots, namely, 966, the opposite party, Sheikh Bhaggan, has built a small house. The plaintiff (Sheikh) Chamru) wanted that plots Nos. 996 and 967 (now not cultivated) should be partitioned. Evidently he thinks that any vacant land that he may get he would be able to bring under cultivation. The suit was orginally intsituted in the revenue Court. Sheikh Bhaggan took the plea inter alia that the suit was not cognizable by the revenue Court. His ground was that plots 966 and 967 were no longer under cultivation. This plea found favour with the learned Assistant Collector, and he dismissed the suit.

The plaintiff, Chamru, had to file a second suit in the civil Court. Then

Bhaggan raised the plea that the civil Court had no jurisdiction to hear the case. The learned Munsiff has accordingly made the present reference.

We are of opinion that the revenue Court had jurisdiction to hear the suit for partition and it will be the revenue Court, which will again hear the case.

Section 37, Tenancy Act, permits one of several tenants to institute a suit for division of a holding. Holding is defined as a parcel of land held under one tenure. This would naturally refer to the engagement under which the land was taken. It may be that part of the land, originally taken for agricultural purposes, has been converted into abadi land with or without the consent of the landlord. But this would not interfere with the original engagement. In this view a division of a holding which includes all the lands that were originally let out will lie in the revenue Court.

We direct the Court below to return the plaint to the plaintiff for presentation to the proper Court. We also direct that it will order the defendant to pay all the costs before it to the plaintiff. The costs of this reference will also be paid by the defendant.

V.B./R.K. *Reference answered.*

A. I. R. 1930 Allahabad 220 (1)

SULAIMAN AND KENDALL, JJ.

Bindraban—Defendant—Appellant.

v.

Durag Singh—Plaintiff—Respondent.

Second Appeal No. 1640 of 1927, Decided on 6th December 1929, from decree of Sub-Judge, Jhansi, D/- 24th February 1927.

Pre-emption—Successful pre-emptor dying—Vendor succeeding as legal representative of pre-emptor—Vendor is not estopped from taking benefit of decree.

The fact that after the death of the successful pre-emptor the vendor himself has become the legal representative is not enough to estop the latter from taking the benefit of the decree.

[P 220 C 2]

K. N. Laghate—for Appellant.

Judgment.—This is a defendant's appeal arising out of a suit for pre-emption brought by Mt. Nannhi Bahu against the vendee Bindraban impleading the vendor Durag Singh. The suit, was decreed by the first Court and the decree was affirmed ly the lower appellate Court on 24th February 1927. The pre-emption money was paid by the decree-holder, and under O. 20, R. 14 (b) the title to the property accrued to her from the date of such payment. She however, died, and after her death a second appeal was filed in this Court on 20th May 1927, against the vendor Durag Singh who, it now appears, has succeeded to her estate.

The main ground urged before us is that because the vendor has himself now become the legal representative of the pre-emptor he should be estopped from taking any benefit from the decree. In our opinion this contention has no force whatsoever. The pre-emption suit was decreed in favour of Mt. Nannhi Bahu, in whom the property became vested as soon as she deposited the pre-emption money. The vendor has now succeeded to her estate as the legal heir. He is the legal representative of the deceased plaintiff for the purposes of this appeal, He is not defending this appeal in his own right or in his capacity as a vendor, but as the legal representative of the decree-holder. We do not see why this fact should in any way handicap him. There can be no estoppel as the succession has come into effect by operation of law and inheritance.

The other two grounds of appeal have no force and cannot be seriously pressed. The appeal is dismissed but without any order as to costs as no one appears for the respondent.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 220 (2)

SEN, J.

Dwarka Prasad—Plaintiff — Appellant.

v.

Badri Lal and *others*—Defendants—Respondents.

Second Appeal No. 1011 of 1928, Decided on 13th December 1929, from decree of Sub-Judge, Ghasipur, D/- 16th February 1928.

Civil P. C., O. 41, R. 27—Additional evidence on points not in issue in trial Court cannot be admitted in appeal and if it is allowed opposite party should be given proper opportunity to meet it.

Where the parties have closed their evidence in the trial Court, it is no province of a Court of appeal in the exercise of its powers under O. 41, R. 27, to admit additional evidence on a point which was never in issue in the trial Court and which never arose from the plead-

ings. It is a salutary rule of law that the parties should be tied down to their pleadings and no evidence should be allowed to be led on a point which does not strictly arise from the issues in the case and if further such evidence is allowed, the opposite party must be given proper opportunity to meet it. [P 221 C 2]

Haribans Sahai and *Narain Sahai*—for Appellant.

A. P. Pandey—for Respondents.

Judgment.—This is an appeal by the plaintiff for joint possession of plot 362/1 and for damages. The plot in question is admittedly the joint holding of the parties and the plaintiff owns a one-third share therein. In the year 1925 the defendants having dispossessed the plaintiff from plot 362 along with certain other properties, a suit for possession was instituted against the defendants. This suit was decreed by the trial Court on 20th February 1925 and the decree was affirmed on appeal on 2nd December 1925. Formal delivery of possession was made on 5th May 1926. In July 1926 the defendants are alleged to have successfully obstructed the plaintiff from cultivating the land; hence the suit.

The suit was contested by Lala Badri Lal defendant 1. He pleaded that he had not obstructed or dispossessed the plaintiff from the land in dispute and that no cause of action had accrued to the plaintiff.

The Court of first instance repelled this plea and granted the plaintiff a decree for joint possession and Rs. 11-4-0 as damages. The lower appellate Court has reversed the decree and dismissed the plaintiff's suit. The ground upon which the judgment of the lower appellate Court is based, is that the plaintiff had mortgaged his share in plot 362 1 with possession to one Ram Naresh Lal, that the mortgagee has continued in possession right up to the institution of the present suit and that the story about an obstruction or dispossession on behalf of the defendants is entirely unjustified.

The plea that the property in suit has remained in the possession of Ram Naresh Lal was not taken in the written statement. A half-hearted attempt seems to have been made before the trial Court to lead evidence on this point, in spite of the fact that the pleadings did not give rise to this issue. The lower appellate Court, however, has seriously entertained this plea and what is remarkable is that it has sent for the record of a suit which contains the original mortgage bond in favour of Ram Naresh Lal. Where the parties have closed their evidence in the trial Court, it is manifestly clear that it is no province of a Court of appeal in the exercise of its powers under O. 41, R. 27, Civil P. C., to admit additional evidence on a point which was never in issue in the trial Court and which never arose from the pleadings. It is a salutary rule of law that the parties should be tied down to their pleadings. It is equally a provision of law that no evidence should be allowed to be led on a point which does not strictly arise from the issues in the case. There could be no doubt, therefore, that the lower appellate Court was not justified in sending for the record of a case, and use a document contained therein, as evidence in the case, which was not before that Court. The mortgage bond does not automatically prove itself. No evidence appears have been taken by the appellate Court in proof of the document. If the document could be brought upon the record as additional evidence in the case, an opportunity ought to have been given to the plaintiff to meet that evidence. This was not done. The procedure adopted by the lower appellate Court appears to have been illegal from start to finish.

There is still another aspect of the case which does not seem to have been appreciated by the lower appellate Court. In the year 1925, a suit for joint possession of the land now in dispute together with certain other properties was instituted by the plaintiff appellant against the defendants respondents. If, on the date of that suit, the share of the plaintiff in plot 362/1 was already in the possession of Ram Naresh Lal as a usufructuary mortgagee, this plea might and ought to have been raised in the said suit. If the plea had been raised and substantiated, it would have been an effective answer to the plaintiff's claim for joint possession qua the land in dispute. The plea was not raised and a decree for joint possession was passed. It is not open to the defendants now to raise this plea in answer to the present suit. The defendants are precluded from agitating tha

question by the constructive rule of res judicata.

The appeal is allowed, the judgment of the lower appellate Court is reversed and that of the Court of first instance restored with costs.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 222

DALAL, J.

Municipal Board, Benares — Defendant—Appellant.

v.

Narsingh Dutt Pande and *another*— Plaintiffs—Respondents.

Second Appeal No. 755 of 1928, Decided on 10th December 1929, from decree of Dist. Judge, Benares, D/- 21st January 1928.

(a) U. P. Municipalities Act (2 of 1916), S. 160—No regular assessment nor alteration in assessment—Party aggrieved at being classed in particular class can sue for declaration of his non-liability in civil Court.

Where there has been no regular assessment or alteration of assessment, and a party sues for a declaration that he is not liable to be classed in a particular class of tax-payer, provisions of S. 160 do not apply and suit lies in the civil Court. [P 222 C 2]

(b) U. P. Municipalities Act (2 of 1916), S. 128 (i) (iv) with rules thereunder — "Lorry" defined.

The main characteristic of lorry is that it is vehicle for carriage of goods. [P 223 C 1]

Harnandan Prasad—for Appellant.

U.S. Bajpai, P. L. Banerji, N. Upadhiya and *L. N. Pandey* — for Respondents.

Judgment. — Two tax-payers who were plying a motor vehicle for hire sued the defendant Municipal Board of Benares for a declaration that the motor vehicle used by them was a motor car assessable to duty at the rate of Rs. 25 per annum and not a motor lorry assessable at the rate of Rs. 100 per annum. Both the subordinate Courts granted the declaration, whereupon the Municipal Board has come here in second appeal. Like most concerns with which one is acquainted, the Municipal Board of Benares evidently carries on its business by rule of thumb and has found itself in somewhat unpleasant situation in this suit. The plaintiff's car was assessed at Rs. 25, and when they took Rs. 12-8-0 for six months for payment to the municipality they were told that after the body was changed the car was assessable at Rs. 100. Both the subordinate Courts, however, stated that there has been no regular assessment. No assessment book has been produced before this Court to indicate that the plaintiffs have been assessed to a tax of Rs. 100. The learned counsel here engaged by the municipality pointed to para. 5 of the plaint. In that paragraph nothing is said as to actual assessment, but the words used are that the defendant has been classing the vehicle as a lorry liable to an annual tax of Rs. 100. After making such a statement, the plaintiffs were not prevented from raising the objection that there was no regular assessment and that, therefore, the jurisdiction of the civil Court as laid down under S. 160, Municipalities Act, was not barred. The judgment of the first Court was passed as far back as 13th September 1927, that is, more than two years ago. An appeal was filed to the District Judge in which no assertion was made that the plaintiffs had been assessed according to rule, though the trial Court had definitely stated that no such assessment was made. This is not to be wondered at because the grounds of appeal are signed by an executive officer of the municipality Mr. B. P. Mehta, presumably unacquainted with law, and the learned vakil has coyly put his signature at one side as if disclaiming responsibility for the grounds of appeal. Even in this Court after more than two years no assessment register is produced to satisfy me that there had been an assessment of the plaintiffs for a sum of Rs. 100 per annum. Section 160, Municipalities Act, 1916, permits an appeal to the District Magistrate, but an appeal can only be filed from some kind of order and not against a verbal direction of an official of the municipality. In the case of a tax assessed by the municipality an appeal against an assessment or any alteration of an assessment may be made to the District Magistrate. In the present case both the subordinate Courts have held that there has been no assessment. No evidence is produced before me to come to a contrary conclusion. For that reason the provisions of S. 160, Municipalities Act, do not apply and the civil Court has jurisdiction.

It was next argued that the body with a seating capacity for ten passengers having been placed on a Ford car it must be designated as a lorry. A lorry,

however, is defined as stated in the judgment of the lower appellate Court as a vehicle for the carriage of goods or goods and passengers. The main characteristic, therefore, of a lorry is that of a vehicle for the carriage of goods. The vehicle in dispute is not such, and, therefore, cannot be designated as a lorry. Reference was made to a definition given in the previous rules of 1st March 1924. Those rules, however, appear to have been superseded by the rules published in the Gazette of 21st January 1928.

This appeal is dismissed with costs.

Mr. Harnandan Prasad desired to produce further evidence. I refuse to permit it as the municipality had sufficient warning for the last two years to prove in the lower appellate Court or here that the plaintiffs had been assessed according to rules.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 223

BANERJI AND KING, JJ.

Jadunandan Chaube and *another*—Plaintiffs—Appellants.

v.

Surajdeo Narain Lal—Defendant—Respondent.

Second Appeal No. 81 of 1927, Decided on 27th November 1929, from decree of Second Addl. Judge, Gorakpur, D/- 12th July 1926.

(a) Transfer of Property Act, S. 3 (1)—Scribe becomes an attesting witness only when he signs with that intention.

Although scribe of a deed can be an attesting witness, he will not be so unless he intends to sign the deed as an attesting witness.

[P 223 C 2]

(b) Transfer of Property Act, S. 3 (1)—Scope.

The definition of the term "attested" has retrospective effect and the Court is bound to deem that the words always had that meaning and the effect is that it is necessary that the attesting witness must have signed the instrument in the presence of the executant.

[P 224 C 1]

Baleshwari Prasad for *Waliullah*—for Appellants.

Ambika Prasad Dube for *P. L. Banerji*—for Respondent.

Judgment.—The only point that arises in this second appeal is whether the Courts before were correct in holding that the mortgage deed in suit was not attested in the manner required by law.

The mortgage deed bears the signature of the executor and in the margin of the deed there are the names of two persons purporting to be witnessess since each name is preceded by the letter 'g' (gawah). There is a fourth name in the margin, namely, Thakur Prasad; but this name is not preceded by the letter 'g' but by the latter 'd' (dastkhat) showing that Thakur Prasad did not purport to sign as a witness of the deed. The evidence shows that Thakur Prasad was in fact the scribe of the deed.

As regards the two signatures of the persons who purport to have signed as witnesses it has been found that one of them, namely Maheshar Ram, did not sign his name himself and that there was no proof that he had authorised the scribe to sign for him as an attesting witness. For this reason the lower appellate Court held that Maheshar Ram was not a valid attesting witness. We may mention that the trial Court found that Maheshwar Ram was not even present at the execution of the deed but the lower appellate Court did not come to a finding of fact on that point.

The lower appellate Court proceeds upon the view that the other witness Ramjan Ram, whose name appears as an attesting witness, may be regarded as a valid attesting witness, but the document cannot be considered to have been duly attested because Thakur Prasad, who is the only other person who could be regarded as an attesting witness did not sign the document as a witness but signed it as a scribe. We have already pointed out that Thakur Prasad, as the scribe of the deed, must have intended to make a distinction between himself and the other two marginal witnesses since he only purports to have signed the deed, whereas the other two marginal witnesses purport to have signed the deed as witnesses. Although the scribe of a deed can be an attesting witness we do not think that he is so in the present case since it appears that he did not intend to sign the deed as an attesting witness.

There is another objection to the validity of Thakur Prasad's signature as an attesting witness. The definition of "attested" which was introduced in the Transfer of Property Act by the amending Act of 1926 to which retrospective effect was expressly given by the amend-

ing Act of 1927, lays down the meaning which should be attached to the word "attested" and we are bound to deem that the word always had that meaning. Under this definition it is necessary that the attesting witness must have signed the instrument in the presence of the executant. In the present case, Thakur Prasad deposes that the executant signed the document in his presence, but there is no evidence that Thakur Prasad himself signed the document in the presence of the executant. On this ground also we hold that the signature of Thakur Prasad cannot be accepted as the signature of an attesting witness.

We accordingly dismiss the appeal with costs.

V.B./R.K. *Appeals dismissed.*

A. I. R.1930 Allahabad 224

NIAMATULLAH, J.

(Shri) Siivalinga Mahadeo—Plaintiff—Appellant.

v.

Kumodini Debi—Defendant—Respondent.

Second Appeal No. 939 of 1928, Decided on 6th December 1929, from decree of Addl. Sab-Judge, Benares, D/-29th February 1928.

Landlord and Tenant—Ejectment—Suit for—Servant, wife or relative of person in possers on cannot be ejected without making latter party.

Possession wrongful or otherwise implies more than physical presence of a person and so no suit for ejectment can be instituted against a servant, wife or relative of a person in possession without impleading latter as defendant. [P 225 C 1]

H. P. Sen—for Appellant.

B. Malik and *P. L. Banerji*—for Respondent.

Judgment.—This appeal arises out of a suit brought by the plaintiff-appellant for ejectment of the defendant and for possession of a room and dalan, said to be in the occupation of the defendant. The house is alleged to be an endowed property dedicated to the idol, in whose name the present suit has been brought by the surviving trustee, Mt. Gangamani Debi. It was originally purchased in the name of Mts. Gangamani Debi and Kumudamani Debi the two wives of Chintamani Chakrabarty. The two ladies created the endowment and installed the plaintiff idol in part of the house. Mt. Kumudamoni has since died, leaving two sons: Tincauri Chakrabarty and Panchcauri Chakrabarty. Gangamani Debi, through whom the present suit has been brought in the name of the idol, is apparently on bad terms with her stepsons. Under the deed of endowment she is the sole surviving trustee after the death of Kumudamani Debi. The defendant respondent has admittedly no interest in the house. The suit for ejectment was based on the allegation that the defendant was a tenant at a certain monthly rent. By a subsequent amendment the character of the suit was slightly modified by treating her in the alternative as mere licensee.

The defence was that the defendant was neither tenant nor in any manner holding permissibly from the plaintiff. It was alleged that the defendant was brought into the house by Kumudamani Debi, on whom she attended, that after the death of Kumudamani Debi Tincauri Chakrabarty who is residing in the house, allowed her to stay and that she is living with him as a member of his family.

The Court of first instance decreed the suit. The lower appellate Court has, however, dismissed it on the finding that the defendant is neither the tenant nor the licensee of the plaintiff but is living in part of the house in the actual occupation of Tincauri Chakrabarty. The finding may be usefully quoted. It runs thus:

"I havs been taken through the entire evidence on the record and I have no hesitation in saying that she was asked to live in this house as a servant. It appears that Mt. Gangamani and her stepson, Tincauri, have fallen out. The appellant is now living with Tincauri, who is occupying the ground floor of the house. No specific portion of the house is in the possession of the appellant but that she is living as a servant with Tincauri. Therefore she has no independent right to live in the house either as a tenant or a licensee (which she is not). She is there with the permission of Tincauri and is living in the portion of the house which he himself is occupying. This is proved beyond doubt.."

In my opinion this finding, if accepted will disentitle the plaintiff to a relief. Tincauri is in possession of the lower story either as a trespasser or with the permission of the plaintiff, assuming the latter is the owner of the lower story. In either case the person in actual possession is Tincauri. The members of his family, his servants and

retainers, though living with him cannot be considered to be in possession of the house. The proposition that a plaintiff can eject any of his servants, wife or relative, without impleading him as a defendant, is an impossible one. Possession wrongful or otherwise implies something more than physical presence of a person. I am of opinion that the view taken by the lower appellate Court in dismissing the plaintiffs's suit is correct. This appeal cannot succeed. It is accordingly dismissed.

As the defendant contested the validity of the wakf and the same having been given effect to a plea which has been found to be groundless, I order that the parties should bear their own costs of the first two Courts. The respondent will have his costs of this appeal.

v.B./R.K. *Appeal dismissed.*

** A. I. R. 1930 Allahabad 225
Full Bench

MEARS, C. J., SULAIMAN, BOYS, BANERJI, YOUNG, SEN AND NIAMATULLAH, JJ.

(*Mahant*) *Shantha Nand Gir Chela* and *Mahant Gayanand Gir*—Appellant.

v.

(*Mahant*) *Basudevanand*—Respondent.

Execution First Appeal No. 156 of 1928, Decided on 24th January 1930, against decree of Sub-Judge, Allahabad, D/- 4th February 1928.

**** (a) Legal Practitioner—He cannot be ordered personally to pay costs except under Civil P. C., S. 35.**

(Per *Full Bench.*)—The High Court has no power to order a legal practitioner to pay personally the costs of an application or suit except in cases to which S. 35 can be made applicable. [P 252 C 2]

(b) Interpretation of Statutes—Jurisdiction—Existing one can be taken away only expressly or by necessary implication.

(Per *Mears, C.J.* and *Boys* and *Young, JJ.*)—A jurisdiction existing in a Court can only be taken away by the use of precise and distinct words in a statute, or as some authorities have held, by necessary implication of the words used, (*English case law discussed.*) [P 230 C 1]

*** (c) Legal Practitioner's Act (18 of 1879)—High Court—Inherent powers—Bar Councils Act (38 of 1926), S. 13.**

(Per *Full Bench.*)—In-herent powers of the Supreme Court of Calcutta were not conferred on the Allahabad High Court by the Indian High Courts Act of 1861 and no power to exercise inherent disciplinary jurisdiction over legal practitioners independently of the Legal Practitioners Act and the Indian Bar Councils Act now exists in the Allahabad High Court in respect of their professional or other misconduct. (*Mears, C. J., Boys* and *Young, JJ.*, contra.) [P 234 C 2]

(d) Legal Practitioner—Contempt — Subordinate Courts cannot punish for contempt except under Penal Code, S. 228.

(Per *Full Bench.*)—No power to punish for contempt of an inferior Court now exists independently of the Indian Penal Code and the Contempt of Courts Act and no disciplinary power over legal practitioners or power to punish for contempt outside the provisions of the Indian Penal Code is vested in the subordinate Courts. [P 234 C 2]

(e) Interpretation of Statutes—Statement of objects and reasons is not part of Act.

(Per *Full Bench.*)—It is not permissible in India to refer to the statement of objects and reasons which accompanies the draft Bill when it is first introduced in the legislative body. Unlike the preamble, the headings and the marginal notes, the statement of the objects and reasons is no part of the Act as passed by the legislature; 14 *All.* 145; 22 *Bom.* 112; *A.I.R.* 1928 *Lah.* 35 and *A.I.R.* 1917 *P. C.* 42, *Ref.*; 22 *Cal.* 788, *Expl.* (*Mears, C. J., Boys* and *Young, JJ.*, contra.) [P 238 C 2]

*** (f) Bar Councils Act (38 of 1926)—Legal Practitioner cannot now be proceeded under inherent jurisdiction.**

(Per *Sulaiman, Bannerji* and *Sen, JJ.*)—Independently of the Indian Bar Councils Act the High Court does not any longer possess any inherent jurisdiction to punish an advocate for professional misconduct or to adopt a procedure for enquiry other than that laid down in the Act or to pass an order for costs against him or impose a fine which are not contemplated by the Act: *A. I. R.* 1926 *All.* 623, *Ref.* [P 239 C 2; P 240 C 1]

(g) Interpretation of Statutes—Judicial decision—Presumption.

(Per *Sulaiman, Banerji* and *Sen, JJ.*)—The legislature must be presumed to know the course of judicial decisions. [P 240 C 2]

*** (h) Civil P. C., S. 35—S. 35 has nothing to do with misconduct of advocates—Costs can, however, be ordered against even upon party responsible for them.**

(Per *Sulaiman, Banerji* and *Sen, JJ.*)—No doubt S. 35 as it now stands has a wider scope and authorizes a Court in appropriate cases to make an order as to costs, against a person who is strictly speaking not a party to the litigation. But the section has nothing to do with the misconduct of advocates. Cases of contempt of Courts stand on a separate footing and are not within the scope of the section, as inferior Courts have no jurisdiction to punish for contempt of Court in cases not falling within Penal Code, but under this section Court can order payment of costs by any person who is really responsible for those costs, that is, has been the cause of those costs having been incurred, whether he is a party to the suit or not and whether those costs have been directly occasioned like commission or omission. [P 241 C 1, 2]

**** (i) Civil P. C., O. 45, R. 7—Proprietary interest of surety is not extinguished—It merely becomes the first charge on the property—Liability of property discussed—Such interest is not exempt under Transfer of Property Act, S. 6 or Civil P. C., S. 60.**

(Per *Sulaiman*, *Banerji* and *Sen*, *JJ.*) — When either immovable or moveable property is offered as security the proprietary interest of the surety is not automatically extinguished and merely a first charge is created on the security which will have to be available in the first instance for the purpose for which it has been offered. Although the depositor cannot defeat that purpose his power of disposal of his security subject to that charge will subsist, and his interest in the surplus which may remain over is both transferable and attachable. Such an interest does not come within any of the exceptions enumerated in S. 6, T. P. Act nor is such security exempted from attachment under S. 60, Civil P. C. If the decree-holder desires to be cautious there is nothing in law to prevent him from applying to the Court for attaching the security so as to prevent the judgment-debtor from dealing with it personally any further. It is not only permissible to a decree-holder to attach the security but he has a right to do so subject always of course to the first charge created and the Court has no discretion to refuse his prayer. The only condition which the Court issuing an order for attachment must impose is that the previous charge created in the property is in no way to be affected. O.21, R. 52, is specially applicable to attachment of property in the custody of any Court of public officer: 1929 *Pat.* 97; 8 *Pat.* 478 *Ref.* [P 242 C 1, 2]

*(j) **Civil P. C., S. 35—Relief asked more than one can get—Part should be allowed that could be granted — Costs as to rest should not be saddled on party as disciplinary measure.**

(Per *Sulaiman*, *Banerji* and *Sen*, *JJ.*) — The mere fact that the plaintiff or the applicant has asked for more than he can get does not give the Court any discretion to refuse to grant even that part of the relief asked for to which he is entitled and to make his advocate to pay the costs subsequently. Courts exist for doing justice and not forcing any discipline against litigants.

[P 244 C 1]

(k) **Legal Practitioners Act (18 of 1879)—Preamble—"Consolidates," meaning of—It is complete Code on the subject.

(Per *Full Bench.*)—The Act does not merely consolidate previous enactments but the whole law on the subject and it does not merely consolidate pre-existing law but also amends it which taken with the consolidation of the same implies both addition to and derogation from the pre-existing law. It is a complete Code in itself as regards the subject it deals with. (*Mears*, *C. J.*, *Boys* and *Young*, *JJ.* contra.)

[P 247 C 1]

(l) **Civil P. C., S. 35—Costs by way of disciplinary action are not permissible.**

(Per *Niamatullah*, *J.*)—S. 35 was not intended to confer any disciplinary jurisdiction on any Court inferior to a High Court which cannot acting under that section against a legal practitioner for what amounts to misconduct or other reasonable cause justifying the existence of disciplinary jurisdiction. The right to receive and the liability to pay costs under S. 35 must be treated like any other question in the case and no Court of appeal can ever be justified in making it a matter for consideration over the heads of the parties to the case; an action which has all the attributes of a disciplinary measure to which different considerations should apply. [P 249 C 2; P 250 C 1]

Tej Bahadur Sapru, *B. L. Dave* and *Ambica Prasad Pande*—for Applicant.

Janki Prasad—for Respondent.

Government Advocate—for the Crown.

Mears, **C. J.**, **Boys** and **Young**, **JJ.**—One Basdeonand Gir obtained leave to appeal to the Privy Council and on the due date deposited a sum of Rs. 4,000 as security for costs and a further sum for printing charges.

On 2nd November 1927 Mr. Newal Kishore, who was the legal practitioner for Shankernand Gir, the respondent to the Privy Council appeal, drafted an application to the Court of the Subordinate Judge at Allahabad in which he prayed that the cash certificates for Rs. 4,000-12-0 and a sum of Rs. 798-11-0 for printing charges, which had been paid into the High Court by the appellant, might be attached :

"and the amount of the decree may be so far as possible satisfied by attachment thereof."

The application came before Sudeshar Maitra on 4th February 1928. His order was a short one and may be given in full.

"The items objected to relate to the printing charges and security furnished by the defendant objector in connexion with his appeal to His Majesty in Council. The decree-holder is anxious to lay his hands on these items too towards the satisfaction of his decree. No doubt, and it is not disputed, the same belongs to the defendant, but if he were to be deprived of it at this stage, it would be denying him his inherent right to appeal. It is not charitable for the decree-holder that he should pursue the judgment-debtor to this extent. As a Court of justice I think I should intervene equitably to let the judgment-debtor approach the Privy Council. In this view of the matter I allow this portion of his objection and direct that the two items shall not be attached in execution. No costs allowed."

It is clear that the learned Judge did not regard the application in a favourable light. He did not discuss whether the application was in part good and in part bad, and whether the one could be severed from the other, for the evident reason that the decree-holder was anxious to lay his hands on the money deposited in the High Court, with the result that if the application was granted, the appellant would be deprived of his right of appeal. The applicant did not ask for and did not want an order attaching any surplus, that might remain after the decision of the Privy Council. He wanted immediate payment of the money and nothing else.

Shantanand Gir appealed from this order. *The notice of appeal is undated and is signed by Mr. A. P. Pandey and Mr. B. L. Deva. The application (para. 1) sets out that the Court below was wrong in refusing to allow the decree-holder "to proceed against the said money." When the matter came up for argument in this Court it was apparent that Mr. Pandey had become aware of the dubious nature of the application, and in an attempt to render it innocuous, he claimed to attach so much of the money as might not eventually be required to satisfy the costs of the appeal. Had that been the form of the application in the first instance, no objection could have been taken to it.

The original application being in the opinion of the Bench a reprehensible proceeding which amounted to an abuse of the process of the Court, they issued notice to Mr. Newal Kishore and Mr. Pandey.

"to argue the general question whether this Court has power to order a legal practitioner in appropriate circumstances to pay personally the costs of an application or suit, and secondly if the High Court has such power, whether it should be exercised in the present case." : (Vide *A. I. R.* 1929 *All.* 794 (at 795).

The matter was referred to this Full Bench and at an early stage of the proceedings Mr. Pandey stated that at the hearing of the appeal :

"It was common ground between counsel and the Bench that the object of the original application in the Court below was to burke the appeal to the Privy Council."

This statement was taken down word for word. It transpired subsequently that Mr. Pandey had argued the appeal in this Court without having had a consultation with Mr. Newal Kishore or the client and so his statement must not be taken to have been a repetition of anything said by them to him. That, however, does not destroy its force, and we can have no doubt that Mr. Pandey (a practitioner of repute and experience) and the Bench were right in describing the proceedings in the lower Court as having for their object the destruction of the appeal.

If the application had been granted and the money withdrawn, the respondent to the Privy Council appeal would have contended that the time for any second payment in had expired and the certificate must therefore be cancelled. Whether this manoeuvre would or could have been eventually carried to a successful conclusion is immaterial.

After Mr. Pandey had explained the position as he conceived it to be, Mr. Newal Kishore was asked for his explanation. He gave one which we regret to say was in our opinion untrue. He said that it was hoped that the result of the application would be that the appellant would pay over to his client another and a different sum of Rs. 4,000 so as to protect the Rs. 4,000 lying in Court. That explanation is foolish. If true, it indicates an intention to squeeze money out of the appellant by an application, which Mr. Newal Kishore must, as a lawyer, be deemed to have known had no possibility of success. The reason why, in our opinion, he invented this story is that having heard Mr. Pandey's explanation and our reception of it he was afraid to admit the obliquity of the motive. We have got to say what was, in our opinion, the motive and we feel no difficulty about it. A perusal of the application shows that Mr. Newal Kishore's client wanted in the words of the Subordinate Judge "to lay hands on the money." A perusal of the judgment of Mr. Mitra shows that the argument proceeded on that basis and that the effect, i. e., the destruction of the appeal to the Privy Council, would follow as the result. That being the line of argument in the lower Court, there can be no doubt that the application when drafted was drafted with that object and intention.

Mr. Newal Kishore must have known perfectly well that no Court in this country has ever passed an order allowing money paid in by an appellant to the Privy Council to be taken out by any adverse claimant. If we were to accept his own explanation, the application was intended as a lever to extract money from the appellant. That in itself is an abuse of the process of the Court. We believe, however, that Mr. Pandey was right when he said the object was to burke the Privy Council appeal, and that he, when in Court, quickly realised the impropriety of the whole proceeding and tried to get on to safe ground by asking the Court to disregard his prayer for immediate pay-

*Vide : A. I. R. 1929 All. 791.

ment and to order the attachment of the eventual balance, if any.

It is suggested that since the actual application, which was drafted and filed, was in form an application permitted by the Code of Civil Procedure, it is immaterial to consider with what intention Mr. Newal Kishore drafted the application and pressed it. But it is impossible to divorce an act from the intention which accompanies it. As Lord Bowen J. said in *Edgington* v. *Fitzmaurice* (1). "The state of a man's mind is as much a fact as the state of his digestion'" It is an inference from circumstances. In support of this view we have a decision most directly in point in *Miller* v. *Knox* (2), where it was said :

"It is also a contempt to abuse the process of the Court by wilfully doing any wrong in executing it, or making use of it as handle to do wrong."

Again it was held in *Taylor* v. *Lawrence* (3) that it would be proper under the inherent jurisdiction to order the solicitor to pay costs to the other side where he has improperly undertaken a case without any bona fide chance of success or for the purpose of exacting money from the defendant. This latter phrase exactly covers the present case.

The utter impossibility of divorcing, in a matter such as we are considering, an act from the dishonourable intention and purpose with which it was committed is apparent, if indeed support is required for such a proposition, from the view expressed. In *re, Grey* (4) where the jurisdiction of the Court over its officers was declared to exist for the purpose of enforcing honourable conduct on the part of the Court's own officers :

"Can it then be gravely suggested that it is open to a legal practitioner to employ a process of the Court for a " dishonourable " purpose ?

The question being with what intention Mr. Newal Kishore drafted the application, we have the following facts. He appeared in Court in a proceeding which he must have known could not succeed. He frankly asked for the removal of the money from the High Court and for nothing less. When the Judge laid emphasis in his order on the result, namely the sweeping away of the Privy Council appeal, he did not dissent from that as the logical consequence. It was indeed the desired consequence. Can anyone doubt that the drafting of the application was the first essential step which it was hoped would result in the ultimate burking of the appeal if by good luck the Court could be imposed upon sufficiently to make the order?

We find this in fact to have been his intention and that it was reprehensible and that his action amounted to contempt of Court. The result has been to put the appellant to expense in the Court of the Subordinate Judge and in this Court. That is the direct consequence of the initiation and prosecution of proceedings which were in their nature an abuse of the processes of the Court.

In this connexion it is important to note that neither Sir Tej Bahadur Sapru nor Mr. Pandey nor Mr. Newal Kishore attempted to justify the application or the proceedings in the lower Court as being made honestly in good faith.

In these circumstances can any decision be more right and proper, if the Court has power so to order, than that Mr. Newal Kishore should reimburse the appellant for all the expenses to which he has been put by proceedings launched against him without lawful justification.

Mr. Pandey stands in a different position. It is true that he signed the notice of appeal but he was not the originator of the proceedings, and as we have said, he virtually abandoned the application as untenable. In our view it was not until he was preparing the case, perhaps not even until he was in Court, that the real object of the proceedings dawned upon him. He then sought to get out of the difficulty in which he found himself by saying he would be content with an order of attachment limited to any balance which remained after satisfaction of the costs of the appeal. We repeat that his client did not want that, indeed never had asked for it. As Mr. Pandey had no instructions from his client or Mr. Newal Kishore, it is obvious that he did this of his own motion, because he realised the impropriety of the original proceedings and was not prepared to support them.

(1) [1885] 29 Ch. D. 459=55 L. J. Ch. 650=50 J. P. 52=33 W. R. 911=53 L. T. 369.
(2) [1838] 4 Bing. N. C. 574=132 E. R. 910.
(3) [1892] I. J. 422.
(4) [1892] 2 Q. B. 442.

We are therefore of opinion that Mr. Pandey's conduct was not reprehensible.

It now remains to consider the powers of this Court to deal with the state of facts which we have found to be established and more particularly whether this Court has power in appropriate circumstances to order a legal practitioner to pay costs personally. Those powers, if they exist, might exist:

(1) as "inherited," i. e. they might be found to have existed in some previous Court of which this is the direct successor, though its name and constitution may have changed. In the present case there is no suggestion that this Court is the direct and immediate successor of any earlier Court having such powers, and it would not be necessary to mention this possible source, but that there has been some confusion in the argument and discussion between "inherited" "inherent" and "statutory" powers;

(2) as "inherent" in every Supreme Court;

(3) as particularly statutory, i. e. directly conferred by statute;

(4) under a general power conferred by S. 35, Civil P. C.

It being unnecessary to consider whether this Court has "inherited" powers further than we have already mentioned, we proceed to consider the question whether the Court has any "inherent" powers, and if so, the nature and extent of those powers.

To facilitate appreciation of what follows we may state forthwith our conclusions and then our reasons therefor. We are of opinion:

(a) That this Court has inherent powers to punish contempt of Court committed against either this Court or a Court subordinate to it. For such contempt this Court has power to inflict a punishment of fine or imprisonment. (b) That this Court has such power to punish for contempt committed by any person, whether that person be or be not a legal practitioner. (c) That, based on and having its origin in the power to deal with contempt, this Court has the more particular power to direct a legal practitioner to pay costs to the extent of the loss sustained by the injured party where he has committed a reprehensible act in the performance of a professional duty such as would be performed by a solicitor in England.

So far as this Court is concerned, the question whether it has inherent powers to punish a contempt of Court committed against a subordinate Court was definitely answered in the affirmative by the decision of three Judges in the Special Bench case *Hadi Husain* v. *Nasiruddin* (5), and was further settled beyond any doubt by Act 12 of 1926, which came into force on 8th March 1926, but which had not come into force when the contempt in the case just referred to was committed and the proceedings initiated.

Before leaving this point we may refer to the decision in *R.* v. *Almon* (6), in which it was said that it is a necessary incident to every Court of Justice, whether of record or not, to fine or imprison for a contempt of the Court acted in the face of it.

That this Court, having inherent power to punish for contempt of Court, is not deprived of that power by the mere fact that the offender is a legal practitioner is really self-evident for there is no reason whatever why a legal practitioner should be in a privileged position. If support, however, be needed for this proposition it is to be found in *Rainy* v. *Sierra Leone Justices* (7) where the Judicial Committee of the Privy Council held that they had no jurisdiction to entertain an appeal from orders made by a Court of Record in the colonies inflicting a fine upon a practitioner for contempt of Court, such Court being the sole Judge of what constituted the contempt. From this it is clear that (whatever may be the effect of the Legal Practitioners and Bar Councils Acts upon inherent powers to deal with misconduct, which we shall next discuss) this Court has inherent power to punish any act by a legal practitioner which amounts to contempt.

The present Bench of seven Judges being agreed that the High Court of Allahabad being a Supreme Court in the sense in which that term is used in England, has prima facie an inherent jurisdiction to deal with its own officers and, included in that jurisdiction, power to order a legal practitioner to pay costs, it remains for us to discuss whether that

(5) A. I. R. 1926 All. 263=48 All. 711 (S.B.).
(6) [1765] Wilm 243=97 E. R. 94.
(7) [1853] 8 Moo. P. C. 47=14 E. R. 19.

inherent jurisdiction has been superseded or taken away from the Court by legislative action.

A reference has been made in argument to Cl. 14, Letters Patent, which it was suggested limited the powers of the Appellate Court in this respect to the powers exerciseable by the Subordinate Courts, but the ar ument was not and could not be seriously pressed in view of the fact that the inherent powers of the Court, whatever they may be, exist independently of statute.

The only other legislative action, which, it is suggested, has taken away from this Court its inherent powers admittedly pre-existing, is to be found in the Legal Practitioners Act 18 of 1879 and the Bar Councils Act No. 38 of 1926.

It is clear from the authorities that a jurisdiction existing in a Court can only be taken away by the use of precise and distinct words in a statute or as some authorities have held by the necessary implication of the words used. In the same way if the common law is to be altered, there must be equally precision in the words of the Act. In the case of *Galsworthy* v. *Durrant* (8), the then Master of the Rolls said as follows:

"According to the well established principle which regulates the construction of Acts of Parliament, an existing jurisdiction cannot be taken away except by precise and distinct words."

Lord Halsbury in *Leach* v. *Rex* (9) said:

"If you want to alter the law which has lasted for centuries to suggest that that is to be dealt with by inference and that you should introduce a new system of law without any specific enactment of it seems to me to be perfectly monstrous."

Tindal, C. J., in *Albon* v. *Pyke* (10) said:

"The general rule undoubtedly is, that the jurisdiction of the superior Court is not taken away, except by express words or necessary implication."

Lord Campbell in *Southampton Bridge Co.* v. *Local Board of Southampton* (11) said:

"Inasmuch as the power of the Court Queen's Bench to changs venue is a common law power, words should be very strong which are relied upon to take away such power."

Examples need not be multiplied.

This rule for the construction of statutes has been explicit in English Law for centuries. Bearing this in mind we now will discuss the statutes in India which, it is suggested, take away or limit the admitted inherent jurisdiction of this Court. The first is Act 18 of 1879 known as the Legal Practitioners Act. The preamble to that Act begins:

"Whereas it is expedient to consolidate and amend the law relating to legal practitioners."

It has been contended that the word "consolidate" must be construed as meaning that the law in relation to legal practitioners as laid down by this Act is conclusive and final and leaves existing no other jurisdiction in the Court to deal with legal practitioners. We have searched in vain for any authority which establishes such a proposition. "Consolidation" is the reduction into systematic form of the whole of the statute law relating to the same subject matter as illustrated by judicial decisions. This is the definition given in the Encyclopedia of English Law, 2nd Edn. Vol. 3 at p. 288. "Consolidation" merely places together in a later volume of the Statute Book enactments previously scattered over many volumes:

"The Courts will lean against any presumption that such an Act was intended to alter the common law: Griffith, C. J., in *Nolan* v. *Clifford* (12)."

Another rule in applying a Consolidating Act is that the statutes not expressly repealed continue in force without modification. The same applies to jurisdiction. There is nothing in the Legal Practitioners Act which takes away the inherent jurisdiction of this Court. There are no "express, precise or distinct words." By Ss. 12 and 13 it is enacted that the High Court may suspend or dismiss any pleader for certain offences. It in no way deals with the inherent disciplinary jurisdiction over the Court's officers which is based upon the doctrine of contempt: see Halsbury, Vol. 26. p. 828. para. 1349: and the observations of Lord Justice Kay in the case *In re, Grey* (13) at p. 450.

In England the jurisdiction of the Court:

(8) [1860] 2 L. T. 788.
(9) [1912] A. C. 305=82 L. J. K. B. 616=28 T. L. R. 289=106 L. T. 281=56 S.J. 342=75 J. P. 201=22 Cox. C. C. 721.
(10) [1842] 4 Man. & G. 421=11 L. J. C.P. 266=5 Scott. (N.R.) 241.
(11) [1858] 8 E. B. 801.
(12) [1904] 1 Australia C. L. 429.
(13) [1892] 2 Q. B. 440.

" is quite independent of the statutory jurisdiction over solicitors in disciplinary matters now contained in the Solicitors Acts 1888 and 1919: see Annual Practice, 1929, p. 2065."

In the same way the inherent jurisdiction of this Court is quite independent of the statutory jurisdiction contained in the Legal Practitioners Act.

In the case *In re, Grey* (13) at p. 444 Lord Esher said: "It was suggested that there are other means" (i. e., proceedings before the Incorporated Law Society to strike the solicitor off the roll):

" of proceeding against the solicitor for any breach of duty which he may have committed; but the fact of there being such other means does not take away the jurisdiction to make the order for payment of the money. Of course, it would not be exercised cumulatively in addition to such other means, but a Court may take whichever course it may think right."

We may look at this matter from another aspect. The improper act of a solicitor or in this country a legal practitioner acting as a solicitor may amount to mere neglect, or to something more grave and amounting to misconduct. It is clear that in England the summary jurisdiction inherent in the Court may be and has been often exercised in cases where there is no allegation of acts amounting to misconduct but where there has been nothing but the "simplest neglect": see in the case *In re, Dangar's Trusts* (14), and Lord Justice Turner in *Dixon* v. *Wilkinson* (15), in which he said:

"I strongly incline to the opinion that the jurisdiction is not limited to cases of malfeasance but extends also to cases of mere neglect."

This view was endorsed in *In re, Dangar's Trusts* (14) by Sterling, J. It being agreed that this Court had at one time inherent jurisdiction co-extensive with that of the Supreme Court in England, to what extent is it to be suggested that inherent jurisdiction can no longer be exercised owing to the passing of the Legal Practitioners and Bar Councils Acts. Assuming for a moment that the inherent jurisdiction is superseded in cases of misconduct within the meaning of those Acts, what is to be said in regard to the inherent jurisdiction to deal with cases of "simplest neglect?" How could it be possible to draw the line in each case between cases of neglect and cases into which there enters an element of misconduct.

The Bar Councils Act No. 38 of 1926 is the Act, which it is contended, clearly takes away the inherent jurisdiction of this Court. The preamble to this Act uses the word "consolidate" and what we have said above relating to the Legal Practitioners Act equally applies to the Bar Councils Act.

In neither of these Acts is there anything that expressly deprives this Court of its inherent powers, nor has our attention been drawn to anything whatsoever in support of the bare assertion that the powers have been taken away by necessary implication.

We are, therefore, of opinion that the inherent jurisdiction of the Court has not been superseded or modified or in any way limited by either of these two Acts.

While this, beyond any doubt, is our opinion on the construction of the statute itself, we are confirmed in our view by reading the statement of objects and reasons of this Act. In para. 5 of the statements of the objects and reasons it is said:

"The *existing disciplinary jurisdiction* of the High Court *should be maintained*, but the Court should be bound before taking disciplinary action against an advocate, *except in regard to contempt of Court* and the like to refer the case to the Bar Council for enquiry and report."

It is clear from these words that the intention of the framers of the Act was clearly to save to the Court its original inherent jurisdiction in this matter. It is to be noted that the summary disciplinary jurisdiction which we are discussing is based on the doctrine of contempt, and, therefore, the words underlined (*Italicized*)above clearly cover the inherent jurisdiction of the Court in this matter.It has been suggested that their Lordships of the Privy Council have held that reference cannot be made to the statement of objects and reasons for the purpose of interpreting a statute even where there is ambiguity. It need hardly be said that if this were a correct statement of what was held by the Privy Council, there would be an end of the matter, and no reference by a Court in India to the statement of objects and reasons would be permissible. But it is far from clear that this is so. The suggestion has its origin in the re-

(14) [1889] 41 Ch. D. 178=58 L. J. Ch. 315=37 W. R. 651=60 L. T. 491.
(15) [1849] 4 De. G. & J. 504.

marks of their Lordships in *Administrator General of Bengal* v. *Prem Lal* (16) in the year 1895. Their Lordships having given their own view of the effect of the law which was under consideration concluded their judgment with this brief observation:

"Their Lordships observe that the two learned Judges who constituted the majority in the appellate Court, although they do not base their judgments upon them refer to the proceedings of the legislature which resulted in the passing of the Act of 1874 as legitimate aids to the construction of S. 31. Their Lordships think it right to express their dissent from that proposition. The same reasons which exclude these considerations when the clauses of an Act of a British legislature are under construction, are equally cogent in the case of an Indian Statute."

It will be noticed that what their Lordships prohibited was a reference to "the proceedings of the legislature which resulted in the passing of the Act." There is nothing in the above ruling prohibiting reference to the statement of objects and reasons which is not part of the "proceedings of the legislature." The use that had been made of these matters by the Calcutta High Court was two-fold: see *Administrator General of Bengal* v. *Prem Lal* (17), Prinsep, J., there said as follows :

"Accordingly the introduction of any Bill into the Legislative Council is always accompanied by a statement of the objects and reasons for the proposed measure. On these grounds I believe, the Judges of our Court have taken this statement of objects and reasons into consideration as having (sic. giving) some indication of the motives which have caused legislation on any particular subject and the object which it is desired to attain."

Here Prinsep, J., specifically referred to the statement of objects and reasons as to the admissibility of reference to which he had no doubt and their Lordships of the Privy Council expressed no dissent from the use made of it, and thereby impliedly assented to the use made of it. He then continued :

"An original Bill is, as experience has shown, considerably altered in its character and scope while passing through the Legislative Council, and chiefly after its committal to a Select Committee for report, after consideration of the opinions expressed by various persons, official and non-official, on the measure before the Council. As an easy and certain way of learning the amendments contemplated and proposed by the Select Committee it is not unusual, and I think not improper, to refer to the report so made. The report contains mention not only of the proposed amendments of the law but generally reasons for recommending them. By this means we can learn the reasons for which legislation has been thought necessary, and the objects in view, that is, the particular points on which it is desired to amend the existing law or for passing any new law."

It will be noted again here that in this passage referring to the Select Report, Prinsep, J., speaks of using what happened while the Bill was "passing through the Legislative Council" a phrase practically identical with that used by their Lordships of the Privy Council, "The proceedings of the legislature which resulted in the passing of the Act" and it was in regard to using these proceedings, i. e., the report of the Select Committee, that he expressed some diffidence, it would seem, therefore, that the correct interpretation of their Lordships' opinion is that what they were condemning was a reference to the proceedings of the Council and not the reference to the statement of objects and reasons. We are further confirmed in this view by a reference, to the state of the law in England where, as appears clearly, the debates and other proceedings in Parliament are not permissible matters for consideration, and where, as it appears, there is no judicial authority for holding that material which precedes or accompanies the presentation of the Bill, and of which the Bill is the direct outcome, is not admissible. Before considering further the English law we would note that we have considered a number of cases in the Indian Courts subsequent in date to the decision of their Lordships just referred te, but in none of those cases does the distinction to which we have adverted appear to have been noted ; and, with one or two exceptions, they only refer to the proceedings actually in the Council. In *C. S. Parameswara* v. *Kittunni* (18), their Lordships of the Madras High Court said :

"Supposing, however, there is some ambiguity in an Act, then the preamble and the object of the Act can be referred to, as has been done by the Privy Council recently in *Kandukuri Balasurya Prasadha Row* v. *The Secy. of State* (19). In this last cast case their Lordships of the Privy Council said: The construction of the sanads in the way their Lordships construe them has the advantage of being

(16) [1895] 22 Cal. 783 (799)=22 I. A. 107 (118)=6 Sar. 603 (P. C.).
(17) [1894] 21 Cal. 732 (766).
(18) [1917] 33 M. L. J. 591 (593) = 43 I. C. 173.
(19) A. I. R. 1917 P. C. 42=40 Mad. 836 = 44 I. A. 166 (P. C.).

in ample accord with the known policy and objects of the permanent settlement."

The learned Judges of the Madras High Court continued :

"In *Administrator General of Bengal* v. *Prem Lal* (16) their Lordships of the Privy Council said that the proceedings of the Legislature, which resulted in the passing of an Act, cannot be referred to as legitimate aids to the construction of the particular section which was construed in that case. In that case, however, the language, according to their Lordships of the Privy Council, was quite clear."

Turning to the law in England, Craises in his Treatise on Statute Law (Edn. 3, 1923), says at p. 121 :

"It is now generally agreed that reference may be made to reports on the effect and defects of previous statutes in pari materia. In *Eastman Photographic Materials Co.* v. *Controller General of Patents* (20), it was held that for the purpose of construing the Patents Act, 1888, reference could be made to the report of a commissioner appointed in 1887 to inquire into the duties, arrangements etc., of the Patent Officer under the Patents, etc., Act 1883. Before this there had been a disposition on the part of the Judges with some exceptions, to disallow reference to such reports, which were considered scarcely legitimate guides to the construction of the statute which is the outcome of a report."

Again Craises says on the same p. 121 :

"The memorandum or breviate (semble, statements of objects and reasons) now usually prefixed to Bills of considerable importance, and especially to consolidation Bills, often supplies useful hints as to the intention of the draftsman, but has not yet been adopted as an aid to the Judges in construing the Act when passed."

This would seem to suggest at any rate, that the learned author does not consider prohibition of the use of such memorandum or breviate to be included in the prohibition of the use of the debates of other proceedings which may be properly described as proceedings in the passing of an Act. For the reasons we have given, we do not think that the interpretation which has been placed on the decision of their Lordships in *Administrator General of Bengal* v. *Prem Lal* (16), without any consideration of the essential difference between the statement of objects and reasons and the debates in Parliament or in Council, is justified. Altogether independently of the statements of objects and reasons we have given our grounds for holding that the Indian Acts do not take away the inherent powers of this Court. A consideration of the statement of objects and reasons of the Bar Councils Act, which we consider a legitimate, indeed necessary, aid to interpretation, in cases where there is doubt, puts the question we have to consider in our opinion, beyond argument.

As to the scale on which payment of costs may be ordered there can be no doubt that : "What is to be ascertained is the loss which the party has sustained." *Dixon* v. *Wilkinson* (15) and that the legal practitioner can be ordered "to make good the loss occasioned by his neglect or breach of duty": see *Marsh* v. *Joseph* (21).

We restate then, our conclusions as to the inherent powers of this Court :

(a) That this Court has inherent powers to punish contempt of Court committed against either this Court or a Court subordinate to it. For such contempt this Court has power to inflict a punishment of fine or imprisonment.

(b) That this Court has such power to punish for contempt committed by any person, whether that person be or be not a legal practitioner.

(c) That, based on and having its origin in the power to deal with contempt, this Court has the more particular power to direct a legal practitioner to pay costs to the extent of the loss sustained by the injured party where he has committed a reprehensible act in the performance of a professional duty such as would be performed by a solicitor in England.

It being our view that the inherent powers exist, as stated by us, in this Court by virtue of its being a Court of supreme jurisdiction, it is unnecessary to consider further whether we have powers co-extensive with the inherent powers exercised by the Court of King's Bench in England, those powers being conferred on us by statute. It was held by a member of this Bench (Boys, J.), in *Hadi Husain* v. *Nasiruddin Hyder* (5), that the power was not only inherent in this Court, but together with all similar powers exercised by the Court of King's Bench was conferred on us by statute, and up to the present date no dissent from that decision has been

(20) [1898] A. C. 571=67 L. J. Ch. 628 = 14 T. L. R. 527 = 47 W. R. 152 = 79 L. T. 195.

(21) [1897] 1 Ch. 213=66 L. J. Ch. 128 = 45 W. R. 209=75 L. T. 558.

expressed in the law reports. But it is unnecessary to pursue this aspect of the case further.

We next have to consider the effect of S. 35, Civil P. C. Sub-S. (1) reads as follows :

" Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid."

They words "by whom" are very wide and on the face of them would seem to give the very largest discretion to the Court in the matter of the payment of costs. This becomes clearer when we find that in S. 187, Civil P. C., of 1859 and Ss. 219 and 220, Civil P. C., of 1882, the words " by whom" were not used, but the words " by which party" were used instead. The fact that the word "party" has been expunged from the present Civil Procedure Code makes it in our opinion clear that the words "by whom" are deliberately used to give the Court complete discretion in the matter of costs. If anything could make this clearer, we have only to look at S. 35 (a) (1) where the word "party" is used. For the contrary view it is not, as we understand, suggested in this case that either the terms of the Legal Practitioners Act or the Bar Councils Act or of any other statute override the clear wording of S. 35 and indeed it is manifest that an Act providing for the punishment of misconduct but not for payment of costs (except by a tortuous device to which we shall refer) cannot supersede an Act providing directly for costs but for punishment for misconduct. It is, however, suggested that S. 35 " is not intended" to cover any case where the act of a legal practitioner comes within the scope of the term 'misconduct' within the meaning of the Legal Practitioners and Bar Councils Acts, or that in some such way the clearly wide scope of S. 35 is to be narrowed. Nothing to support this assumed limitation is stated. In our view there is no justification for such limitation ; and we would go further and say that even where the act of the legal practitioner comes within the term "misconduct" it is not necessarily even desirable to proceed under the Legal Practitioners or Bar Councils Act to the exclusion of S. 35, for the latter provision serves a wholly different purpose. The effect of S. 35 is to give the Court power not merely to punish the offender but to punish him with the direct purpose of compensating the injured person at any rate to the extent of the legal costs. The only way by which recoupment of money to the injured party could be effected as a result of proceeding under either of the Acts named, would be by the tortuous method of inflicting a period of suspension upon the legal practitioner coupled with a condition putting an end to or reducing the period of such suspension in the event of his paying a certain named sum by way of costs to the aggrieved party. This has only to be stated to suggest the undesirability of obtaining by such tortuous method a result which the legislature has clearly given the power to this Court to attain in part at any rate by means of S. 35, Civil P. C.

In view of the opinion that we have expressed we would discharge the rule issued to Mr. Ambika Prasad Pandey and in the exercise of our inherent powers direct the ascertainment of the total costs suffered by the judgment-debtor as a consequence of the acts of Mr. Newal Kishore which we have found to be reprehensible and direct the payment of those costs to him by Mr. Newal Kishore.

Sulaiman, Banerji, Sen and Niamatullah JJ. — Our conclusions are as follows :

1. (a) The inherent powers of the Supreme Court of Calcutta were not conferred on the Allahabad High Court by the High Courts Act, 1861.

(b) No power to exercise inherent disciplinary jurisdiction over legal practitioners independently of the Legal Practitioners Act and the Bar Councils Act, now exists in the High Court in respect of their professional or other misconduct.

(c) No power to punish for contempt of an inferior Court now exists independently of the Penal Code and the Contempt of Courts Act.

(d) No disciplinary power over legal practitioners or power to punish for contempt outside the Penal Code is vested in the subordinate Courts.

2. (a) Section 35, Criminal P. C., has nothing whatsoever to do with disciplinary action against legal practitioners for misconduct or with contempt of Court.

(b) Under S. 35 costs cannot be awarded against a legal practitioner as such; but where they have been occasioned by his act or omission under circumstances in which a stranger to the action can be made liable, he may be ordered to pay such costs.

(c) Costs in excess of the taxable amount in the cause can in no circumstances be awarded under S. 35.

1. The legal position of Mr. Pandey was perfectly correct both as taken up in:

(a) the grounds of appeal, and

(b) his arguments.

2. (a) The application filed Mr. Newal Kishore was in itself innocuous.

(b) The way in which it was pressed in argument in the Court below was reprehensible, but the application should not have been dismissed in toto on that ground.

(c) This is not a case in which costs can be ordered against Mr. Newal Kishore.

(d) We express no opinion whether or not Mr. Newal Kishore was guilty of any professional or other misconduct or of contempt of Court.

Sulaiman, Banerji and Sen, JJ.— The first question referred to the Full Bench is:

"Whether this Court has power to order a legal practitioner, in appropriate circumstances to pay personally the cost of an application or suit?"

In order to answer this it is necessary to examine all the possible sources through which this High Court might have derived such jurisdiction. The jurisdiction might have been acquired not only under the Letters Patent, the High Courts Act, and subsequent statutory enactments, but might also have "inherited" from some of the Courts which were abolished or the High Court may possess an inherent jurisdiction to deal with its officers in this way.

In this province advocates ordinarily occupy the dual capacity of counsel and solicitors. They not only "plead" but also "act and have direct dealings with their clients, and indeed combine all the functions which counsel and solicitors perform in England. One would therefore expect that if advocates are acting like solicitors they would be subject to liabilities similar to those of solicitors in England.

The position of a solicitor in England is perfectly clear. He is an officer of the Supreme Court of Judicature, over whom it exercises summary and disciplinary jurisdiction and against whom orders for costs of litigation, in appropriate cases, are frequently passed. This jurisdiction has always been considered to be inherent and both antecedent to and independent of the rules of the Supreme Court.

In Halsbury's Laws of England Vol. 26, Part 6, S. 1, p. 828, it is stated:

"The Court possesses a disciplinary jurisdiction over solicitors, as being its officers. This jurisdiction, though it has been extended by statute and by the rules of the Supreme Court, is inherent in the Court, and is based upon the doctrine of contempt. It is exercisable summarily by writ of attachment or by committal."

In S. 2, at p. 830 it is stated:

"The jurisdiction is based upon the right of the Court to require its officers to observe a high standard of conduct, it is immaterial that any misconduct of the solicitor is suggested."

As to a solicitor's liability to pay costs it is remarked in S. 3, pp. 832 and 833:

"The Court has power to order a solicitor to pay any costs occasioned by his misconduct or default in course of legal proceedings to the person injured thereby or to indemnify his client in respect of his liability to pay them."

Numerous cases have been quoted in this part showing that solicitors were ordered to pay costs direct to the opposite party where proceedings were instituted or defended without authority from the client, or on behalf of a non-existent client or for non-joinder or for bringing speculative actions etc. or default.

A large number of cases are collected in the Empire Digest, Vol. 42, Part 10, S. 4, pp. 337 to 355. In this Digest also in para. 3554, it is stated that:

"Every Court possesses inherent authority to prevent contempt of its proceedings and exercises censorial power over its officers."

The basis of this authority is the maintenance of honesty of officers of the Court and a high standard of conduct: *United Mining and Finance Corpn., Ltd.* v. *Becher* (22).

Condery in his Treatise on Solicitors (pp. 1, 2 and 138) has pointed out that

(22) [1910] 2 K. B. 296 (305)=79 L. J. K. B. 1006=103 L.T. 65.

the liability of the solicitors in England exists on account of their being officers of the Court and jurisdiction over them is exercised in that capacity.

In the Annual Civil Practice 1929, Part 4, Division 3, p. 2065, it is clearly stated that the summary jurisdiction of the Court over solicitors is quite independent of the statutory jurisdiction over solicitors in disciplinary matters now contained in the Solicitor's Act, 1888 and 1919. In addition to its statutory jurisdiction, the Supreme Court exercises a summary jurisdiction over the proceedings of solicitors who are its officers. On p. 2067 it is further stated that the Court has also full power either under its general jurisdiction or special rules of Court summarily to visit a solicitor with costs occasioned by his misconduct, negligence or default.

The Supreme Court of England has framed special rules for making solicitors liable for costs, e. g., O. 54, R. 7, and O. 65, Rr. 5 and 11. But those rules are by no means exhaustive and the disciplinary jurisdiction is being exercised even independently of those rules.

All the English cases which we have seen were cases arising on the original Side of the High Court and we have not been able to find any case wherein an appeal from an inferior Court costs have been awarded against a solicitor. There is, however, the case of *Ashley* v. *Seagrave* (23), in which the Chief Justice remarked that the King's Bench:

"constantly exercises its jurisdiction in correcting the misbehaviour of officers in all inferior jurisdiction."

On principle it would seem to make no difference whether the matter comes up to the High Court on its original or the appellate side. As the jurisdiction is exercised over solicitors because they are officers of the Court, the appellate Court would be seised of the whole case and can take disciplinary action no matter whether the liability arose on account of conduct before it or in any one of its subordinate Courts.

But it is clear that even in England inferior Courts do not posses disciplinary jurisdiction over solicitors and a County Court Judge cannot make an order for payment of costs: *Davies* v. *Coles* (24), quoted in the Annual Practice 1929, pp. 1399.

(23) [1729] 1 Barn. K. B. 282.
(24) [1912] L. T. Jo. 577.

In India the Supreme Courts of Calcutta, Bombay and Madras had jurisdiction within the areas of their respective presidency towns where they applied English Common Law. This common law was not applicable to the Courts in the mufassil. In *Ram Coomar Coondoo* v. *Chunder Canto Mukerji* (25), their Lordships of the Privy Council remarked at pp. 235:

"so far as concerns the mufassil there is no ground on which it can be contended that these laws are enforced there. The question has generally been whether they are in force in the presidency towns although the distinction between the presidency towns and the mufassil has not been always borne in mind:"

also see the *Mayor of the City of Lyons* v. *Hon'ble the East India Co.* (26) pp. 246-9. The mufassil was within the territorial jurisdiction of the Sudder Dewani Adalat which in cases for which no specific rules existed had to :

"act according to justice, equity and good conscience. (Reg. 6 of 1793, S. 31)."

It may however, be conceded that the Supreme Courts possessed the same inherent jurisdiction as the King's Bench Division possessed over its officers. It may further be conceded that the three Presidency High Courts of Calcutta, Bombay and Madras have, over and above the powers conferred upon them by their respective charters acquired other powers formerly possessed by their respective Supreme Courts, even though the territorial jurisdiction of the Presidency High Courts now extends over the whole of the Presidencies and not only the presidency towns to which the jurisdiction of the Supreme Courts was limited. In this sense one may say that the Presidency High Courts which have superseded the Supreme Courts have 'inherited' the inherent jurisdiction of the King's Bench Division.

But the same argument cannot apply to the Allahabad High Court. The province over which the Allahabad High Court now exercises jurisdiction was never within the territorial jurisdiction of any of the three Supreme Courts and the latter had no jurisdiction over the Courts or practitioners in this territory. The province was originally within the jurisdiction of the Sudder Dewany and Nizamat Adalat at Calcutta, and by Reg.

(25) [1876-77] 2 Cal. 233=4 I. A. 23=3 Sar. 654 (P.C.).
(26) [1836-37] 1 M.I.A. 175=1 Moo. P.C. 175=1 Sar. 107 (P.C.).

6 of 1831, S. 3 separate Courts of Sudder Dewany and Nizamat Adalat was constituted for these Provinces and was stationed at Allahabad. By virtue of S. 6 it possessed within the territories subject to it jurisdiction :

"all the powers vested under the existing regulations in the Courts of the Sudder Dewany and Nizamat Adalat."

The Sudder Adalat at Allahabad was in no way under the Supreme Court of Calcutta, but was the highest civil Court in the province and appeal from it lay directly to the Privy Council. This Court did not apply the English Common Law but acted according to justice, equity and good conscience.

Our High Court was established in 1866 and could hardly have 'inherited' the powers of the Supreme Courts. To use the word 'inherited' with reference to our High Court is using a somewhat loose language because that word would have been appropriate only if our High Court had taken the place of any of the Supreme Courts and had succeeded to it. As shown above, our High Court has been established by Letters Patent in place of the Saddar Adalats, and not any Supreme Court, which had jurisdiction in this Province.

Coming to the question whether the powers of the Supreme Courts have been conferred upon us by statute we must examine the High Courts Act. Although that Act has now been repealed in toto, the jurisdiction conferred under it has been preserved under S. 106, Government of India Act, 1915. It has been suggested that the combined effect of Cls. 16 and 9, High Courts Act, 1861 (24 and 25 Victoria, Ch. 104) is to confer upon our High Court all the powers of the Presidency Supreme Courts. This was the view expressed by one learned Judge in *Hadi Husain* v. *Nasiruddin Hyder* (5) but another Judge was not prepared to agree with that view. Now Cl. 16 does not confer upon the High Courts to be newly established all the powers of the Supreme Courts which were abolished, but only says that

" all the provisions of this Act, shall as far as circumstances may permit be applicable to the High Court established in the said territories."

It undoubtedly makes Cl. 9 applicable to our High Court. Now Cl. 9 provides that :

" Each of the High Courts to be established under this Act shall have and exercise ... jurisdiction and all such powers and authority for and in relation to the administration of justice in the presidency for which it is established (as may be granted by the Letters Patent), and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General in Council the High Court to be established in each presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same presidency abolished under this Act."

Had the clause merely said that the new High Courts shall have the powers of Courts abolished, it would have followed that all the powers of the Supreme Courts which were abolished would be vested in such High Courts. But the clause vests in the new High Court only the jurisdiction of the Courts in the same presidency abolished under the Act. Applying this clause to our High Court " as far as circumstances permit " it would follow that in relation to the administration of justice in our province for which our High Court has been established it has the jurisdiction of the Sudder Adalats of this province which were abolished, but not of the Supreme Court of Calcutta which was never a Court in this province. It may also be noted that no such general power is referred to in S. 113, Government of India Act, 1915. It cannot therefore be said that the Allahabad High Court, in addition to the powers expressly conferred upon it by the Letters Patent and the powers which the Courts situated within its territorial jurisdiction exercised at the time of their abolition, did also possess all the powers of the Supreme Courts of the presidency towns. Had that been the real intention the language of the two clauses would have been quite different. It is therefore very difficult to hold either that the Allahabad High Court has inherited the jurisdiction of the Supreme Court of Calcutta or that all the inherent powers of the Supreme Courts have been conferred upon it by statute.

But there can be no question that a High Court by virtue of its very constitution as the highest Court of Justice in the province established by Royal Charter must possess inherent jurisdiction over its own officers, particularly such as has been recognized to vest in the High Court of England.

Advocates are undoubtedly officers of the Court, and unless the power is limited or regulated by statute the inherent disciplinary jurisdiction, similar to that exercised in England, would exist. That such inherent power can exist was recognized in the Full Bench case of *Hadi Husain* v. *Nasiruddin Haider* (5).

Any inherent power that may be possessed has been clearly saved by the Civil Procedure Code : vide S. 151 of Act 5 of 1908. Similarly the Government of India Act 1915, S. 106 leaves such jurisdiction, powers and authority untouched.

When the High Court for the N. W. P. was established in 1866 such inherent jurisdiction not having been taken away by anything in the Letters Patent, must be deemed to have existed so far at least as its extraordinary original civil jurisdiction was concerned. That was long before the Legal Practitioners Act (18 of 1879) was passed, which " consolidated and amended " the law relating to legal practitioners.

But as regards the appellate jurisdiction there was a specific Cl. 14 in the Letters Patent which somewhat restricted it. It said :

" That with respect to the law or equity and rule of good conscience to be applied by the said High Court . . . . . to each case coming before it in the exercise of its appellate jurisdiction such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case."

This had the effect of preventing the High Court on its appellate side (civil) from exercising any jurisdiction which the Court from which the appeal came could not have exercised, unless of course by subsequent enactments, which can always modify the Letters Patent, such power was expressly conferred. It cannot be seriously denied that even an inherent power can be curtailed in this way.

Since the establishment of our High Court in 1866 the Subordinate Courts within our jurisdiction never possessed any inherent disciplinary jurisdiction over practitioners and this High Court, therefore, would not under its Letters Patent have an inherent power in a civil appeal to make an order, in the cause itself, which the inferior Court could not have made. But so far as the disciplinary jurisdiction of the High Court and power to suspend or dismiss an advocate for misconduct in a separate summary proceeding were concerned, they undoubtedly existed. That jurisdiction was later on incorporated in the Legal Practitioners Act of 1879 and is now embodied in the Bar Councils Act (38 of 1926) so far as advocates are concerned. As shown by the preamble, the latter Act was intended not only to " consolidate " but also to " amend the law relating to legal practitioners." As there was no statutory enactment existing previously and containing many of the provisions of the Bar Council's Act, consolidation of the law cannot mean merely a reduction into a systematic form of only the existing statute law. S. 10, sub-Cl. (i) of the latter Act authorizes the High Court to " reprimand," " suspend or remove from practice " any advocate found guilty of " professional or other misconduct " and sub-Cl. (2) which is imperative enjoins upon the High Court the duty to refer a complaint of misconduct for enquiry either to the Bar Council or to District Judge. It lays down the procedure which has to be followed in cases of such misconduct. The punishment is also prescribed and it may be reprimand, suspension or dismissal but not fine. The expression that the High Court " may of its own motion so refer any case " to the Bar Council or the District Judge only emphasizes its power to act suo motu and cannot possibly mean that when acting of its own motion it need not so refer the case at all.

It has been suggested that in order to interpret the language of a section of a statute, it is permissible in India to refer to the statement of the objects and reasons which accompanied the draft bill when it was first introduced in the legislative body. We are unable to agree with this view. Unlike the preamble, the headings and the marginal notes, the statement of the objects and reasons for the bill is no part of the Act as passed by the legislature. The statement merely indicates the original object of the mover of the bill, who may be a private member and the language employed in the statement is

never the subject of discussion in the council. The statement if not actually a part of the proceedings of the council or assembly, is very much on the same footing. It is also possible that the draft bill may by radical amendments undergo such a change as to make certain phraseology of the statement wholly inapplicable to it. The motive or intention of the mover of a bill is not necessarily a true guide to the mind of the legislature as represented by the majority who passed the Act. Nor is it possible to say definitely that the original object has been retained unless the entire proceedings of the legislature are examined.

No doubt it used to be the practice in the Calcutta High Court to refer to the proceedings in the legislature which resulted in the passing of an Act, but this was strongly dissented from and the practice condemned by this High Court in *Kadir Baksh* v. *Bhawani Prasad* (27). Edge, C. J., declined to look at the objects and reasons referred to by counsel and gave his reasons for such refusal (pp. 149-150). Straight, J., was:

"glad that the learned Chief Justice had spoken with no uncertain voice on the subject.

The Calcutta practice was disapproved by their Lordships of the Privy Council in *Administrator General of Bengal* v. *Prem Lal Mullick* (16). A learned Judge of the Bombay High Court in *Queen Empress* v. *Bal Gangadhar Tilak* (28) felt himself bound by this decision of the Privy Council and held that the contrary practice was wrong and could not be permitted any longer (p. 127). He also remarked that if he were to consider the question apart from authority he would agree entirely with the judgment of Edge, C. J., in *Kadir* v. *Bhawani* (27). Ever since then it has been the invariable practice of this High Court not to refer to statements of objects and reasons and it would be a bad precedent to depart from such a settled practice, impliedly approved by the Privy Council at any rate so long as a contrary opinion has not been expressed by a higher authority. The Lahore High Court also follows this practice *Raj Mal* v. *Harnam Chand* (29) *A. I. R.* 1928 *Lahore*, *p.* 35. It has been imagined that in *Urlam Kandukuri* v. *The Secretary of State* (19) their Lordships of the Privy Council referred to the statement of objects and reasons. An examination of the case will show that it was not so. The object of an Act as gathered from its title or preamble should not be confused with the written statement of the objects and reasons accompanying the draft bill.

But even if we were to refer to the statement of the objects and the reasons for the Indian Bar Councils Act it would only strongly confirm our view based on the imperative language of S. 10 that :

"the High Court should be bound before taking disciplinary action against an advocate to refer the case to the Bar Council for enquiry and report."

To illustrate how the original object mentioned in the statement may not be wholly carried out in the Act we may here point out that contrary to the idea underlying the statement that the High Court should be bound to refer the matter to the Bar Council in every case, the Act gives an alternative discretion to the High Court to refer it to the District Judge instead.

This enactment therefore now supersedes the inherent power of the High Court to exercise its disciplinary jurisdiction in cases of professional or other misconduct in a sumary manner and also limits the punishment that can be imposed. Proceedings against advocates arising out of all cases of misconduct (professional or otherwise) can now be taken only under the Bar Councils Act. And under Chap. 1 R. 2 of our rules such a charge can be heard and decided by a Bench of three Judges, and not by a Bench of one or two Judges, which ordinarily hears a civil appeal.

That a power, authority or jurisdiction vested in the High Court can be taken away by a legislative enactment passed by the Government of India is clear from the words of Cl. 9, High Courts Act, quoted above, Cl. 35 of our Letters Patent as well as from the Government of India Act S. 131 (3) read with Sch. 5.

It follows that independently of the Bar Councils Act, the High Court does not any longer possess any inherent

(27) [1892] 14 All. 145=(1892) A. W. N. 6.
(28) [1898] 22 Bom. 112.
(29) A. I. R. 1928 Lah. 35.

jurisdiction to punish an advocate for professional or other misconduct, or to adopt a procedure for inquiry other than that laid down in the Act or to pass an order for costs against him or impose a fine which are not contemplated by the Act.

It has next been suggested that because the original foundation of disciplinary jurisdiction in remote antiquity was the doctrine of contempt, and the statement of the objects and reasons shows that the power to deal with contempt of Court was left untouched by the Bar Councils Act, the High Court still possesses such jurisdiction. The language of the statement is inadmissible, but even without referring to that statement, we have not the least hesitation to say that the Bar Councils Act was never intended to and did not itself take away any inherent jurisdiction to punish for contempt of inferior Courts that might be possessed by the High Court. That such inherent jurisdiction existed before 1926 is clear from *Hadi Husain* v. *Nasiruddin Hyder* (5).

But even this inherent power has now been "defined" and "limited" by the Contempt of Courts Act (12 of 1926). The High Court must exercise its jurisdiction "in accordance with the same procedure and practice" as it exercises in respect of contempt of itself. It cannot take cognizance of a contempt which is an offence under the Penal Code, and the only punishment which it can impose under S. 3 is imprisonment or fine, and the latter is limited to two thousand rupees.

Now according to the practice of this High Court, cases of contempt of inferior Courts or those not committed 'in facie curiae' and particularly by advocates, are heard by a Bench of three Judges, and not by the ordinary Benches which dispose of civil or criminal appeals.

It is also obvious that a fine, which is permitted by the Act is not the same thing as an order for payment of costs against the advocate made in favour of the opposite party who can himself execute it through the civil Court and recover the amount. Such an executable decree is not contemplated by the Act. In the absence of any specific procedure, S. 5 (2), Criminal P. C., would make the procedure laid down in Chap. 28 of that Code for the recovery of fines applicable and the amount would be realised by the Collector and would go to the Government Treasury and not into the pocket of the opposite party.

It is equally evident that when the amount is not to be paid to the opposite party, the scale of the amount should not be determined by the loss sustained by that other party, and it cannot possibly be always so for the amount can in no circumstances exceed two thousand rupees.

We are therefore clearly of opinion that the High Court has at least now no inherent jurisdiction to pass an order for costs against an advocate and in favour of the opposite party capable of execution by the latter on the supposed ground of punishing him for a contempt of an inferior Court.

It now remains to consider whether there has been any other statutory enactment which confers any power on the High Court to order an advocate to pay costs of litigation and if so to what extent.

In the Civil Procedure Code (Act 8 of 1859) there were Ss. 187 and 189 relating to costs of an action. S. 187 laid down that :

"the judgment shall in all cases direct by whom the costs of each party are to be paid whether by himself or by another party, and whether in whole or in what part or proportion."

Section 189 also mentioned costs incurred by what parties and in what proportions.

Similarly in the Civil Procedure Code (Act 14 of 1882), Ss. 219 and 220 used the expression :

"direct by whom the costs of each party are to be paid, whether by himself or by any other party to the suit, and whether in whole or in what part or proportion."

It was accordingly held by the Bombay High Court in *James Bevis* v. *C. A. Turner* (30), that costs could not be awarded against a person who was no "party to the suit." Now the legislature must be presumed to know the course of judicial decisions. It must therefore have been aware that the Courts had held that the use of the words 'party to the suit' in the Code limited the power to grant costs against only parties to the litigation.

(30) [1883] 7 Bom. 484 (486).

In the Civil Procedure Code (Act 5 of 1908) S. 35 is quite differently worded. It says :

"subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid."

The omission of the words "party to the suit" is significant and must have been designedly made. The section as it now stands has undoubtedly a wider scope and authorizes a Court in appropriate cases to make an order as to costs against a person who is strictly speaking not a party to the litigation. It is noteworthy that in S. 35-A which has been subsequently added, and which relates to false or vexatious claims or defences knowingly made, the word "party" has been re-introduced. S. 35 therefore stands in marked contrast with S. 35-A, which is not applicable to appeals.

We must, however, bear in mind the distinction between an order suspending an advocate on condition of restoration in case he pays costs or ordering him to pay costs on the penalty of suspension, and an unconditional order for payment of costs capable of execution by the attachment of his property. In the former cases the advocate has an option to submit to suspension, and the order is undoubtedly in the exercise of disciplinary jurisdiction. In the latter case the order is an order in the cause capable of being executed at the instance of the opposite party. The two are not exactly the same thing. Similarly, such an order for costs executable by the party in whose favour it is made is by no means a "fine" for contempt of Court.

While exercising the power under S. 35, the subordinate Court is not to take into account any supposed misconduct of the advocate as such or intend to punish him for that. Such disciplinary jurisdiction does not vest in the inferior Courts at all. The legislature could not have intended to invest the subordinate Courts with summary disciplinary jurisdiction over advocates similar to that exercised by the Supreme Court in England over solicitors. S. 35 which can be availed of by subordinate Courts has nothing to do with misconduct of advocates. Similarly, cases of contempt of Court stand on a separate footing and are not within the scope of that section, as the inferior Courts have no jurisdiction to punish for contempt of Court in cases not falling within the Indian Penal Code. But under S. 35 a Court can order payment of costs by any person who is really responsible for those costs' i.e., has been the cause of those costs having been incurred, whether he is a party to the suit or not, and whether those costs have been directly occasioned by his commission or omission.

An obvious instance may be cited of a case where an advocate files a suit believing that he has authority from the plaintiff, but in fact and in law no such authority exists. If S. 35 were not applicable to such a case, the Court would have no power to make him pay the costs of the litigation when the absence of the authority is discovered, although those costs have been occasioned by him solely. That there is jurisdiction to make the pleader pay costs in such special circumstances can also be inferred from the fact that under O. 32, Rr. 2 and 15 the pleader who files a suit on behalf of a minor or lunatic without a next friend can be saddled with the costs. The High Court has power under S. 122, Civil P. C., to annul, alter or add to these rules, and such rules could not have been framed if Courts had not such jurisdiction under the body of the Code. S. 35 would obviously apply where in special circumstances it would be unfair to tax the litigant concerned with the costs for which the main responsibility lies on the advocate. It cannot be utilized by subordinate Courts for punishing advocates for supposed professional or other misconduct or for contempt of Court. It is also apparent from S. 35-A that costs of false or vexatious claims and defences, which in the case of an advocate having knowledge of it would undoubtedly amount to misconduct, have been expressly excluded.

This view is strengthened by a further consideration that S. 35 places the award of costs at the discretion of the Courts. When a Court finds an advocate guilty of misconduct or contempt this is an adjudication and not a mere exercise of discretion. Even in England it has been held that when a solicitor

is ordered to pay costs the matter is not one of a mere discretion of the Court and an appeal lies from such an order, without leave, on the question whether there has or has not been misconduct or negligence *In re, Bradford* (31).

But the mere fact that the lower Court has omitted to pass any such order under S. 35 would not prevent the appellate Court from passing such an order, as in appeal it is undoubtedly seised of the whole case. The appellate Court would be competent to pass an order for costs in an appropriate case not only against the advocate who appears before it but also against those who appeared only in the original Court.

The words of S. 35 are wide enough to cover not only the costs of the suit but all costs incidental to it and would undoubtedly extend to execution proceedings. But the costs contemplated by that section are the taxable costs in the suit or application and not any amount which may be considered as adequate compensation for the loss sustained by other party, or sufficient to reimburse him for all the expenses to which he has been put.

Question 2 referred to the Full Bench is :

"If the High Court has such power, whether it should be exercised in the present case."

Before taking up the individual cases of the two advocates concerned, it seems desirable,, in order to clear the ground, to consider to what extent, if any, a security deposited in Court can be attached.

When either immovable or moveable property is offered as security, the proprietary interest of the surety is not automatically extinguished. Merely a first charge is created on the security which will have to be available in the first instance for the purpose for which it has been offered. Although the depositor cannot defeat that purpose, his power of disposal over the security, subject to that charge will subsist. His interest in the surplus which may remain over is both transferable and attachable. Such an interest does not come within any of the exceptions enumerated in S. 6, T. P. Act. Nor is such security exempted from attachment under S. 60, Civil P. C.

Indeed, if the decree-holder wants to prevent the judgment-debtor from transferring or mortgaging his interest or realizing the surplus when it falls due, the only way open to him is to apply for attachment of the security. Without such attachment the judgment debtor can at his pleasure transfer his interest in surplus so as to place it wholly outside the reach of the decree-holder. It is obvious that it cannot be known beforehand what order for costs will be ultimately passed by the Privy Council. No one can foresee whether their Lordships will award costs in whole or in part or none at all or whether the amount of the costs awarded against the appellant would be more or less than the value of the security. Similarly, it cannot be ascertained definitely in advance whether the actual costs of printing will ultimately be less than the estimated costs, which generally have a margin of surplus, or whether there will be no surplus left.

If the decree-holder desires to be cautious, there is nothing in law to prevent him from applying to the Court for attaching the security so as to prevent the judgment-debtor from dealing with it personally any further. It is not only permissible to a decree holder to attach the security but he has a right to do so, subject always of course to the first charge created on it, and the Court has no discretion to refuse his prayer.

The only condition which the Court issuing an order for attachment must impose is that the previous charge created on the property is in no way to be affected. O. 21, R. 52, is specially applicable to attachment of property in the custody of any Court or public officer. In such a case the attachment is made by a notice requesting that such property may be held subject to further orders. It is the duty of the Court to see that the attachment is issued in proper form. In support of the view that security for costs of a Privy Council appeal which may have been deposited in a High Court can be attached in this way, we would cite the case of *Jagdish Narain Singh* v. *Mt. Ramtakal Kuar* (32) at p. 482 (*of* 8 *Pat.*).

(31) [1885] 15 Q. B. D. 635=53 L. J. Q. B. 65 =32 W. R. 238=50 L. T. 170.

(32) A. I. R. 1929 Pat. 97=8 Pat. 478.

We may also point out that there is no provision in the Civil P. C. for an immediate conversion into money of security deposited for costs and its immediate payment to the attaching creditor. Attachment of security does not necessarily mean either its actual seizure or its immediate conversion. In some cases cash security deposited for costs in a Privy Council case has been ordered by the High Court to be paid directly to satisfy the Privy Council decree for costs, but this practice does not seem to be in accordance with the provisions of O. 45, R. 15 (2), Civil P. C. which lays down that the High Court shall transmit the order to the Court below.

In taking up the case of each of the advocates separately we would emphasize that we do not consider it proper to examine any alleged or supposed "professional or other misconduct" or any supposed "contempt of Court," which the trial Court could not inquire into. That would be an inquiry outside the scope of S. 35, Civil P. C., which alone, in our opinion, can apply to an order for costs to be made by an appellate Court in the cause stself. If there has been any misconduct of an advocate or any contempt of Court by him, the proper course is to proceed against him in the usual way and we do not desire to prejudice such an enquiry by saying anything on those points either in favour of or against any of the advocates. We merely propose to consider whether in this case either the costs in the High Court or those in the Court below have been directly occasioned by the advocates engaged and whether they should be made liable to pay them under S. 35, Civil P. C.

The case of Mr. Pandey is to our minds perfectly simple. In the grounds of appeal which he had signed with his colleague it was urged firstly that the Court below was wrong in granting the judgment-debtor's objection and refusing to proceed against the said money; secondly, that the money deposited was not exempted from attachment but that the debtor himself had a right to withdraw the unexpended money any time he liked for his own use and give up the appeal, and thirdly that there was no equity in favour of the judgment-debtor. The only expression objected to is "refusing to proceed against the said money." That does not necessarily mean conversion of the security and immediate payment. Before the High Court Mr. Pandey in express terms confined his request to a claim to attach so much of the money as might eventually be found not to be required for the purposes for which it had been entrusted to the Court. That, in our opinion, was a perfectly good position to take.

Two of us were members of the Bench which admitted the appeal, and we can say with confidence that had we understood either from the grounds of appeal or the argument that the relief asked for was a conversion of the security into cash and its immediate payment to the decree-holder, and not a mere attachment of the surplus subject to the first charge for the purpose for which it had been deposited, we would never have admitted the appeal. With great respect, we would say that the appeal instead of being a frivolous or vexatious one should have been allowed in those terms. The Court has no discretion to refuse a prayer for such attachment merely because it considers that the motive, object or intention behind it is improper. To quote the words of a medieval Judge, Brain, C. J., (Y. B. 17 Edw. IV p. 1):

"The thought of man is not triable, for the Devil himself knoweth not the thought of man."

In the same way we do not wish to express any opinion whether the conduct of Mr. Nawal Kishore in the Court below, not so much in the matter of the drafting of the application for execution as in the way in which it was pressed before the Court, amounted to misconduct or contempt of Court. If it did, the proper course is to proceed against him under the Bar Councils Act or the Contempt of Courts Act. In considering whether he should be made to pay the costs under S. 35 we confine our attention to the sole question whether the written application filed by him was such as must be deemed to have been the cause of the costs being incurred.

So far as the facts given in the application for execution and the supplementary application were concerned they were perfectly correct and there was no concealment of any material particular. The Court was clearly informed that the security which the applicant wanted to attach had been deposited for the costs

of the Privy Council appeal and the cash was for costs of printing and both were in the custody of the High Court's officer. But the prayer asked for was in the following words :

"It is therefore prayed that a parwana for attachment may be sent to the Registrar, High Court, and the amount of the decree may be as far as possible satisfied by attachment thereof."

The same words in the supplementary application have been translated in different language having the same meaning as follows :

"May be caused to be attached by means of issuing an attachment parwana to the Registrar of the High Court and by attaching the same the decretal amount may be caused to be paid as much as possible."

We do not consider it within the scope of S. 35 to enquire into the motive, object or intention underlying this prayer, but we must say that the form of the prayer is almost a stereotyped one, namely "realization of the decretal amount by attachment as much as possible." Realisation of the decree can be either immediate or deferred. But it must be conceded that it would have been more proper to make the prayer absolutely definite and explicit so as to make it clear that a mere attachment was being sought for and not an immediate payment of the amount after the conversion of the security. Even assuming that the true interpretation of the prayer is that the applicant asked for immediate payment of the money by attachment of the security and its conversion, we would say that S. 35 would not apply to a case where the facts are correctly and fully stated in the plaint or application and only part of the relief or prayer asked for is such as cannot be granted. It is the duty of the plaintiff or the applicant to state the facts correctly and not conceal them and it is the duty of the Court to see to what relief the plaintiff or the applicant is entitled under the law. The mere fact that the plaintiff or the applicant has asked for more than he can get does not give to the Court a discretion to refuse to grant even that part of the relief to which he is entitled and to make his advocate pay the costs personally. Courts exist for doing justice and not for enforcing discipline against litigants.

When an application is made for execution of a simple money decree, it is not within the province of the Court executing the decree to start an enquiry into the motives of the decree-holder or his advocate behind the application. In the *Kayastha Co. Ltd.* v. *Sita Ram Dubey* (33), a Full Bench of five Judges unanimously held that the question whether an application for execution was a mala fide one was wholly immaterial for purposes of saving limitation, that such a finding would not vitiate the application and that the Court should not enter into any such enquiry. If the relief claimed is wider than what the decree-holder is entitled to, the Court ought not to throw out the application, but should grant such relief as the law permits. To refuse to do this is likely to defeat justice and to tend to a multiplicity of applications and waste of the time of the Court. Courts of Justice have before them the paramount duty to do justice in each case. If the application was not in proper form, the decree-holder should have been asked to amend his application.

The intention or object behind a plaint or application is not per se punishable by mulcting the applicant or his advocate in costs. We have to see whether the means adopted resulted in certain costs being incurred which would not otherwise have been incurred. In this connexion it is to be noted that the judgment-debtor took up in his objection the extreme position that the security was not at all attachable and that the application should be dismissed in toto. The costs were incurred on account of the application and not on account of the argument which, though reprehensible, was subsequent to the objection. The mere advancing of an argument, howsoever puerile or absurd it may be, cannot bring the case under S. 35 as the Court can easily put a stop to it. In our opinion the application should not have been disallowed entirely, though the Court might have punished the decree-holder by a suitable order as to costs. The filing of such an application did not make it a case in which under S. 35, Civil P. C., costs should be allowed to the judgment-debtor against the advocate concerned.

Niamatullah, J.—I take the first question to refer to the power of this Court to direct payment of costs by a legal practitioner as part of its order in

(33) A.I.R. 1929 All. 625 (F.B.).

an appeal heard by a single Judge or a Bench.

It is said that the High Court in England can, in the exercise of its summary jurisdiction make a solicitor pay costs occasioned by his misconduct or default. This may be conceded. It may also be conceded that a practitioner in India performs many of the functions which a solicitor does in England. But it does not follow that this Court is possessed of the same jurisdiction over legal practitioners. The rules applicable to the legal profession in England are based on traditions many centuries old, and like those applicable to most subjects are not based on statute. The case is different in India, where powers of Courts, including the High Court are laid down by statute. It is not out of place to consider how far the power of a High Court to order a legal practitioner to pay costs is borne out or negatived by the course of legislation in regard to the disciplinary jurisdiction of the Courts, over the profession which existed long before this Court was established by the High Courts Act of 1861. It was originally subject to the disciplinary jurisdiction of District Courts Act 1 of 1846 (an Act for amending the law regarding the appointment and remuneration of pleaders in the Courts of the East India Company) which repealed numerous regulations dealing with the subject was the first consolidating Act providing for qualifications and punishment of pleaders. S. 4 of that Act threw open the 'office of the pleader' to all who :

"obtained a certificate in such manner as shall be directed by the Sudder Courts that he is of good character and duly qualified for the office,"

and to Barristers :

"of any of Her Majesty's Courts of justice in India . . . . . subject to all the rules in force in the said Sudder Courts applicable to pleaders."

Sections 10 to 12 empowered the Court of a Principal Sudder Amin or Sudder Amin or Munsiff to impose fine on pleaders (subject to an appeal to 'Zilla or City Judge', whose decision was final) whenever a pleader has conducted himself in such a manner as would have renderded himself liable to a fine if he had so conducted himself in the Court of a Zilla or City Judge. This Act was repealed by Act 20 of 1865 and it is significant that all the provisions authorizing the imposition of fines were omitted. The disciplinary jurisdiction was conferred on the High Courts whose powers in that behalf are defined in S. 4, which enacts that :

"the High Court is hereby authorized and required, within six months after this Act shall take effect in the territories in which such Court exercises jurisdiction, to make rules for the qualification, admission and enrolment of proper persons to be pleaders and mukhtars of the Courts in such territories, for the fees to be paid for the examination, admission and enrolment of such persons and subject to the provisions hereinafter contained, for the suspension and dismissal of the pleaders and mukhtars, so admitted and enrolled."

It is quite clear that the power of Courts to impose fines in the exercise of disciplinary jurisdiction was deliberately withheld. This Act was extended to 'the Sudder Court of the North Western Provinces' by Act 9 of 1866 and became applicable to it with all the implications arising from repeal of the previous enactment. At about the same time the Letters Patent of this Court (dated 17th March 1866) empowered it :

"to make rules for the qualification and admission of proper persons to be advocates, vakils and attorneys-at-law,"

and to remove or to suspend from practice, on reasonable cause, the said advocates, vakils or attorneys. Only two forms of penalty are permitted for professional misconduct, viz, removal or suspension from practice. It is clear the High Court cannot extend its jurisdiction in that behalf by assuming an "inherent power" any more than they can do so for inflicting imprisonment or other form of punishment for professional misconduct. I desire to emphasise this point, as it is suggested that the High Court can order a legal practitioner to pay costs in the exercise of an inherent power to punish contempt of itself or subordinate Courts by imposing a fine or imprisonment. That a legal practitioner guilty of contempt of Court may be punished like any other person in accordance with rules applicable to such cases and by adopting the procedure laid down for that class of cases cannot be disputed. The question before us is different, viz., whether, in the exercise of the disciplinary jurisdiction possessed by this Court, a single Judge or a Bench of Judges exercising appellate powers, can, by a summary order passed in the particular case before it, impose a fine on an erring legal practitioner and award it as compensation to his client's ad-

versary. It is quite clear to me that professional misconduct as such cannot be punished except by removal or suspension from practice or reprimand. If it is contempt of Court for which a legal practitioner is to be ordered to pay costs, the punishment need not be limited to the amount of costs, nor can the Court direct payment by him of costs occasioned by his act not amounting to contempt of Court. In this view this Court cannot direct a legal practitioner to pay costs in many cases in which the High Court in England can do so against a solicitor. Numerous instances illustrating cases in which solicitors have been directed to pay costs are mentioned in Halsbury's Laws of England, Vol. 26, pp. 832 and 833, paras. 1356 and 1357, which may be usefully quoted:

"1356. The Court has power to order a solicitor to pay any costs occasioned by his misconduct or default in the course of legal proceedings to the person injured thereby or to indemnify his client in respect of his liability to pay them. Thus, a solicitor may be ordered to indemnify his client against costs where he defends an action to which there is to his knowledge no defence; where he appeals in his own interest, and not on behalf of his client; where he improperly continues proceedings after the lunacy of his client; where he fails to get an error in a decree of the Court corrected; and, generally, wherever costs have been incurred improperly and without reasonable cause, or though properly incurred, have proved fruitless to the client by reason of the solicitor's conduct. Where a solicitor institutes proceedings without authority, he may be ordered to pay the costs of his alleged client as between solicitor and client."

"1357. A solicitor may be ordered to pay costs direct to the opposite party where he institutes or defends proceedings without authority from his client or on behalf of a non-existent client, or where he brings the wrong party before the Court: where he brings a speculative action without taking reasonable care to satisfy himself that the plaintiff has a fair prospect of success; where he issues a writ on behalf of a client resident abroad and gives his client's address as in England; where he proceeds after his client has been ordered to give security for costs and before security has been given; where he fails to attend proceedings in chambers, and the Judge does not think it expedient to proceed; where he fails to file an affidavit which has been used in the proceedings; where, on an account being taken in chambers, he acts unreasonably in adjourning items to the Judge; where the trial of the action cannot proceed owing to his neglect to attend or send a representative, or to deliver any papers necessary for the use of the Court which according to the practice ought to be delivered, where a case in which judgment has gone by default owing to the solicitor's negligence is restored to the list. Similarly a solicitor may be liable for costs where a fraudulent adjudication in bankruptcy is set aside, or where an order for the appointment of a receiver is obtained through suppression of the facts, even though innocent. Where prohibition is granted against proceedings in an inferior Court, the Court may order the costs to be paid by the plaintiff's solicitor provided that the rule has been moved for in that form and notice has been given to the solicitor so as to give him an opportunity of showing cause."

"A solicitor who obtains a special jury for a client without means may be ordered to pay the jury fees personally."

It will be seen that in a number of cases it could not have been contempt of Court which was punished and that in the majority of cases the liability of the solicitors was not of a criminal nature but the object was to compensate his own client or his adversary for some act or omission, not necessarily amounting to contempt of Court, which occasioned loss to one or the other of them. It is true that the origin of the general disciplinary jurisdiction of the Supreme Court is the doctrine of contempt; but it was subsequently extended so as to embrace cases in which the element of contempt was not present: vide Halsbury's Laws of England, Vol. 26, pp. 828 and 829 paras. 1349 and 1359 quoted below :

"1349. The Court possesses a disciplinary jurisdiction over solicitors, as being its officers. This jurisdiction, though it has been extended by statute, and by the rules of Supreme Court, is inherent in the Court and is based upon the doctrine of contempt. It is exerciseable summarily by writ of attachment or by committal.

"1350. A solicitor is guilty of criminal contempt where he is guilty of conduct, whether in or out of Court, amounting to a contemptuous interference with the administration of Justice ,as, for instance, where he insolently defies the Judge in open Court, or uses improper language to the Judge, or to the solicitor of the opposite party, where he writes to the Press with reference to the merits of a pending case in which he is professionally interested or where he prepares a special case for the opinion of the Court based upon a fictitious statement of facts. A solicitor who commences or defends legal proceedings on behalf of a client, whilst he himself is in prison, or who permits a solicitor in prison to use his name for the purpose is gulity of contempt."

It should be noted that this has no reference to solicitor's liability to pay costs.

"In many cases the act done by the solicitor which calls for the intervention of the Court is not in itself a contempt; the Court in the first instance makes an order against the solicitor and it is his disobedience to the order which constitutes the actual contempt. In particular, where the Court has ordered a

solicitor to pay costs for misconduct as such, or to pay a sum of money in his character as an officer of the Court, the solicitor on making default, is liable to attachment and imprisonment for a period not exceeding one year. (Ibid, para. 1351 p. 829)."

I have already referred to the successive enactments dealing with legal practitioners. An intention to codify the law on that subject is clearly discernable even in earlier Acts. Act 18 of 1879 (Legal Practitioners Act) consolidated and defined all powers of a disciplinary character which it was intended the High Court should exercise over legal practitioners. The object of the Act, as noted in the very first line is "to consolidate and amend the law relating to legal practitioners." The preamble recites the expediency to "amend and consolidate" such law. It should be noted that it does not merely consolidate previous enactments but the "law" on the subject. Further it does not merely consolidate pre-existing law, but also "amends" it, which taken with consolidation of it implies both addition to and derogation from the pre-existing law. It follows that it is a complete code in itself as regards the subject it deals with.

As observed by their Lordships of the Privy Council :

"the object of codification of a particular branch of law is that on any point specifically dealt with by it such law should be sought for in the codified enactment and ascertained by interpreting the language used therein : *Norindra Nath Sarcar* v. *Kamal Basine Dasi* (34), at p. 26."

Similarly their Lordships observed in *Gokul Mandar* v. *Padmanand Singh* (35) at p. 202 that :

"the essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction."

That the Legal Practitioners Act is a complete code as regards pleaders, mukhtars and revenue agents will be apparent on a cursory glance at its provisions. The extent of rule making power of the High Court is defined (S. 6). Provisions for their qualifications, enrolment, dismissal and suspension are laid down. The procedure for the exercise of disciplinary power of the High Court is prescribed (Ss. 13 and 16). Rules relating to remuneration and penalty have been enacted (Cls. 6 and 7). As regards advocates and vakils, only their right to appear before subordinate Courts is declared. Matters relating to their enrolment and discipline are declared to be unaffected by the Act, being provided for in the Letters Patent and rules made by the High Court. Advocates and vakils of High Courts not established by royal charter are declared subject to rules made by such Courts with the previous sanction of the Local Government. It is noteworthy that an advocate enrolled in High Courts not established by royal charter cannot be dismissed or suspended except with the concurrence of the Local Government. Considering for the present, the case of pleaders alone nothing is left unprovided for. The conduct which can be taken notice of in the exercise of the disciplinary jurisdiction is described in the widest possible language. S. 13, gives power to the High Court to dismiss or suspend for "any reasonable cause", which includes a case where a pleader has been guilty of misconduct, for which costs would be awarded against him in the cause itself if the Court had the power to do so. Disciplinary action in reference to such misconduct should be taken according to the procedure laid down by Act. It would be contrary to all canons of construction if summary power in the name of 'inherent power' is exercised in disregard of the machinery contemplated by the Act. If I am right in taking the view that the Legal Practitioners Act is an exhaustive enactment as regards pleaders, there is no room left for any inherent power in matters for which provision is expressly made by the Act. To concede power outside the Act would be to stultify its provisions.

If costs cannot be awarded against a pleader in a summary manner, it is inconceivable that they can be so awarded against an advocate or vakil. S. 8, Letters Patent of this High Court, clearly limited its powers to removing or suspending him from practice in a manner leaving little room for any inherent power. In any case, on the passing of Bar Councils Act, exactly the same considerations became applicable to advocates as I have mentioned above in res-

(34) [1896] 23 I. A 18 = 23 Cal. 563 = 6 Sar. 663 (P.C.).
(35) [1902] 29 I. A. 196 = 29 Cal. 707 = 8 Sar. 823 (P.C.).

pect of the Legal Practitioners Act and the pleaders. The Bar Councils Act, 38 of 1926 purports in the preamble to consolidate the law applicable to all legal practitioners. It amends the Legal Practitioners Act in some respects and provides exhaustively for the constitution of Bar Councils, for admission, enrolment, misconduct, with rules of procedure for enquiry, into it and punishment therefor. S. 10 is mandatory, and the disciplinary power of the High Court is to be exercised only in a given manner and not summarily.

The power of the Supreme Court in England to award costs against a solicitor is now contained in the rules of the Supreme Court : see O. 65 Rr. 5 and 11 and O. 54, R. 7. It is true that, even before the rules were framed, this power existed and was exercised. It is suggested that the principle under which the High Court in England can take a particular action against its officers, the solicitors, is of general application, and a High Court in India has similar inherent power to deal with its own officers as the legal practitioners should be considered to be. I have already shown the extent of statutory law in this country on the subject and its character as an exhaustive Code in itself. It should be borne in mind that no statutory law limiting the jurisdiction of the Supreme Court expressly or by implication has ever existed in England : see the following in Halsbury's Laws of England, Vol. 26 p. 844 :

"1374. The Court, in the exercise of its disciplinary jurisdiction, has power to strike a solicitor off the roll upon various grounds specified by statute and also upon the ground of misconduct. In the latter case the Court may in lieu of the striking of the solicitor off the roll suspend him from practice.

"1375. The statutory ground for striking a solicitor off the roll are :

(1) That there is some defect in his article, service, admission or enrolment . . . . .

(2) That he has wilfully and knowingly acted as agent in any action or suit in any Court or order of bankruptcy for any person unqualified to act as a solicitor or has permitted or offered his name to be used by any unqualified person to enable him to undertake solicitor's business for his own benefit, or has sent in process to such unqualified person for the like purpose . .

3. That he has been guilty of a corrupt practice in connexion with an election, whether parliamentary or municipal.

These are the only three grounds on which the statute provides for striking off a solicitors name. As regards grounds based on misconduct, there is no statutory provision. To quote again from the same book :

"1376. Apart from statute a solicitor may be struck off the roll on the following grounds, namely :

(1) That he has been convicted of a criminal offence . . . .

(2) That he has been guilty of professional misconduct . . . .

(3) That he has been guilty of conduct showing him to be unfit to be a solicitor . . . .

"1377. The Court may, instead of striking the solicitor off the roll order him to be suspended from practice for a period stated in the order . . . .

Side by side with this power, which emanates from the relationship of Court and its officers, there has existed the power of the Court to mulct a solicitor in costs, both having a common source and not being incompatible with each other. After the passing of the Judicature Act of 1873, rules were framed and now exist as regards both these powers. There is nothing in the rules themselves, and certainly in any statute, which may in any manner negative the existence of the power to award costs against solicitors. As is the case with most branches of the common law, which is said to be :

"nothing else but the common custom of the realm (Hals. vol. 11 p. 376)."

no codification has ever been attempted as regards rules of discipline applicable to solicitors. The Court has always been at liberty to lay down such rules of practice in regard to its officers as local conditions required. The same considerations cannot be applied in India where the paramount authority in the matter of making laws has laid down categorically what disciplinary powers are and in what manner the Court can exercise. Another important difference thatought to carry weight is the difference in the constitution of Court and of the legal profession. This Court has no ordinary original jurisdiction and is mostly a Court of appeal. Legal practitioners who are not enrolled in this Court and over whom it cannot directly exercise any disciplinary power are entitled to act and plead before it and the Court subordinate to it. An advocate enrolled in any High Court in India established by royal charter or not may appear to act or plead in any Court subordinate to this High Court, S. 14 (1) (b) Bar Councils Act, though he cannot be considered to be the officer of the High

Court to which such Courts are subordinate. The question arises whether this Court can order them to pay costs in cases where, if the advocate concerned had been enrolled in this High Court, it had power so to order. If it is only on the general doctrine that a Court can take disciplinary action of that kind against its own officers that the foundation of the exercise of the power rests, the advocate enrolled in another High Court can do with impunity what an advocate enrolled in this High Court cannot. Anomalies of this character can hardly be found to result in England where there is only one High Court and all solicitors practising before it are enrolled in that Court. Again :

" where the facts would otherwise establish a case of negligence, the solicitor may escape liability on the ground that he acted upon counsel's advice. Halsbury, Vol. 26, p. 7555."

If this rule be acted on in India the position will be curious. A legal practitioner is both a counsel and a solicitor. Any act done by him in his capacity as solicitor must be deemed to have been advised by himself as counsel. This and similar anomalies would disappear if it is recognized that a legal practitioner in India derives his position from a system peculiar to this country. He does not enjoy all the privileges of an English barrister and is not subject to all liabilities of a solicitor. His rights and obligations are determined by statutes and rules made thereunder. In England :

" If a barrister acts honestly in the discharge of his duty he is not liable to an action by his client for negligence, or for want of skill, discretion, or diligence in respect of any act done in the conduct of a cause or in settling drafts, or in advising. If a barrister accepts a brief in a cause and receives payment of his fees, but does not attend at the trial, no action can be brought against him to recover either the fees, or damages for non-attendance. No action is maintainable against a barrister for unskilfully drawing pleadings or for compromising an action without the authority of the client. The law requires of counsel nothing but the honest discharge of his duty to the best of his judgment ; and if he means what he does to be for the benefit of his client, he is not responsible to his client for anything he does. This immunity from action is not confined to litigation, but extends to all cases where the relation of counsel and client exists. (Halsbury Vol 2 p. 314) "

None of these privileges can be claimed by a legal practitioner in India, who also performs all the functions of a counsel in England, for the obvious reason that there is nothing in Indian law which can give him the same privileges as barristers enjoy in England. If, on the one hand, a legal practitioner's claim to such privileges can be ruled out on the ground that the law to which he is subject does not provide for them, it is perfectly logical for him to insist that he cannot be saddled with any responsibilities of a solicitor in England, unless the Indian law clearly warrants it and the summary procedure employed to enforce it against solicitors.

Assuming that this Court has inherent power to order a legal practitioner to pay costs in a proper case, it should be borne in mind that the jurisdiction belongs to the Court. Individual Judges sitting singly or in Bench to here appeals cannot be considered to be the High Court. Under S. 27. Letters Patent of this Court, read with S. 13, High Courts Act 1861, the High Court :

"may by its rules provide for the exercise by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court and the original and appellate jurisdiction vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice. A single Judge or a Bench of two Judges sitting to hear civil appeals in which the question of payment of costs by a legal practitioner may arise have the power of the High Court to hear the appeals set down for hearing before them and can exercise appellate civil jurisdiction of the High Court but cannot assume the disciplinary jurisdiction of the Court in the absence of a specific rule in that behalf under the rules of this Court only a Full Bench of at least three Judges nominated by the Chief Justice can exercise the disciplinary powers of the Court."

In England where the power to award costs undoubtedly exists, it is exercisable by the Court or Judge ; see O. 65, R. 5and 11, Rules of the Supreme Court.

The provisions relating to costs generally are to be found in S. 35, Civil P. C., (1908) which is now couched in wider language than that employed in the corresponding provision of the older Code. It makes arguable that costs can be awarded against persons not being parties to the case. The provision is common to Subordinate Courts and the High Court. The former possess no disciplinary jurisdiction except so far that they can report to the High Court through the District Judge for action being taken against a legal practitioner. It follows that S. 35, Civil P. C., was not intended to confer any disciplinary jurisdiction on any Court, including the High Court which cannot acting under that section

award costs against a legal practitioner for what amounts to misconduct or "other reasonable cause" justifying the exercise of disciplinary jurisdiction. In my opinion, the costs can be awarded by any Court acting under S. 35, Civil P. C., against a legal practitioner as such.

It is, however, permissible for the Court to direct payment of costs by the legal practitioner under circumstances in which they would be payable by any other person not a party to the case. It is impossible to cite all possible instances in which costs may be awarded against persons not being parties to the case. If a person institutes a suit in the name of the plaintiff who is not the real plaintiff, finances the litigation and is himself a de facto plaintiff, expecting to reap the fruits of the litigation, or if he is instrumental in the institution of a suit or in the making of a defence on behalf of a person who from unsoundness of mind or other cause, could not or did not confer intelligent authority for the institution of the suit or the making of defence, costs may be awarded against such person, though he is not a party to the case. If such a person happens to be the legal practitioner for one of the parties to the case, costs may be awarded against him. The Court has no power to take disciplinary action under cover of the provisions of S. 35, Civil P. C. Acts done by a legal practitioner within the scope of his authority or on instructions given by his client are acts of his principal the client, and any costs occasioned by such act cannot be awarded under S. 35, Civil P. C., against him personally.

Like every other relief to be granted to a party to the case, the Court will not direct payment of costs against a stranger to the suit, unless it is made a question in the case. Ordinarily liability to pay costs will depend on the result of investigation in certain facts, and the person against whom costs are claimed should for that purpose be virtually made a party. If a legal practitioner appearing for one side or other is to be proceeded against for costs of the case for something done professionally an immense confusion is likely to arise. He may have in many cases, to discontinue appearing for his client, and a controversy having otherwise little to do with the merits of the case will have to be introduced as order for costs has to be embodied in the decree which must be in conformity with judgment : O. 20, R. 6, Civil P. C.

The right to receive and the liability to pay costs under S. 35, Civil P. C., must be treated like any other question in the case, and no Court of appeal can ever be justified in making it a matter for consideration over the heads of the parties to the case, an action which has all the attributes of a disciplinary measury to which different considerations should apply. Under these circumstances I am of opinion that S. 35, Civil P. C., cannot be deemed to confer any power to award costs against a legal practitioner except to the extremely limited extent already indicated.

As regards the second question under reference, it is necessary to examine the contents of the application for execution of decree filed by Mr. Nand Kishore on behalf of the decree-holder and those of the petition of appeal filed in this Court by Mr. Pandey in the light of subsequent events. In the last column in which is to be mentioned the :

"mode in which the assistance of the Court is required"

the application states as follows :

"In connexion with the application for execution of decree dated 18th September 1927 it is submitted that the amount due to the decree-holder is more than Rs. 7,500,000 and the amount attached in execution thereof is Rs. 23,575-2-9. Basdevanand Gir judgment-debtor has deposited postal cash certificates worth Rs. 4,006-12-0 as given below in his own name as security in Privy Council Appeal No. 28 of 1927 preferred in the Hon'ble High Court and a sum of Rs. 798-11-0 due to the judgment-debtor is deposited in the Hon'ble High Court on account of surplus charges for printing of papers in the said case. It is therefore prayed that a parwana for attachment may be sent to the Registrar, High Court, and the amount of decree may be, so far as possible, satisfied by attachment thereof."

It will be seen that the postal cash certificates of the face value of Rs. 4,006-12-0 are clearly stated to be 'security' for costs and Rs. 798-11-0 as 'surplus' which can only mean money that is left after the printing charges are met. The prayer is that :

"decree be satisfied by attachment so far as possible."

It is obvious that in execution of a decree only the right of the judgment-debtor can be attached. Once the prospective costs of the respondent to be incurred in the Privy Council appeal are

secured on the postal certificates deposited with the Registrar, the right of the judgment-debtor, the depositor, in them is subject to a paramount charge which will vary from time to time and costs incurred by the respondent after the attachment will be as much secured on the property as those incurred before it. The judgment-debtor cannot withdraw any part of it till the respondents' costs are ascertained and paid thereout or otherwise satisfied, and they cannot be ascertained till the appeal is finally decided. The judgment-debtor's right in that item of property is the right to recover the unexpected part of it. It may be a shadowy right or a substantial one. Much depends on what the respondent spends in presecuting his case before the Privy Council. If he does not enter appearance and incurs little or no costs and the appeal is dismissed, the bulk of the security will be returnable to the judgment-debtor after the respondent's costs are eventually found to be nominal. It is also possible that the Privy Council may award no costs to the respondent, though successful. This being the judgment-debtor's right, the decree-holder, if he attaches it and he cannot attach any thing more, it is impossible for him to seize the amount forthwith and compel the judgment-debtor to file fresh security and again resort to the same procedure with incalculable hardship to the latter. Such a result is inconceivable to me, having regard to the nature of the property. The application for execution of decree itself does not betray any intention on the part of the applicant to seize forthwith the property sought to be attached regardless of the charge to which it is subject. All it prays for is attachment, which term means no more than that the Court should retain custody of the property to make it available for the satisfaction of the decree so far as the judgment-debtor's interest will make it possible. A reference to O. 21, R. 52, Civil P. C., will show how the prayer for attachment, if granted, is to be given effect to. It provides that :

" where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest, dividend becoming available thereon, may be held subject to the further orders of the Court from which the notice is issued : provided that, where such property is in the custody of a Court any question of title or priority arising between the decree-holder and any other person not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment attachment or otherwise, shall be determined by such Court. "

The legal effect of attachment of a property when made is laid down in S. 64, Civil P. C., which enacts that :

" where an attachment has been made any private transfer or delivery of the property attached or of any interest therein and any judgment to the judgment-debtor of any debt, dividend or other money contrary to such attachment, shall be void as against all claims enforceable under the attachment. "

It follows that if the decree-holder's application for attachment in this case had been granted, only a notice would have been issued to the Registrar to hold the postal cash certificates, or rather the judgment-debtor's interest therein, subject to the orders of the Court executing the decree. In passing its orders consequent on attachment, if it correctly follows the law, it could only allow the attachment to continue till the respondent's costs in the Privy Council appeal, for which the property was given as security, are fully satisfied and a balance payable to the judgment-debtor is found to exist which alone can be made available for satisfaction of the decree. If no such balance is eventually found, the attachment will prove fruitless. The decree-holder's prayer for attachment can be considered only as a prudent step which in certain contingencies may prove to be of advantage to him, preventing the judgment-debtor, at the same time to have access to it. At the first sight, there is nothing in the application for execution of decree in the grounds of appeal before this Court which can be construed as requesting the Court to do something illegal, even if the law could lend itself to such an attempt. By an application dated 10th December 1927, the judgment-debtor objected to the attachment of the postal certificates and the money deposited to meet the printing charges on the ground that they " can under no circumstances be attached. " It is clear that the view he desired to press was that his right in the two properties was exempt from attachment. It is obvious that this contention was untenable.

It is evident from the Court's order, dated 4th February 1928, that the impression conveyed to its mind was that attachment, if allowed, would mean immediate withdrawal of the postal certificates and the cash in question. There is no doubt that the Court was not aware of the correct legal view, otherwise it would not have given as a ground of "intervening equitably, that the judgment-debtor would be deprived of his inherent right of appeal." The omission of the vakils for both parties to remind the Court of the true significance of attachment was highly improper. It is also to be regretted that the learned Subordinate Judge did not take the trouble of consulting the Civil Procedure Code and acted on the erroneous impression as to what an attachment, if granted would signify.

Mr. Nand Kishore stated before the Full Bench that the object of the application was to make the judgment-debtor pay an amount equal to the value of the security, towards the satisfaction of the decree, in order to secure the postal certificates for the purposes of the Privy Council appeal. Taking this statement at its face value, it will make it appear that the prayer contained in the application was intended by him to be understood by the judgment-debtor at least, as asking for immediate seizure of the security otherwise the judgment-debtor could not be expected to pay. In furtherance of the desire to hoodwink the judgment-debtor on the showing of Mr. Nand Kishore, I can call the attempt by no other name, it was necessary that actual seizure of the property by attachment should be demanded. It is difficult to imagine that a manoeuvre of the kind spoken of by Mr. Nand Kishore could possibly be believed by him to have the remotest chance of succeeding. Whether it was a manoeuvre of the character that he admits or that which is attributed on the other side viz., to "burke" the Privy Council appeal, he cannot escape censure, if he improperly acted in furtherance of his client's device. It is probable that he attempted to mislead the Court and the judgment-debtor either by trying to make out what an attachment would mean, if granted or by attempting to induce the Court to order the seizure of the property so as to prejudice the judgment-debtor's appeal to Privy Council. In either case, his conduct was reprehensible. Whether it amounted to professional misconduct I refrain from expressing any opinion.

Mr. Pandey's case is altogether different. The petition of appeal which he signed and filed in this Court cannot be taken exception to on any ground. It prays for attachment of unexpended security. It objects to the refusal of the Subordinate Judge to "proceed against" the security. This cannot be interpreted as praying for immediate seizure of it. It could be proceeded against, subject of course, to the charge existing on it. In his argument before the Court he took up the strictly legal and accurate position and prayed for attachment of such interest as the judgment-debtor had, giving his client the chance of obtaining any money which might be found to be payable to the judgment-debtor.

By the Court.—Our answer to the first question is that the Court has no power to order a legal practitioner to pay personally the cost of an application or suit except in cases to which S. 35, Civil P. C., can be made applicable.

The answer to the second question is in the negative.

R.K. *Reference answered.*

A. I. R. 1930 Allahabad 252

MUKERJI AND BENNET JJ.

Mt. Rani Kunwar—Defendant—Appellant.

v.

Mahbub Baksh — Plaintiff — Respondent.

First Appeal No. 150 of 1928, Decided on 9th December 1929, from order of Small Cause Court Judge, D/- 16th July 1928.

Contract Act, Ss. 20 and 65 — Contract void on account of mutual mistake — Only remedy of vendee is to claim consideration or purchase money and not interest or damages.

Where parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the contract is void and the only remedy of the vendee under such contract is to claim consideration or purchase money. He is not entitled to any damages or interest.

[P 254 C 1]

K. N. Katju—for Appellant.

K. Verma—for Respondent.

Judgment.—This is a first appeal by Mt. Rani Kunwar defendant from an order of remand passed by the lower appellate Court. The suit was brought by Mahbub Baksh plaintiff, and he claimed Rs. 2,762-15-0 made up of Rs. 1,100,the consideration of two sale deeds by the defendant to him and the costs of litigation between the plaintiff and the zamindar Ganga Prasad. The two sale-deeds were executed by the defendant on 23rd February 1924 and 31st March 1924 in favour of the plaintiff. Each sale-deed purported to be of a plot of land 10 biswas in area, old number 1473, for the purpose of building a house. In the first sale-deed boundaries were given and in the second sale deed no boundaries were given.The plaintiff began to build his house and objections were made by Ganga Prasad, zamindar, and Ganga Prasad brought a suit against the plaintiff and a compromise was entered into with him by which the plaintiff admitted that the land on which he built his house was not the land which he purchased from the defendant Mt. Rani Kunwar but was land which belonged to Ganga Prasad. Accordingly the plaintiff took the land on a lease from Ganga Prasad.

The Court of first instance dismissed the present suit on the ground that the allegations of the plaintiff that the land had been demarcated by the agent of the defendant and shown to him were not true. The lower appellate Court, while upholding this finding of fact of the Court of first instance, has come to a contrary finding on issue 1 and has remanded the suit for disposal under the remaining issues and for determination as to whether the plaintiff is entitled to damages.

Issue 1 was whether the defendant was the owner in possession of the property sold by her to the plaintiff by means of the two sale-deeds dated 23rd February 1924 and 31st March 1924 respectively. It is admitted that the defendant is a zamindar and owner of old plot 1473, area 7 bighas 11 biswas. This plot is barren land and there is no demarcation on the spot between it and old plot 1472 which is owned by the zamindar Ganga Prasad. The lower appellate Court has come to a finding of fact that on the western sides of plots 1473 and 1474 (lying to the south-east of plot 1473) there is a road. That road is not marked on the map Ex. 13, but the lower appellate Court made a local inspection and came to its finding of fact on its local inspection and on the evidence before it which was partly oral and partly documentary. It is not, therefore, open to us on second appeal to difier from this finding of fact.

It is further found as a fact by the lower appellate Court that the land on which the plaintiff built his house is situated to the west of that road or track, and also that there are two houses of Husain Baksh and of Karim Baksh which also lie to the west of that track and outside the old plot 1473 owned by the defendant.

The lower appellate Court finds that the defendant was not certain of the position of her plot and though as a matter of fact her plot lay to the east of the road, she was under the impression that it lay to the west of the road and under that impression she had given two small pieces of land both of which lie to the west of the road to Husain Bakhsh and Karim Baksh to build houses and that the house of Husain Baksh was ready when the plaintiff bought his first plot of 10 biswas. The plaintiff also wanted to build a house to the south of Husain Baksh. Accordingly we find in the first sale-deed of 23rd February 1924 that the eastern boundary is given as "the limit of the land sold and the way," and the northern boundary is given as "the land sold and then the house of Husain Baksh."

Aecording to these boundaries, the plot of 10 biswas sold lies to the south of Husain Baksh's house and to the west of the way or road and accordingly it does not lie within old plot 1473 which belonged to the defendant, In the next sale-deed a month later on 31st March 1924, the finding of fact is that the land sold was to the south of the first 10 biswas sold by the defendant. It is a fact that the second sale-deed did not give any boundaries, but apparently the parties did not consider it necessary, as the house of the plaintiff was then ready or in course of erection.

The finding, therefore, of the lower appellate Court is that the one bigha over which the house was built by the plaintiff and which was bought from the defendant did not belong to the defen-

dant and that both parties were under a mistaken but honest belief that the land sold did belong to the defendant. The case, therefore, came under S. 20, Contract Act:

"where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void."

The remedy for the vendee would lie under S. 65 which lays down that when an agreement is discovered to be void, any person who has received any advantage under such agreement or contract is, bound to restore it. In the present case the claim of the plaintiff would legally be for return of the sale consideration in the two deeds. i.e., Rs.1,100. There is nothing in the Contract Act, or any law which gives the plaintiff a right to claim any further damages except return of the purchase money, and the plaintiff is not entitled to any interest.

We consider, therefore, that the order of remand is a correct order and we dismiss this appeal from order. Under the circumstances of the case, as it arose from a mutual mistake,we consider that it will be fair if parties pay their own costs of this appeal.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 254

MUKERJI AND BENNET, JJ.

Nathan and *others* —Defendants—Appellants.

v.

Harbans Singh and *others*—Plaintiffs —Respondents.

Letters Patent Appeal No. 97 of 1927, Decided on 14th December 1929, from judgment of Ashworth, J., D/- 15th June 1927.

Agra Tenancy Act (3 of 1926), Ss. 58 and 63—Suit for ejectment of tenant with lease only for gathering thatching grass is cognizable by revenue Courts only—And if such suit is dismissed as being non-cognizable by revenue Court, in a suit between same parties in civil Court, if such a one is filed, it is not open to parties to plead the matter of jurisdiction as res judicata.

A suit for ejectment of a person taking a lease of land on annual rent for the purpose of gathering thatching grass is cognizable by revenue Courts as a suit for the ejectment of a non-occupancy tenant and if such suit is dismissed as being non-cognizable by revenue Courts, it is not open to the parties in a suit for ejectment in the civil Court, on the same cause and between the same parties to plead the matter as res judicata : *A. I. R.* 1921 *All.* 128 and *A. I. R.* 1929 *All.* 132, *Rel. on.* [P 254 C 2]

M. L. Agarwala—for Appellants.

P. N. Sapru—for Respondents.

Judgment.—This is a Letters Patent appeal by the defendants against the decree of a learned single Judge of this Court, awarding the plaintiffs possession of 29 bighas 1 biswa of land. The facts which are not in dispute are as follows: The plaintiffs lessed 48 bighas 1 biswa of land to the defendants at an annual rent of Rs. 99 for the purpose of gathering thatching grass. This lease was admittedly a lease from year to year terminable by notice from the plaintiffs. The plaintiffs gave notice and brought a suit against the defendants for ejectment in the revenue Courts and it was eventually held by the Board of Revenue that the revenue Courts had no jurisdiction to entertain such a suit. Accordingly, the plaintiffs after that adjudication issued a fresh notice to the defendant and brought a suit in the civil Court. The Court of first instance and the lower appellate Court dismissed the suit of the plaintiffs on the ground of want of jurisdiction.

It is settled by rulings of this Court, of which we may quote *Param Hansman Tewari* v. *Dasrathiman Tewari* (1) that a suit for ejectment of a tenant from land which has been leased to him for grazing cattle or cutting grass is cognizable by the revenue Court only as a suit for ejectment of a non-occupancy tenant under S. 58 and S. 63, Tenancy Act. The argument in favour of the plaintiffs is that because the revenue Court of final appeal has held that the suit is not cognizable by the revenue Courts, therefore that matter is res judicata between the parties and cannot be pleaded as a ground of defence in the civil Courts. We do not agree with this contention. We consider that as this Court has held that such a suit lies only in the revenue Courts, this Court cannot hold that it is bound by a decision of the Board of Revenue to the contrary effect, merely because that decision was given in a suit between the present parties.

One member of this Bench sitting singly in *Jwala Debi* v. *Amir Singh* (2) in a similar case held that a decision in

(1) A. I. R. 1921 All. 128=43 All. 445.
(2) A. I. R. 1929 All. 132.

a former suit between the parties by a revenue Court on the question of jurisdiction did not operate as res judicata in the civil Courts.

Accordingly we allow this Letters Patent appeal and direct that the plaint be returned to the plaintiff for presentation to the revenue Court. In case the objection is made in the revenue Court that the parties are bound by the previous decision between them by the Board of revenue, it will be open to the revenue Court to make a reference to this Court, under S. 267, Act 3 of 1926, and under sub-S. 5 of that section, the orders of this Court are final and binding on all Courts subordinate to it or to the Board of Revenue. Parties will bear their own costs in all Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 255 (1)

SULAIMAN AND KENDALL, JJ.

Ram Charan — Plaintiff—Appellant.

v.

Mathura Prasad and *another*—Defendants—Respondents.

Second Appeal No. 1581 of 1927, Decided on 6th December 1929, from a decree of Addl. Sub-Judge., Banda, D/- 22nd June 1927.

Limitation Act, Art. 10—Lease for fixed period—Share in capable of possession—Lease does not make it capable of possession.

An undivided share which is incapable of physical possession cannot become capable of physical possession merely because a lease of it for a fixed period has been granted: 20 *All.* 315; 24 *All.* 17 and 17 *A. L. J.* 269, *Ref.*

[P 255 C 2]

M. L. Agarwala and *Madho Achari Rawat*—for Appellant.

Shiva Prasad Sinha—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for pre-emption. The suit was instituted more than one year after the registration of the deed of sale, and the only question that arises for consideration in appeal is one of limitation.

The property sold consisted of a two pies undivided share out of a 4 pies share which constituted khewat No. 1 owned by Nathoo and Dasaiyan. Nathoo alone has sold his two pies share to the vendee. The interest sold is obviously a fractional undivided zamindari share. Such an undivided share cannot be owned and possessed separately and is therefore not capable of physical possession within the meaning of Art. 10, Lim. Act.

This point is quite clear from the Full Bench case of *Batul Begam* v. *Mansur Ali* (1) which was affirmed by their Lordships of the Privy Council by a judgment reported in *Batul Begam* v. *Mansur Ali* (2). The same view has been followed in *Umrao Beg* v. *Mukhtar Beg* (3). The learned advocate for the appellant argues that because the two pie share had been leased for five years to a lessee Har Prasad, who was collecting rents for the shares from the tenants separately, the property became capable of physical possession. We are unable to accept this contention as it is difficult to understand how the undivided share, which was incapable of physical possession would become one capable of physical possession merely because a lease of it for a fixed period has been granted.

It is unnecessary to consider in this case the further question whether interest in the property capable of physical possession when once leased out become incapable of physical possession.

The appeal is dismissed with costs including in this court-fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

(1) [1898] 20 All. 315=(1898) A. W. N. 61 (F.B.).
(2) [1902] 24 All. 17=28 I. A. 243=8 Sar. 133 (P.C.).
(3) [1919] 17 A. L. J. 269=50 I. C. 80.

A. I. R. 1930 Allahabad 255 (2)

MUKERJI AND BENNET, JJ.

Munawwar Khan——Applicant.

v.

Tasalli Khan—Opposite Party.

First Appeal No. 189 of 1928, Decided on 11th December 1929, from order of Addl. Dist. Judge, Basti, D/- 19th May 1928.

(a) Guardians and Wards Act (8 of 1890), S. 15—Separate guardians for each minor as to person—Property not being large may be left in hands of one if appointment of separate guardians of property would lead to waste.

Where property is not large and the Court has appointed separate guardians of persons of the minors, and the appointment of as many guardians of property as that of persons would

lead to waste, property may be left in the hands of one of such guardians. [P 256 C 2]

(b) Guardians and Wards Act (8 of 1890), S. 15—Guardian of person of minor should be put by Court in position to support minor.

The Court, when it appoints a person as the Guardian of a minor's person should put the person appointed as guardian in a position to support the minor. [P 256 C 2]

M. Waliullah—for Applicant.

Ambika Prasad—for Opposite Party.

Judgment.—This is an appeal by a gentleman who was appointed guardian to two minors, Jhabbu Khan and Zaibunnissa, and who has been now dismissed from his office of guardianship, except in so far as the guardianship of the person of Zaibunnissa is concerned.

it appears, by an order passed sometime in 1923 Munawwar Khan was appointed the guardian of the persons and property of Jhabbu Khan and Zaibunnissa, who are brother and sister. Zaibunnissa, although then a child of 6 had already been married to Munawwar Khan's son. In 1918 one Tasalli Khan the respondent to this appeal, put in an application before the learned District Judge of Basti for the removal of Munawwar Khan from the guardianship of the minors. The charge that he brought against Munawwar Khan was mainly that he mismanaged the minor's property. The learned District Judge called for an account and had the same checked by a commissioner. It was found that a sum of Rs. 83-13-0 was payable by Munawwar Khan. Munawwar Khan had paid himself a sum of Rs. 280 on account of the maintenance charges of Zaibunnisssa. This amount he took for the period of four years. The learned District Judge was of opinion that, as the father-in law of Mt. Zaibunnissa, Munawwar Khan was responsible for her maintenance and, therefore, he was not entitled to pay himself the sum of Rs. 280. The learned Judge removed Munawwar Khan from the guardianship of the person and property of Jhabbu Khan and from the guardianship of the property of Zaibunnissa. He ordered Munawwar Khan to pay back a sum of Rs. 320-14-6 to Tasalli Khan, who was appointed guardian of the property in place of Munawwar Khan.

Munawwar Khan's contention in appeal is that he should not have been called upon to refund the sum of Rs, 280 that he was entitled to a proper amount of money for the support of Zaibunnissa whose guardian he still was, and that the share of the property of Zaibunnisa should have been handed over to him for management.

Taking the last point first, it is abundantly clear from the judgment of the learned District Judge that the property should be left in the hands of Tasalli Khan. The property is not large, and the appointment of two guardians for the management of a small property would only lead to waste. This part of the appeal, therefore, must fail.

Coming to the question of maintenance, past and future, it appears that the guardian appointed by the Court should be put in a position to maintain the minor. We do not propose to decide whether a Mahomedan father in-law is bound to maintain, out of his own property, his daughter-in-law. We think it to be sufficiently clear that the Court, when it appoints a person as the guardian of a minor, should put the person appointed guardian in a position to support the minor. On this broad principle, the order of the learned District Judge is not capable of being maintained.

In the result, we modify the order of the Court below by directing that the sum of Rs.280 taken by Munawwar Khan for the maintenance of the minor need not be refunded to him. We also direct Tasalli Khan, the respondent, to pay Munawwar Khan, in two instalments Rs. 70 per annum for the maintenance of the minor Zaibunnissa, Rs. 35 to be paid on 1st November and Rs. 35 on 15th April of each year. We may point out that Rs. 70 per annum is less than the income of Zaibunnissa from her property, and that after payment of this sum a small amount will be left in the hand of Tasalli Khan to meet the expenses of collection and other necessary expenses. Having regard to the circumstances of the case we direct that the parties shall pay their own costs in this appeal. We leave the order as to costs passed by the Court below undisturbed.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 257

YOUNG, J.

Mohammad Husain—Applicant.

v.

Mt. Nanhi—Opposite Party.

Criminal Revn. No. 461 of 1929, Decided on 29th October 1929, from order of Dist. Magistrate, Bijnor, D/- 4th June 1929.

(a) Criminal P. C., S. 435 (1)—Revision application filed before Sessions Judge or District Magistrate bars another application before the other.

The construction of sub-S. (4) clearly is that where either the Sessions Judge or District Magistrate has had an application in revision, in the same matter, before them, moved by either party, the other local district Court would have no jurisdiction to hear a further application in the same matter : 26 *Mad.* 477 and 110 *P. R.* 1912 *Cr. Ref.* [P 258 C 1]

(b) Criminal P. C., S. 435—District Magistrate cannot order retrial—He can act under S. 436 only—High Court alone can order retrial.

A District Magistrate has no jurisdiction to order a retrial of a case. He can order, if he so wishes, on proper grounds, under S. 436, a further inquiry into the complaint, but it is reserved to the High Court in S. 439, to use any of the powers conferred on a Court of appeal, which would include the right of ordering a retrial. [P 258 C 2]

(c) Criminal P. C., Ss. 253 and 436—Order of discharge should be set aside only when prima facie incorrect and further evidence necessary.

An order of discharge should only be set aside very sparingly and only when it can be said either to be perverse or prima facie incorrect and there is a suggestion that any further evidence might be forthcoming. [P 259 C 1]

K. O. Carleton and *T. A. K. Sherwani*—for Applicant.

A. M. Khwaja—for Opposite Party.

Judgment.—This is an application in revision from an order in revision of the District Magistrate of Bijnor. A complainant brought a charge under S. 406, I. P. C., against the applicant. The matter came before a Special Magistrate and he discharged the applicant. The complainant went in revision to the District Magistrate who, purporting to act under S. 436, Criminal P. C., ordered a retrial. The applicant comes in revision to the High Court against the order of the District Magistrate.

Mr. Khawja, on behalf of the complainant, raises a preliminary objection to the case being entertained by the High Court. He contends that the applicant should not be heard by the High Court, until he has first made an application in revision to the Sessions Judge, and he prays in aid the authority of *Sharif Ahmad* v. *Qabul Singh* (1). In that case a Bench of this Court decided that :

"as far as the practice of this Court is concerned, an application to the lower Court should be cousidered an essential step in the procedure, and that should be so whether the District Magistrate or Sessions Judge has power to grant the relief or not. In future, therefore, failure on the part of the applicant to submit his application to the lower Court will operate as a bar to the application being entertained by this Court."

It is contended that the applicant in this case should have first of all filed an application in revision in the Court of the Sessions Judge as a preliminary step to an application to the High Court in accordance with the ruling quoted above. It is contended that the District Magistrate's Court is an inferior Court to the sessions Court within the meaning of this ruling, and it is contended that this is made clear specially in matters of revision by the explanation following S. 435 (1), Criminal P. C., which enacts that :

"all Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of S. 437."

I am of opinion that this preliminary point is misconceived and has no force. It is to be noted that the case of *Sharif Ahmad* v. *Qabul Singh* (1) was dealing with an application in revision from an order convicting the applicant and sentencing him to a fine of Rs. 10. In that case the conviction was by a Magistrate and no application had been made in the matter in revision to either the District Magistrate or the Sessions Judge. In the matter before me an application in revision has been made to the District Magistrate by the complainant and it is clear, in my view, that sub-S. (4), S. 435, therefore, applies. The sub-section enacts that :

"if an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by either of them."

It is contended by the complainant that this sub-section should be construed so as to mean :

"an application under this section has been made to either Court by the applicant to the High Court,"

and that the sub-section would not apply where the application to the lower

(1) A. I. R. 1921 All. 30=43 All. 497.

Court had been made by the opposite party in the High Court. If effect were given to this contention of the complainant, it would mean that the applicant in revision to the High Court, having already applied to the District Magistrate in revision on the same point, would have then to go to the Sessions Court as a mere formality, because the Sessions Judge would have no power to pass an effective order; he would merely be a sort of conduit pipe through which the applicant would have to travel before he reached the High Court. This would mean additional expense and delay to the parties for no effective purpose. If the Bench of this Court in *Sharif Ahmad* v. *Qabul Singh* (1), had made a rule of practice enforcing such a step upon applicants in revision, I would, of course, be bound by it. But, as I have pointed out, the case of *Sharif Ahmad* v. *Qabul Singh* (1), has no real application to the present case. The construction of sub-S. (4) clearly must be that where either the Sessions Judge or District Magistrate has had an application in revision in the same matter before them, moved by either party, the other local District Court would have no jurisdiction to hear a further application in the same matter. This reading of the subsection accords, in my view, with common sense. I am confirmed in my view on this point of law by decisions of other High Courts in India: see the case of *Kalimuthu* v. *Emperor* (2). In that case an application in revision was made to the Sessions Judge, which was dismissed. The District Magistrate then took up the case suo motu and made an order contrary to the decision of the Sessions Judge. It was held in that case under Cl. (4) of S. 435 that the District Magistrate's order was invalid. In *Emperor* v. *Waryam* (3) the Punjab Chief Court held that S. 435 (4), Criminal P. C., applied to all cases in which either a District Magistrate or a Sessions Judge had taken action, or had refused to take action, under Ss. 435, 436, 437 and 438 of the Code and that the words "further application" in S. 435 mean another application in respect of the order in question of the inferior criminal Court.

(2) [1903] 26 Mad. 477.
(3) [1913] 110 P.R. 1912 Cr.=18 I.C. 886= 117 P.L.R. 1913.

It is clear that the provisions of S. 435 (4) were enacted for the purpose of avoiding a conflict of opinion between two local Courts of co-ordinate jurisdiction.

The preliminary objection having been disposed of, it is contended by the applicant that the order of the District Magistrate in this case, ordering a retrial, ought to be set aside.

In the first place, the order of the District Magistrate is clearly illegal and improper, in that a District Magistrate has no jurisdiction to order a retrial of a case. He can order, if he so wishes, on proper grounds, under S. 436, Criminal P. C., a further inquiry into the complaint; but it is reserved to the High Court in S. 439, Criminal P. C., to use any of the powers conferred on a Court of appeal, which would include the right of ordering a retrial. The order of the District Magistrate is, therefore, bad. It is competent for this Court to amend the order of the District Magistrate to one competent to him under S. 436. But as any order under S. 436 would be clearly improper in this case, it is unnecessary to amend it.

The case for the complainant was that she had paid Rs. 700 to the accused for the purpose of his discharging a debt due by her deceased husband to a certain moneylender one Piare Lal. She alleged in her complaint that the accused had never paid the money to the money lender, but had appropriated it to his own use and, therefore, had committed a criminal breach of trust. The complainant called evidence before the Magistrate. She proved herself that she had paid the money to the accused and that is accepted by both Courts as being a fact. She also called Piare Lal, the moneylender and the moneylender gave evidence that on 23rd October 1928, Mohammad Husain, the accused applicant, paid him Rs. 700, and that he (Piare Lal) had struck the debt for this amount out of his bahikhate and returned the bond to the applicant. The prosecution closed its case. On the evidence before him the Magistrate came to the conclusion, which was entirely proper, that the prosecution had failed to make out any case under any section of the I. P. C. It is clear, of course, that no criminal breach of trust had been proved. The prosecution had pro-

ved the receipt of the money by Mohammad Husain and the payment of it by him to the moneylender, as he was instructed to do. The applicant was, therefore, entitled, if he felt so inclined, to submit that no case had been made out and that it was unnecessary for him to make a statement or enter upon his defence. The District Magistrate, however, in an application in revision has delivered himself of a judgment which it is almost impossible to understand. He says,

"it is clear that the money had been deposited by the accused with Piare Lal, but it was deposited not on behalf of the plaintiff but on behalf of the accused himself."

As there was no evidence of this before the learned Magistrate, it is difficult to know how he so found, but even if the facts be as stated, it could not make the accused guilty of a criminal offence. It is perfectly clear that the applicant was entitled, on the evidence of the prosecution itself, to an order of discharge.

It has been laid down in this Court on many an occasion that an order of discharge should only be set aside very sparingly and only when it can be said either to be perverse or prima facie incorrect and there is a suggestion that any further evidence might be forthcoming. In this case it is impossible to say that the order was perverse or incorrect, and it has never been suggested that the prosecution did not call all the evidence it could on this matter, or that it would be possible on any further enquiry to call any further evidence. Indeed, on the evidence of the money lender himself, it would be impossible to call any other evidence which could alter the nature of the finding of the Court. On that evidence alone the accused was entitled to be discharged. I accept the application, discharge the order of the District Magistrate and restore the order of the trial Court.

V.B./R.K. *Application allowed.*

A. I. R. 1930 Allahabad 259

DALAL, J.

Anand Behari Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 472 of 1929, Decided on 2nd December 1929.

Criminal P. C., S. 167 — Magistrate has no power to investigate and keep person in custody for purposes of investigation—Criminal P. C., S. 202.

Where a Magistrate receives a complaint he should either himself examine one or more complainants and take action under S. 202, or if he is taking action on his own knowledge, he should transfer the proceedings completely to another Magistrate so that Magistrate may proceed to enquiry or trial after recording the statement of the complainant. It is also open to him to make report to police who can take action under S. 167. But so far as can be gathered from provisions of the Code a Magistrate has not the powers of a police officer to investigate and keep an accused person in custody for the purposes of such investigation : custody can only follow where definite charge has been made and complainant has been examined. [P 259 C 2 P 260 C 1]

Kumuda Prasad—for Applicant.

U. S. Bajpai—for the Crown.

Judgment. — The learned Government Advocate has now obtained particulars and I am made acquainted with the proceedings taken by the District Magistrate of Farrukhabad. It appears that the District Magistrate received a complaint from a patwari school teacher that he had not received his salary during the time he was on leave. It appears to have been the duty of the applicant Anand Behari Lal to distribute the pay, and the District Magistrate suspected that Anand Bihari Lal was guilty of embezzlement. He immediately issued a warrant for Anand Bihari Lal's arrest and directed a subordinate Magistrate to hold an inquiry. There has been no examination of the complainant as is emphatically directed in S. 200, Criminal P. C., see S. 202 (1) (a). There does not appear to be any authority given to a Magistrate to keep an accused person in custody just as is given to the police under S. 167 of the Code to enable the police to carry out further investigation. In my opinion custody can follow only where a definite charge has been made and the complainant has been examined. The learned Government Advocate suggested that the District Magistrate had taken action under S. 190 (1) (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence had been committed. If such was the case the District Magistrate had no jurisdiction under S. 191 and he ought to have transferred the inquiry preparatory to commitment to sessions

or trial to a subordinate Magistrate and was not entitled to take action under S. 202 himself. It is apparent that he did not make a complete transfer from the fact that he entertained the application for bail himself on 20th November last. It is desirable that action should be taken according to law. Either the District Magistrate himself should examine one or more complainants and take action under S. 202 of the Code, or, if he is taking action on his own knowledge, he should transfer the proceedings completely to the Court of a Subordinate Magistrate so that Magistrate may proceed to inquiry or trial after recording the statement of the complainant. So far as can be gathered from the provisions of the Code, a Magistrate has not the powers of a police officer to investigate and keep an accused person in custody for the purposes of such investigation. It was also open to the District Magistrate to make a report to the police who could then have taken action under S. 167 of the Code.

As matters stand at present Anand Bihari Lal is entitled to bail. I direct his release on bail on his own bond in Rs. 2,000 with two sureties in Rs. 2,000 each to the satisfaction of the District Magistrate. If there is any apprehension subsequently that Anand Bihari Lal in spite of giving sureties is likely to abscond any Magistrate trying the case is permitted to cancel this order for reasons to be stated in writing and order the arrest of Anand Bihari Lal.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 260

DALAL, J.

Sultan Singh—Applicant.

v.

B. Maya Ram Radha Swami—Opposite Party.

Criminal Misc. Case No. 379 of 1929, Decided on 11th December 1929.

Criminal P. C., S. 491 (1) (b)—Power given by S. 491(1) (b) has to be exercised with caution and not in case where there is dispute as to who should be guardian of minors.

The power under S. 491 (1) (b) is to be exercised in matters of urgency, where, for instance the father is suddenly deprived of the custody of his sons and there is danger to the life of the sons in the transferred custody. It is a remedy for a person deprived of his liberty. The power therefore has to beexercised with caution and not in a case where there is a dispute merely as to who should be guardian of particular minors. [P 260 C 2]

Kumuda Prasad, H. P. Sen, K. D. Malaviya and *Hari Ram Jha*—for Applicant.

B. Malik—for Opposite Party.

Order.—The applicant Sultan Singh is father of two minor sons and the opposite party Maya Ram is father of the applicant. The minor boys are at present under the charge of Maya Ram. They have been, according to the applicant's own affidavit, under the charge of Maya Ram since 1925. This application is made for a direction of the nature of a habeas corpus under S. 491 (1) (b), Criminal P. C. That section gives power to this Court whenever it thinks fit to direct that a person illegally or improperly detained in public or private custody within the limits of its appellate criminal jurisdiction may be set at liberty. In the very nature of things the power would be exercised in matters of urgency, where, for instance, the father is suddenly deprived of the custody of his sons and there is danger to the life of the sons in the transferred custody. It is stated in Wharton's Law Lexicon that this, the most celebrated prerogative writ in the English Law, is a remedy for a person deprived of his liberty. The power, therefore, has to be exercised by this Court with caution and not in a case where there is a dispute merely as to who should be guardian of particular minors. In the present case the applicant has permitted his sons to be in the custody of their grandfather for four years and this application is merely a cheap way in which he desires to establish his guardianship over the boys. It further appears that even prior to 1925 the boys were living with Maya Ram. Such a statement has been made in an affidavit of Maya Ram and not been denied by a counter-affidavit filed by Sultan Singh. The case, therefore, clearly is not one of urgency. There may be some difference of opinion between High Courts as to whether a suit should lie in case of Sultan Singh never before having been in charge of his boys, or whether S. 25, Guardians and Wards Act would be applicable : see *Achratlal* v. *Chimanlal* (1) and *Sukhdeo Rai* v. *Ram Chandar*

(1) [1916] 40 Bom. 600 = 37 I. C. 215 = 18 Bom. L. R. 582.

Rai (2). However that may be, a civil remedy is open to the applicant wherein a District Court or a civil Court may fully inquire as to whose custody would be most beneficial to the sons. This Court is not the Court for such an inquiry. There is no cause so far as can be made out from the affidavits for interference. I dismiss the application.

V.S./R.K. *Application dismissed.*

(2) A. I. R. 1924 All. 622=46 All. 706.

A. I. R. 1930 Allahabad 261

KING, J.

Bhaya Lal—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 486 of 1929, and Criminal Appeal No. 710 of 1929, Decided on 14th December 1929.

Court-fees Act, S. 19 (17)— Application by counsel on behalf of, and purporting to be from, prisoner is exempted under S. 19 (17).

An application filed by an advocate or counsel on behalf of the prisoner and purporting to be from the prisoner himself, is a "petition by a prisoner" within the meaning of S. 19 (17), and the fact that it was an adjournment application made by the counsel for his personal convenience is immaterial : *A. I. R.* 1922 *U. B.* 14; 14 *N. L. R.* 77 and *A. I. R.* 1924 *Rang.* 160, *Rel. on.* [P 262 C 1]

Sailanath Mukerji—for Applicant.

U. S. Bajpai—for the Crown.

Judgment.—This is a reference for a decision whether a certain application filed by an advocate on behalf of a prisioner in jail is chargeable with a court-fee.

The application in question was filed by an advocate on behalf of the prisoner on 12th November 1929, and purports to be from the prisoner himself. The application runs as follows:

"That my counsel will be absent from Allahabad between 14th and 21st November 1929, both days inclusive. It is prayed that the above mentioned case be not put up on the days list between the above mentioned dates."

The learned advocate, who appears on behalf of the advocate who presented the petition, has argued that the application is exempted from liability to court-fee under S. 19 (17), Court-fees Act, 1870. This clause runs as follows:

"Petition by a prisoner or other person in duress or under restraint of any Court or its officers."

Undoubtedly the application in question is a petition on behalf of a prisoner, and the only question is whether it should be held to be a "petition by a prisoner" within the meaning of S. 19 (17).

It is conceded that certain classes of applications made to the High Court on behalf of prisoners are in practice held not to be chargeable with court-fee, for example:

(1) Applications for bail on behalf of prisoners in jail. (2) Applications for summoning records of other cases which are required for arguing the prisoners' appeal. (3) Applications for revision on behalf of prisoners in jail.

Also it is conceded that appeals on behalf of prisoners in jail are admitted by this Court without payment of any court-fee although such appeals may not be signed by the prisoner in jail or come from the prisoner through the Superintendent of the jail.

It appears to have been tacitly conceded, therefore, in view of the practice followed in such cases, that applications which are made on behalf of prisoners in jail are considered as equivalent to applications by prisoners.

I have been referred to several reported cases in which this question has been considered by different High Courts. In the case of *Jagannath Kahar* v. *Emperor* (1), it was held by the Upper Burma Judicial Commissioner's Court that an application for bail signed only by the advocate of a prisoner is an application made by the prisoner himself, and under S. 19 (17), Court-fees Act, it is not required to be stamped. The view taken by the Court was that an application made by the advocate of a prisoner should be treated as equivalent to an application by the prisoner himself.

In the case of *Emperor* v. *Maroti Teli* (2), it was held by the Nagpur Judicial Commissioner's Court that a petition of appeal presented by a prisoner not personally but through his pleader is exempted from court-fees under Cl. 17, S. 19.

In the case reported in *A. I. R.* 1924, *Rangoon*, p. 160 it was held by the Rangoon High Court that a petition of appeal or revision signed and filed by an advocate or pleader on behalf of a prisoner under an authority signed by a

(1) A. I. R. 1922 U. B. 14=4 U. B. R. 72.

(2) [1918] 14 N. L. R. 77=45 I. C. 158=19 Cr. L. J. 494.

prisoner need not bear a court-fee stamp. At the present day it is not necessary for the prisoner to give his advocate a written and signed authority, but the reason for the decision still holds good, namely, that it is none the less a petition by a prisoner because it is filed on his behalf by an advocate.

I agree to the view taken by the Courts in these cases. In interpreting a fiscal statute the Court is entitled to demand that the liability of the subject should be clearly established, and in the present case I see no reason why the maxim "qui facit per alium facit per se" should not be applicable. No cases have been shown to me in which a contrary view has been held.

It has been argued by the learned Government Advocate that, although the petition purports to be on behalf of the prisoner, practically it is in the interests of the advocate himself. He contends that the petition was not really in the interests of the prisoner because it meant that the hearing of his appeal would have to be adjourned and that, therefore, he would not have a chance of release from jail so soon as he would otherwise have done. I am not prepared to accept this contention because when a prisoner appoints an advocate to conduct his appeal he presumably wishes the advocate to do so personally. If the advocate appointed is for some reason unable to appear on certain dates and desires that the appeal should not be heard during his absence I think that he would be considered to be acting in the interests of his client if he asks for an adjournment in order to enable him personally to argue the case as desired by his client. In the present case although the advocate's personal convenience was no doubt partly responsible for the application I am not prepared to hold that the application was not made, partly at least, in the interests of the prifoner.

In my opinion, therefore, the application in question should be held te be made "by the prisoner" although it was actually presented through his advocate on the prisoner's behalf. It follows that under S. 19 (17) the application is not chargeable with any court-fee and I decide accordingly

V.B./R.K. *Reference answered.*

A. I. R. 1930 Allahabad 262

MEARS, C. J.

Gokul Prasad and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 73 of 1929, Decided on 4th March 1929.

(a) Criminal P. C., S. 526.—Ground for transfer.

The fact that a Magistrate, fifteen years before, had been a class-fellow of somebody who was either a complainant, a respondent or an advocate in the case is not a fit ground for transfer, [P 262 C 2]

(b) Legal Practitioners Act, S. 13—Mere fact that opposite party happens to be member of the same profession is not a circumstance which entitles a member of the Bar to refuse to undertake the case against him: *See A. I. R.* 1929 *All.* 337.

It is very important that men at the Bar should understand that they are members of a public profession. That is by their very calling they engage and undertake to act for anybody who fulfils certain conditions. Therefore if a client comes to them with proper instructions and prepared to pay a fair and proper fee and invites them to undertake a case of a kind, which they are accustomed to do and they refuse, such refusal amounts to professional misconduct and should be punished as such. [P 263 C 1]

K. N. Laghate—for Applicants.

The Government Advocate U. S. Bajpai—for the Crown.

Order.—This is a transfer application in which Gokul Prasad and others ask that a case now before a Special Magistrate, Captain Bijai Prasad Singh, may be transferred to some other competent Magistrate's Court outside the district of Benares.

The affidavit in support of this application is untrue in one important respect. Para. 11 runs as follows:

"That the learned trying Magistrate was a class-fellow of B. Sahadeo Singh, Advocate, and is on terms of intimacy with him."

The statement "on terms of intimacy with him" is a falsehood. The Magistrate in his explanation has said:

"About fifteen years ago Babu Sahadeo Singh Advocate, was my class-fellow for a few months. I knew him then very casually and after that I have never met (him) as a friend or intimate and have never exchanged any social visits as he is not known to me well."

If a case was to be transferred on every occasion on which a Magistrate fifteen years before had rubbed shoulders with somebody who was either a complainant, or a respondent or an advocate in the case the whole of the

judicial work in this country would come to an end.

The learned Magistrate in his explanation has said :

"that the real reason underlying this application is not any apprehension that the applicants will fail to receive justice from me but has been done to harass the other side."

The incidents out of which this case arises are said to have taken place on 2nd November 1928, and we are now in the month of March and the case has not been concluded.

I refuse this application for transfer. A copy of this order is to be sent to the learned Magistrate with an expression of my wish that he will use all reasonable expedition to sweep this, and apparently some connected cases, off his file as scon as he can.

There is one other point that should be mentioned, and that arises from a statement contained in para. 15 of the affidavit which runs as follows :

"That legal practitioners of influence having been involved in the case as accused, the petitioners have failed to get standard (sic) legal assistance from the local Bar."

It is very important that men at the Bar should understand that they are members of a public profession. That is by their very calling they engage and undertake to act for anybody who fulfils certain conditions. Therefore if a client comes to them with a proper instructions and prepared to pay a fair and proper fee and invites them to undertake a case of a kind which they are accustomed to do and they refuse, such refuse amounts to professional misconduct, and should be punished as such. I should like this to be communicated by the Magistrate to any of the members of the local bar who appear not to be aware of that rule. That is to say, a man at the Bar has no right whatever to refuse a case if proper instructions are given and proper fees are tendered to him and the work is of a class which he is accustomed to do. The mere fact that the opposite party happens to be a member of the same profession is not a circumstance which entitles him to refuse to undertake the case.

K.N./R.K. *Application rejected.*

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SEN, J.

Luttur and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 675 of 1929, Decided on 11th December 1929, by Addl. Sess. Judge, Benares, D/- 16th September 1929.

(a) Criminal P. C., S. 526 (8)—Section is mandatory — Deviation makes proceedings illegal.

Section 526 (8) embodies a statutory mandate which Courts ought to respect and obey and consequently if subsequent to an application under that section the Magistrate without granting adjournment proceeds with the case, the trial becomes illegal and not merely irregular and curable under S. 537. *A. I. R.* 1924 *All.* 533; *A. I. R.* 1928 *All.* 660 and *A. I. R.* 1923 *All.* 268, *Rel. on.* [P 264 C 1, 2]

(b) Interpretation of Statutes—Where rule of law is absolute in terms, it must be given effect to—Criminal P. C., S. 526 (8).

Where a rule of law is absolute in terms, the said rule has got to be observed and duly given effect to, and it is no province of a Magistrate to deviate from the said rule. [P 264 C 2]

S. N. Verma—for Applicants.

M. Waliullah—for the Crown.

Judgment.- The facts of the case which have given rise to this reference are set out in extenso in the judgment of the Additional Sessions Judge of Benares, dated 16th September 1929, and require no recapitulation.

Luttur Balai, Ram Nath and Raghu were on their trial before a Special Magistrate of Jaunpur, under S. 324, I. P. C. During the progress of the trial one Luttur had applied to the Magistrate under S. 526 (8), Criminal P. C., for stay of proceedings to enable him to move the High Court for the transfer of his case. The application was granted, and the case was adjourned. Luttur did not apply to the High Court for the transfer of the case. He applied to the District Magistrate for a transfer, but his application was rejected, and he submitted to the order.

On 17th May 1929, Balai made a similar application, but his application was refused. A second application was made by Balai, on 18th May 1929, but this application shared the same fate. Between 18th May, and 23rd May 1929, there were holidays in the lower Courts and also in the High Court consequent upon the Id-uz-Zoha. On 23rd May

1929, Balai presented an application in the Court of the Magistrate stating that he had been to Allahabad to instruct his counsel to make the necessary application under S. 526, Criminal P. C,, for the transfer of his case and that the application was going to be made immediately upon the opening of the High Court. He prayed further for the adjournment of the case till the matter had been finally disposed of by the High Court. This application was dismissed. Between 17th May 1929, and the date of the actual decision of this case, the proceedings in the Court of the Magistrate continued. The proceedings terminated in the conviction of all the four accused persons upon whom non-bailable sentences were passed. They moved the learned Additional Sessions Judge of Benares for the revision of the conviction, and the matter has been submitted to this Court under S. 438, Criminal P. C.

Under S. 526 (8) where an accused notifies to the Court before which the case is pending his intention to make an application under this section, the Court is bound to adjourn the case for such a period as will afford a reasonable time for an application to be made to the High Court, and an order obtained thereon. S. 526 (8) embodies a statutory mandate, which the Courts below ought to respect and obey. There has been a catena of decisions of this Court and of other High Courts in favour of the view that the rule referred to above is imperative. Some of the later decisions may be referred to. *In re, Sartaj Singh* v. *Emperor* (1), Sulaiman, J,, held that after the application for transfer had been made to a Magistrate, the trying Magistrate should not have recorded any evidence at all but should have adjourned the case at once. In *Walidad Khan* v. *Emperor* (2) Dalal, J., held that the provisions of S. 526 (8), Criminal P. C., were mandatory, and must be enforced. In *Bacridi* v. *Emperor* (3), Walsh and Banerji, JJ., held that where an application under S. 526 (8), was presented, it was the duty of the Court to stay all judicial proceedings.

The learned Magistrate has submitted an explanation, which does not seem to me to be at all satisfactory. Where a rule of law is absolute in terms the said rule has got to be observed and duly given effect to, and it is no province of a Magistrate to deviate from the said rule upon any grounds of expediency. Further, it does not appear that, when Luttur made the application under S. 526 (8), he was doing so on behalf of himself and the other three other co-accused. The Magistrate might well have asked the other three accused persons at the time as to whether they too wanted to avail themselves of the adjournmeut to make an application to the High Court jointly with Luttur or severally on their individual account. This was not done. In refusing the applications, dated 17th and 18th May 1929, the Magistrate has acted in contravention of an absolute and imperative enactment. The progress of the case in his Court between 17th May 1929, and the date, when the application of Balai was finally rejected by the High Court, was illegal, and not a mere irregularity cured by S. 537, Criminal P. C.

I accept the recommendation of the learned Additional Sessions Judge, set aside the conviction and sentence of the applicants and direct a retrial. The witnesses examined between 17th May 1929, and the date, when the final order was passed by this Court, on the application of Luttur, should be recalled, and an opportunity afforded to the accused persons to cross-examine them. Let it be distinctly understood that no aspersion is cast upon the trying Magistrate in any shape or form. There can be no doubt that the said Magistrate will deal with the case fairly and justly. In view of all the circumstances of the case, I do not think that I should make an order of transfer of this case from the Court of Mr. Baqar Hussain to that of any other Magistrate. Let the papers be returned.

V.B./R.K. *Order accordingly.*

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(1) A. I. R. 1924 All. 533.
(2) A. I. R. 1928 All. 660.
(3) A. I. R. 1928 All. 268.

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Full Bench

BOYS, YOUNG AND SEN, JJ.

Emperor

v.

Himanchal Singh—Respondent.

Criminal Appeal No. 539 of 1929, Decided on 16th January 1930, from an order of Special Magistrate Second Class Shahjahanpur, D/- 8th October 1928.

(a) Interpretation of Statutes—Doubt as to correct interpretation — Interpretation favourable to person to be penalized should be adopted.

Where there is reasonable ground for doubt as to the correct interpretation of an enactment that interpretation should be adopted which is most in favour of the person to be penalised, especially in fiscal and penal statutes.

[P 267 C 1]

(b) Interpretation of Statutes — Matter doubtful—Interpretation preventing abuse of process of law should be put.

Where the matter is in doubt as to the interpretation of a statute, that interpretation should be given to the statute which will prevent or will not permit an abuse of the process of the law. [P 267 C ., 2]

(c) Penal Code S. 174—Per *Boys* and *Young, JJ.*,)—**Citation under U. P. Land Revenue Act S. 147 is not summons — Failure to attend does not make person guilty under S. 175—U. P. Land Revenue Act S. 147** (*Sen, J.*, contra).

(Per *Boys and Young, JJ.*) A citation issued to a person who is in arrear of Government revenue under S. 147, Land Revenue Act is not a summons within the meaning of S. 174, Penal Code and the person so iserved is not bound to appear in obedience to it and by his failure to attend he is not guilty under S. 174, Penal Code : (*Sen, J. Contra*) (*Cases considered*). [P 265 C 2 ; P 268 C 2]

U. S. Bajpai—for the Crown.

K. N. Malaviya—for Respondent.

Boys and Young, JJ.—This is an appeal by the Local Government from an order passed by a Magistrate acquitting Himanchal Singh upon a charge of an offence under S. 174, I. P. C. The Magistrate acquitted the accused following, as he was bound to do, the decision of two Judges of this Court in *Emperor* v. *Bhirgu Singh* (1). The Local Government being dissatisfied with the decision in that case that a citation to appear issued under S. 147, Land Revenue Act (U. P.), 3 of 1901, was not a summons, notice or order which the recipient was legally bound to obey have appealed from the decision of the Magistrate. Without waiting to see whether the Bench of two Judges of this Court before whom the appeal might come agreed with the decision of the two Judges of this Court above mentioned, the learned Government Advocate, presumably under instructions from the Local Government, secured an immediate reference by the Chief Justice of the appeal to a Full Bench. We think that the Chief Justice would not have referred the matter to a Full Bench at all if the point we have mentioned had been brought to his attention. If the Bench of two Judges before whom the appeal would have come in the ordinary course agreed with the two Judges who had already decided the question, there would have been an end of the matter. If, on the other hand, they had disagreed, it would have been open to them to ask the Chief Justice, in accordance with the ordinary procedure to refer the matter to a Full Bench.

The question now before us is whether a citation to appear issued under S. 147, U. P. Land Revenue Act, 3 of 1901, is a summons, notice or order which the recipient is legally bound to obey.

The facts are simple. Himanchal Singh was in arrears in the payment of Government revenue for a sum of Rs. 108-6-0. Whether or no a writ of demand had or had not already issued to him under S. 147 we are not informed ; nor is it in fact material. The document which was served upon him is a citation to appear, purporting to be drafted in accordance with form 2 of the forms drawn up by the Local Government by virtue of its power under S. 234 Revenue Act. This document was treated in the argument before us by both sides as if it was a document of a composite character embodying a writ of demand and a citation to appear in the one document. But this is not so as a reference to the forms will show. The English form does not contain an unconditional intimation to appear. It requires the recipient to appear on a certain date and at a certain hour " if the entire arrears plus the talbana for this citation are not sooner paid. The vernacular of the document which was actually served calls upon him to appear if the amount "is not paid with the greatest promptitude" (jaldtar ada na kardiya jawe".) The translation is not accurate but the inaccuracy is im-

(1) A. I. R. 1927 All. 122=49 All. 205.

material. The document further bears a foot-note intimating that failure to attend is punishable (in the criminal Courts) under S. 174 I. P. C. This foot-note manifestly begs the question and is immaterial, except so far as it may indicate a desire to give to the intimation a force which the Act itself certainly does not expressly give it. The Local Government has power to make rules and prepare forms under S. 234, but manifestly, as S. 234 itself declares, only rules "consistent with this Act."

It is common ground that the citation was served upon Himanchal Singh personally and that he did not attend, nor paid the arrears within the time specified in the citation. Himanchal Singh was put upon his trial under S. 174, I. P. C. He admitted that the citation was served upon him and that he did not attend or deposit the amount of the arrears. The Magistrate describes this as a plea of guilty. It clearly was not a plea of guilty of an offence under S. 174, I. P C. But this ceased to be of importance again in view of the fact that the Magistrate acquitted him in obedience to the ruling to which we have referred. It has only been necessary to mention these immaterial matters because they did in fact form the subject of argument, and it is necessary to sweep them aside. Before giving briefly our reasons for holding that the citation to appear was not a summons, notice or order which the recipient was legally bound to obey by appearing within the meaning of S. 174, I. P. C. we will narrate as briefly as possible the history of the previous decisions on the point.

In 1909 the Sessions Judge of Benares, Mr. E. H. Ashworth, subsequently Ashworth, J., referred a conviction under S. 174 to this Court on the ground that in his view it was an illegal conviction in that the accused was not bound to appear. The matter came before Knox, J. and Tudball, J. and was registered as '*Sarju Singh Reference No.* 320 *of* 1909.' On 3rd August 1909, they recorded the following brief judgment :

"In our opinion a citation issued by a Tahsildar is an order to appear before the Tahsildar which the person cited is bound to obey. The intentional disobedience of it is therefore an offence under S. 174."

No reasons for this view were given. The next case, *Emperor* v. *Sheopal Singh* we are unable to give the date but the case is quoted in the next case to which we shall refer) came before Mr. Piggott, A. J.C., Oudh, subsequently Piggott, J., of this Court. The full judgment not being available to us we are only able to note that he held that the accused was not bound to obey the citation, basing his judgment on the report of the Select Committee during the passage of the bill.

In 1909 Mr. Chamier, Judicial Commissioner, and Mr. Evans, A.J.C., Oudh, held that the accused was bound to appear in obedience to the citation. They rejected the decision of Mr. Piggott because he had relied upon the report of the Select Committee. They quoted the form of the citation and then rejected the argument (the only one apparently urged) that a citation was merely an alternative to a writ of demand, because if a citation merely took the place of a writ of demand, the citation itself would be useless as it did not make any demand. No other consideration was apparently drawn to the attention of the learned Judges and they gave no further reason for holding that the recipient was bound to appear in accordance with the citation. This case is *Rambali* v. *Emperor* (2).

The next case is that to which we have already referred, *Emperor* v. *Bhirgu Singh* (1) decided by Dalal, J., and one of the members of the present Full Bench, Boys, J. It was held that the recipient was not legally bound to obey the citation. This appears to have been the first case in which the matter was at all fully argued and reasons are given at length for the decision to which reference may be made.

In the following year the matter came up before a single Judge of this Court, Sulaiman, J., in *Emperor* v. *Banwari* (3). The learned Judge said :

"If the matter were entirely res integra I would have been inclined to hold "that the citation was at any rate a notice, if not a summons or order, and that, therefore, its disobedience was covered by S. 174, I.P.C."

He held himself, however, bound by the last decision to which we have referred. It will be noticed that the learned Judge did not consider whether, even though

(2) [1910] 13 O. C. 55=5 I. C. 805.
(3) A. I. R. 1927 All. 49=49 All. 215.

the citation might be regarded as a notice, it was a notice that the recipient was legally bound to obey. He proceeded to set out in detail the reasoning in *Emperor* v. *Bhirgu* (1) and then added "the view taken by the Bench certainly prevents the abuse of the power to issue a citation to appear and then to arrest the defaulter, which may be an intolerable hardship . . . . . It may be doubtful whether such a procedure was contemplated by the legislature when the Act was passed."

Lastly, the question came up in 1927 before Stuart C. J., and Pullan, J., in the Chief Court at Lucknow in *Chandrika Singh* v. *Emperor* (4). The learned Judges delivered separate judgments to which reference may be made. It is only necessary to point out that Stuart, C. J., referred to the complete difference of opinion in regard to the effect of the citation between the decisions in *Rambali* v. *Emperor* (2) and *Emperor* v. *Bhirgu* (1), and further stated ·

"why the word citation was used in this portion of Local Act, 3 of 1901, I am in no position to decide,"

though he added that the word "citation" was possibly used in Chap. 8 and the word "summons" in Chap. 9, because Chap. 8 is concerned with the purely fiscal act in collecting land revenue, while Chap. 9 is concerned with the procedure of revenue Courts and Revenue Officers exercising judicial or quasi judicial functions. It may be noted further that Pullan, J., relied to some extent at least on the threat in the foot-note to the citation form to which we have referred.

These are all the cases to which we have been referred. It would seem that a mere recital of these cases is sufficient to show this much at least, that there is room for doubt as to the force to be given to the term "citation to appear." That being so, there comes into force immediately the principle of interpretation of a statute that where there is reasonable ground for doubt as to the correct interpretation of an enactment, that interpretation should be adopted which is most in favour of the person to be penalised. This principle is of general application to fiscal and penal statutes. Here we have both a fiscal and a penal statute.

Next, there is the principle of interpretation that where the matter is in doubt, that interpretation should be given to the statute which will prevent or will not permit of an abuse of the process of the law. The learned Government Advocate, putting as best he could the case for the appellant Local Government, was unable to suggest to us why the Local Government should be so anxious to secure the strict interpretation, for which he pleaded, of the word "citation." If the defaulter fails to appear in response to the citation, and even without the issue of a citation, the Revenue Officer has power to issue a warrant of arrest. The only motive underlying the desire of the Local Government to put a strict interpretation on the word "citation" which anybody could suggest was that it would save the Revenue Officer the trouble of issuing a warrant of arrest and of bringing the defaulter before him under arrest. He could, if the defaulter was bound to appear in answer to a citation, issue the citation, and then having the defaulter before him say to him:

"Now come to terms such as I can accept, or I will forthwith arrest you."

Can anybody doubt but that this would be an abuse of the process of the law. No other motive is suggested to us. We should therefore give effect so far to the principle that where there is doubt, that interpretation should be put on the enactment which will prevent an abuse of the legal process.

Having stated these two principles we next turn to the question, what explanation is there of this special use of the word "citation" in S. 147 when it is used nowhere else in the whole Act. When the N. W. P. Land Revenue Act, 19 of 1873, and the Land Revenue Act of Oudh, 17 of 1876, were consolidated into the present U. P. Act 3 of 1901, the draftsman had to consider whether he should or should not use the word "a summons to appear" which appeared in the Oudh Act, and he substituted, and can only be held to have deliberately substituted, the word "citation." It is not the case that the word was used carelessly or with some vague idea that it did not really matter whether one used the word "summons," "citation," "notice" "call upon," etc. The draftsman had the word "summons" before his eyes. He had not the word "citation." He deliberately substituted "citation" for "summons." What wa

(4) A.I.R. 1928 Oudh 122.

the reason for this? No one has been even able to suggest that there was any reason except possibly, and that is in favour of giving the less strict interpretation to the word, that in Chap. 9 where the word "summons" in used the legislature was dealing with the procedure of the Courts, and in Chap. 8 he was dealing only with the proceedings of officers for the collection of the amounts due to Government. There would be a natural inclination to substitute the milder word in the latter case for the stricter word used in the former. This is the only possible explanation that occurs to us or that has been offered by anybody of the deliberate substitution of the term.

Much argument has been directed to suggest that a citation is in fact equivalent to a summons carrying with it the consequence enacted in S. 174, I. P. C. It may be that it is so in some cases. It does not follow that it is so in all. But in fact even if it could be held to be merely a variant of the word "summons," and that the two words are interchangeable, even that will not help the appellant, for it is manifest that the word "summons" is sometimes used in cases where the recipient is not bound to obey the summons. It is in itself a striking fact that nobody has ever yet heard of a man being prosecuted under S. 174, I. P. C., for failing to obey a summons to attend a Court as a witness. The invariable procedure followed, if the attendance of the witness is essential, is to issue a warrant for his arrest; and indeed in the Civil Procedure Code express provision for this is made in S. 32, in which there is no reference to S. 174, I. P. C. But more than this, we find the word "summons" actually used in the very Act which we are considering in S. 201 where it is laid down in the proviso that no order shall be altered without previously summoning the party, in whose favour that order was passed, to appear. Manifestly here no liability under S. 174, I. P. C., can arise. Again, where it is intended that failure to appear even in answer to a summons should carry the consequences laid down in S. 174, I. P. C., we find it expressly stated, which declares that "all persons so summoned shall be bound to attend." As to citations, to refer to another Act, we find that where it is intended that failure to obey a citation should be penalised, that intention is made the subject of express enactment, e. g., Act 21 of 1866, Ss. 10 and 11, where it is declared that the respondent, in other words, the defendant in the suit, shall be served with a citation to appear, and that in default of his or her appearance, liability to punishment under S. 174, I. P. C., follows. Lastly, we may note that to give the less strict meaning to the term "citation," if indeed the more severe interpretation be permissible at all, is in accordance with a reasonable interpretation of the scheme of the Act. The Tahsildar has under S. 145 to certify a statement of account showing the existence of the arrear, of its amount and of the person who is the defaulter. It is declared that this statement of account shall be conclusive evidence of the facts stated in it. It is manifest, however, that this cannot possibly be held to prevent the Tahsildar from amending the certified statement of account if he desires to do so. If he has issued a writ of demand in accordance with that statement of account, and either in consequence of information received from the alleged defaulter, or from any other source, he has reason to doubt the correctness of the statement or the desirability of proceeding to extreme measures without further light on the matter, it is reasonable to suppose that he should be empowered to give the alleged defaulter an opportunity of appearing before him and explaining either that he is not the person liable, or that he is not liable for the whole amount claimed, or of offering to make an arrangement which will not necessitate proceeding to extreme measures. It is not necessary to elaborate this. We have already noted above that no other proper motive can be suggested as underlying the use of the word "citation."

For the reasons we have given we hold that the citation was not a summons, notice or order which Himanchal Singh was legally bound to obey, and we dismiss the appeal.

Sen, J.—This is an appeal by the Local Government from an order, passed by a Magistrate, acquitting Himanchal Singh of an offence under S. 174, I. P. C.

Himanchal Singh was in arrear of Government revenue for a sum of Rs. 108-6-0 on account of Rabi 1332 Fasli-

A writ was issued to him under S. 147, United Provinces Land Revenue Act (Act 3 of 1901) on 11th July 1928. This document was of a composite character being a writ of demand and a citation for appearance, if the demand for revenue is not complied with. The document is in a printed form which is headed as "summons for attendance." The wording of this document is substantially in accord with the prescribed form to be found in the Land Revenue Manual for the United Provinces, which is a Government publication. The document is addressed to Himanchal Singh, who is directed to attend the Court of the Tahsildar of Tahsil Shahjahanpur, on 26th July 1928, at noon, if the amount of arrears together with the costs of the process fee is not paid with the greatest promptitude (*Jaldtar ada na kar diya jawe*). The order was served upon Himanchal Singh personally, on 17th July 1928. The document bears the following endorsement by Himanchal Singh :

"I am informed of your order and received a copy of the summons through the peon."

This document contained a warning note :

"A failure to attend will be punishable in the criminal Courts under S. 174, I. P. C."

Himanchal Singh did not pay the amount of arrears together with the costs of the process fee nor did he attend the Court of the Tahsildar, on 26th July 1928, as he was directed to do. Proceedings were initiated against him under S. 174, I. P. C., and he was eventually put upon his trial before Khan Bahadur Maulvi Muhammad Mansub Hasan Khan, Special Magistrate of Second Class. The statement of the accused was recorded, on 5th October 1928, under S. 364, Criminal P. C., and the accused admitted that the summons was issued to him and that he neither deposited the revenue nor attended the Court. The Magistrate acquitted him. on 8th October 1928. The Magistrate held that, though the accused pleaded guilty, no offence was committed by him under S. 174, I. P. C., for non-attendance in the Court of the Tahsildar and reliance was placed upon a Division Benth ruling of this Court in *re, Emperor* v. *Bhirgu Singh* (1) in support of this view.

The Magistrate is not quite accurate in stating that the accused pleaded guilty before him. The accused was not asked whether he had committed an offence under S. 174, I. P. C., and he did not plead guilty in express terms. The Magistrate was, however, bound to follow the ruling of this Court, which undoubtedly supported his view.

The Local Government challenges the correctness of the decision in *re, Emperor* v. *Bhirgu Singh* (1). The point to be considered in this appeal is of far reaching effect as involving a question of principle, and is a matter of general importance, affecting the authority of the Revenue Officers acting under the Land Revenue Act, as also the liberty of the subjects of the Crown to whom citations are addressed under S. 147 of the Act.

In approaching the question before this Court, no importance can be attached to the fact that the citation is headed as "Notice of attendance" nor to the further fact that the foot-note contains a pointed warning. Nor can the fact of the citation being issued from "the Court of the Tahsildar" and Himanchal Singh being directed to appear "in the Court of Tahasildar" be permitted to be strained too far. The Tahasildar was acting in his administrative capacity as a Revenue Collector. He was not, strictly speaking, a "Court" and was exercising, at the most a quasi judicial function. In S. 189, a Tahsildar is authorized to hold his Court within his tahsil, but his powers under S. 147 are more administrative than judicial.

Section 174, I. P. C., provides :

"Whoever, being legally bound to attend in person . . . . . at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant legally competent, as such public servant to issue the same, intentionally omits to attend at that place or time . . . . . shall be punished with imprisonment . . . . . or with fine . . . . . ."

The ingredients of the offence under this section are, therefore, (1) that a summons for attendance must be issued by a public servant who was legally competent to issue the same, (2) that the person summoned must be legally bound to attend at a certain place and time in answer to the summons and (3) that the person summoned must intentionally have omitted to attend at

that place and time. S. 147, Land Revenue Act provides that when an arrear of revenue becomes due, a writ of demand calling on the defaulter to pay the amount within the time therein stated or a citation to appear may issue.

Circular 3-III of the rules framed by by the Board of Revenue contained, amongst others the following provisions relating to S. 147, Land Revenue Act:

"Processes under S. 147, shall be issued by the Tahashildar of the tahsil in which the arrear fell due, or by order of the Collector or Assistant Collector in charge of the Sub-Division." "Writs, warrants and proclamations shall be in the forms appended. They shall bear the date of issue and shall be signed by the issuing officer and sealed with his official seal."

"Process under S. 147 is not required by law to precede processes under S. 150 but ordinarily writ or citation to appear should issue before any other procees is resorted to." "The fee charged for the issue of a writ or citation to appear shall be 12 annas. The fee shall be included in the amounts specified in the writ or citation as that for the recovery of which the writ is issued."

"No more than one writ shall be issued in respect of the same arrear to any defaulter, except under the orders of the Collector. If the arrears be not paid within 15 days from the date of the service, severer measures should promptly be taken."

It is not controverted that the Tahsildar of Tahsil Shahjahanpur was a public servant, legally competent as such public servant to issue a citation to Himanchal Singh to appear before him under S. 147, Land Revenue Act, or that Himanchal Singh as a defaulter was duly served with the citation calling upon him to appear on 26th July 1928. But it has been argued that a citation to appear under S. 147, Land Revenue Act is not a 'summons" within the purview of S. 174, I. P. C,, and that Himanchal Singh was not legally bound to appear.

Statutes of a fiscal or penal character must be strictly construed so as to prevent undue encroachment upon the liberty of the subject. Where the words of a statute are ambiguous, or of a doubtful import, the words should be construed generously. Where, however, the words of the statute are unequivocal and unambiguous, they must be construed in their plain, natural and grammatical senses.

The question which emerges for decision in this appeal is whether the words "a citation to appear" in S. 147, Land Revenue Act connote anything different from a summons to appear. The word "citation" has not been defined in the Land Revenue Act nor has, the word "summons" been defined in the said Act. It is presumable that the words citation and summons have not been used in the Act in a special or technical sense. If recourse be had to standard books of reference, it would appear that citation aud summons are interchangeable words. For instance, in Webster's New International Dictionary, "citation" means amongst other things, an official summons or notice given to a person to appear before a tribunal of justice; hence any summons. In Murray's Dictionary "citation" is a citing or summoning to a Court of justice. Bouvier gives the following note on "citation":

"A writ issued out of a Court of competent jurisdiction, commanding a person therein named to appear on a day named and do something therein mentioned, or show cause why he should not."

"The act of which a person is so summoned or cited."

"In the ecclesiastical law, the citation is the beginning and foundation of the whole cause, and is said to have six requisites, namely, the insertion of the name of the Judge, of the promovert, of the impugnant of the cause of suits, of the place, and of the time of appearance; to which may be added the affixing the seal of the Court, and the name of the Registrar or his Deputy."

"Process issued in Courts of Probate and Admiralty Courts. It is usually the original process in any proceeding where used and is in that respect analogous to, the writ of capias or summons at law, and the subpoena in Chancery."

According to Wharton (Law Lexicon, Edn. 4, p. 187) "citation" is a summons to appear, applied particularly to a process in the spiritual probate and matrimonial Courts.

In its common significance, therefore, "citation to appear" is clearly "a summons to appear" and cannot be held to mean anything short of this. If this meaning is applied to the text of S. 147, it fits in with the context. It is not necessary either to strain the language or to have recourse to a process of reasoning to find out the meaning of the text. Indeed, if regard be paid to the context and the scheme of the Act, it is not possible to construe the word "citation" otherwise than as a summons.

Section 146, Land Revenue Act prescribes the processes by which an arrear of revenue may be recovered. These

processes are eight in number, and have been enumerated in Cls. (a) to (h). Each of these processes is and is intended to be coercive. Every process enumerated in the section is severer or more drastic than the one immediately preceding it. There may be variance in the degree of the effectiveness of the several processes as also in the degree of their coerciveness, but all of them share one common character in so far that all of them are coercive.

The Local Government may issue a warrant of arrest in the very first instance but the legislature provided for a less drastic remedy by the issue of a citation. It cannot be assumed that the object of the citation is simply to facilitate the execution of the warrant of arrest. The two processes are different. If the man appears in obedience to the citation, he may be allowed to go without any warrant being executed against him. That the process of citation to appear may be abused is no argument against the process itself being from its very inception an instrument of an imperative or compelling character.

A writ of demand or a citation to appear is one of the statutory processes for recovering an arrear of revenue. A citation to appear could not have been intended to be a mere invitation from the Tahsildar to appear in his Court to parley with him about the amount of the arrear or to negotiate with him the time as to its payment. It is not till the revenue has fallen into arrears that steps can be taken for its recovery. S. 145, Land Revenne Act enacts that a statement of account certified by the Tahsildar shall for purposes of Chap. 8 be conclusive evidence of the existence of the arrear, of its amount and of the person who is the defaulter. Ex hypothesi, the amount due has been determined and has been duly certified. The certificate being conclusive, the issue of a citation could not be treated as a mere occasion given to the cosharer concerned to come and discuss with the Tahsildar because of any dispute or uncertainty about the amount of revenue. The certificate having already settled the matter, the chapter regarding dispute or uncertainty is closed anon and for ever. It is extremely difficult to conceive that the legislature could have intended "citation to appear" to have been one of the modes or processes for recovering the arrear of revenue without looking forward to the obedience of that process by the person against whom it is directed.

It has been argued that the processes from (b) to (h) are coercive but "a writ of demand" or "a citation to appear" is not a coercive process. According tc Wharton, a writ is :

"a judicial process by which any one is summoned as an offender and is also a legal instrument to enforce obedience to the orders and sentences of the Courts." "A writ of demand is a peremptory order to pay."

"A citation to appear" cannot be otherwise than a peremptory order to appear, if the arrear of revenue is not paid. It is coercive because he has to leave his business and has to undergo the worry, trouble and expense of a journey to the Tahsil. The appearance before the Tahsildar as a defaulter is humiliation enough. He is exposed to the risk of being arrested by the Tahsildar if the latter chooses to do so. Besides this, he has to pay the expenses of the process issued to him. It is the extent of the privation, wherein lies the compulsion.

The word "citation" does not appear to have been used in Ss. 146 and 147, Land Revenue Act in a technical sense. "Citation" may have a limited or a technical meaning in a particular statute relating to ecclesiastical law or to law relating to probate and administration. But it is not permissible to construe words in one Act by a reference to the use of the same words in another Act which is not in pari materia with the former. It was held in the case of *Muddoo Soodan Dey* v. *Bama-Churan Mookerji* (5) that the meaning of an Act is to be gathered solely by a reference to the Act itself. In *Walji Karimji* v. *Jagannath Premji* (6) it was held that :

"enactments in pari materia should be read together as if they were one law and interpreted as consistently and harmoniously as their language will fairly admit but an enquiry into the vicissitudes which a measure experienced in the course of its passage as a bill through the legislature is not a legitimate mode of ascertaining the intention of the legislature."

It is, therefore, submitted with respect that it is not legitimate to con-

(5) 1 Hydge 100.
(6) [1877] 2 Bom. 84.

strue the words " citation to appear " in Ss. 146 and 147, Land Revenue Act by a reference to S. 69, Act 5 of 1881 or Ss. 199 and 250, Succession Act (Act 10 of 1865). S. 69, Act 5 of 1881 is a replica of S. 250, Succession Act of 1865 and provides that it shall be lawful for the District Judge . . . , to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administrations. The citation here is a general citation and is not addressed to a particular individual by name. The citation is not addressed to persons who do not put forward any claim in the estate of the deceased. It is not a process for enforcement of a pre-existing liability as in the case of a defaulting landholder. If a person having a claim to the estate of the deceased holds himself back, he exposes himself to the risk of an ex parte order against him or to his prejudice. But no liability has been incurred till this order has been passed. S. 199 is clear that no appearance on the part of the next-of-kin is contemplated and he has the option to accept or refuse the letters of administration.

It is worthy of note that a mode of publication of the citation was prescribed by the Probate and Administration Act and the Succession Act. In the Land Revenue Act, no mode for the service of the citation under S. 147 has been specifically provided for. But the mode of service of summons under the Act has been expressly provided. This could not be treated as a case of omission from inadvertence. It is rather suggestive of the fact that the framers of the Act considered the two terms to be synonymous.

In S. 151, N. W. P. Land Revenue Act (Act 19 of 1873) there was a provision for the " writ of demand " but there was no provision of the issue of a citation or summons to the defaulting zamindar. In S. 114, Land Revenue Act of Oudh (Act 17 of 1876), there was a provision for both, that is, there was a provision for " a writ of demand " and, alternatively, for " a summons to appear." Under Act 3 of 1901, the two aforesaid Acts were repealed and they were consolidated into one. In the new Act, a provision has been made for both, with this difference that the word "citation" has been substituted for " summons." This would suggest that the legislature considered the word " summons " and " citation " as convertible terms. As has already been observed, the context, where the words " citation " has been used, is also indicative of the same conclusion. The word " citation " has to be read with reference to the context and not divorced from it, and the interpretation as to the nature and character of the citation may be mild in one case and more severe in another if the mildness or severity is to be assigned to the legal effect of the process. But it would depend in each case upon the text of the statute with special reference to the character of the proceedings, it relates to. Having regard therefore (1) to the natural and grammatical meaning of the word " citation," (2) to the general scheme of the Land Revenue Act and (3) to the use of the word " citation " with reference to the context, it is clear that " citation to appear " cannot but have one meaning, namely, " summons to appear." There is no ambiguity in the word " citation to appear " and the words cannot be construed to mean citation to appear or not to appear at the option of the person served with the citation. There can be no warrant for introducing words into the text of S. 147 as an addition or an alternative. It will be trenching upon the province of the legislature to add an inconsistent alternative into the text.

There are certain sections of the Land Revenue Act, where the word " summons, has been used; for example, Ss. 123, 194, 195 and 201. In S. 193, " all persons " summoned " are bound to appear." If after due service they do not attend, they are, it is submitted liable to be prosecuted under S. 174, I. P. C. It was not necessary to add a provision to S. 147 like the one in S. 193, because the legislature has already declared its mind in S. 146 that citation to appear is a process for enforcing payment of arrears of revenue and it follows that it has to be obeyed.

It cannot be argued from this that the framers of the Act in using the word " citation " Ss. 146 and 147 deliberately intended to use a word of different connotation from " summons." A comparison of those sections with Ss. 146 and 147, Land Revenue Act, satisfies me

that no distinctiation or differention was intended to be made. Ss. 146 and 147 are to be found in Chap. 8 which relates to collection of revenue. The matters dealt with therein are purely fiscal and administrative. Ss. 193, 194, 195 and 201 are to be found in Chap. 9, which relates to procedure of revenue Courts and Revenue Officers. It is not unlikely that "summons" and "citation" were used as mere variants of the same idea and two words were used to mark off the nature and character of the proceedings before the Revenue Officers concerned, but the nature and obligatory character of the "summons" or "citations" are different according to the nature of the proceedings.

The learned Government Advocate has invited the attention of this Court to the following decisions in support of his appeal. *In the matter of Surju*, decided by Knox, A. C. J., and Tudball, J. *Ram Bali* v. *Emperor* (2), decided by Messrs. Chamier and Evans, JJ., which overruled an unreported decision of Mr. Piggot founded upon the report of the Select Committee: *Chandrika Singh* v. *Emperor* (4), decided by Stuart, C. J. and Pullan, J. The last mentioned case expressly dissents from the Division Bench ruling of this Court in *Emperor* v. *Bhirgu Singh* (1). I am in general agreement with the reasonings of the learned Judges in this case. In *Banwari Lal* v. *Emperor* (3), Sulaiman, J., is reported to have observed as follows:

"The question is whether "the citation to appear" does not come, within the expression "summons, notice, order of proclaimation."

If the matter were entirely res integra I would have been inclined to hold that the citation was, at any rate, a notice, if not, a summons or order, and that, therefore, its disobedience was covered by S. 174, I. P. C. I might have sought support from the case of *Ram Bali* v. *Emperor* (2), if the matter were not concluded by a recent pronouncement of a Division Bench in *Emperor* v. *Bhirgu Singh* (1), which is binding on me as a single Judge.

A point is sought to be made of the fact that no penalty for non-attendance has been provided for in the Land Revenue Act as appears to have been done in S. 2 of Act 21 of 1866. This cannot be treated as an example of a casus omissus nor can an inference be drawn from this omission. S. 174, I. P. C., was already on the statute book to meet the situation and it was not necessary to make a special provision for a case like this in the body of the Land Revenue Act.

There can be no charm in the word "citation" or "summons." Citation or summons may be issued to a party or to a witness or to a party who is sought to be examined in the case as a witness. The object may be to give notice to a party of some suit, application or other proceeding. In such a case the party is not bound to appear in Court although his non-appearance may entail the consequence of an exparte order against him (see for instance O. 9, Civil P. C.). Again the object may be to compell his appearance in Court to give evidence. In such a case, he is legally bound to appear in Court and he cannot be allowed to contumaciously withhold his appearance. A summons to a witness is a process of a mandatory character. In a civil suit, the Court has summary powers to proceed against him and pass orders under O. 16, R. 12, Civil P. C. The rule aforesaid, however, does not take away the powers of the Court to prosecute him under S. 174, I. P. C. Cases of deliberate disobedience of summons are rare. Even where they occur, the civil Courts may deal with the offender under O. 16, R. 12, and not file a complaint against him in the criminal Court under S. 174, I. P. C. I am by no means certain that witnesses are never prosecuted by the civil Court for disobedience of summons, although I must say that there are no reported cases where this has taken place. The powers of the civil Court in this respect are foreign to the enquiry in hand. Whether a party or a witness was bound to appear in a preceeding of a civil nature has to be determined by a reference to the nature of the proceeding and the provision of the particular statute under which he is served with the notice. Any answer for or against cannot be made in the abstract and the answer cannot be helpful in the solution of the question which is now before us, which has to be determined by a reference to the relevant portions of the Land Revenue Act and nothing beyond,

(7) [1909] 6 A. L. J. 114 *N.*

Section 201, Land Revenue Act provides that no ex parte order or order by default shall be set aside without a notice of the application to the opposite party. This section is analogous to O. 9, R. 14, Civil P. C. Here the notice served to a party is not for personal appearance. It is a matter of his option to appear or not to appear but non-appearance exposes him to certain legal consequences. It may be conceded at once that the party served with notice in these cases is not legally bound to appear.

I hold, therefore, that where a citation has been issued to a person who is in arrear of Government revenue under S. 147, Land Revenue Act, the said citation is a summons within the meaning of S. 174, I. P. C., that the accused was legally bound to appear in the Court of the Tahsildar in obedience to it and that by his failure to attend, he was guilty under S. 174, I. P. C.

I would, therefore, allow the Government appeal and convict the accused.

By the Court.—The result is that the appeal by the Local Government fails and is hereby dismissed, and the acquittal of Himanchal Singh accused of an offence under S. 174, I, P. C. is hereby confirmed.

R.K. *Appeal dismissed.*

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BOYS AND YOUNG, JJ.

Chandan and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 512 of 1929, Decided on 3rd December 1929, against order of Sess. Judge, Budaun, D/- 14th Judge, 1929.

(a) Criminal P. C., S. 112 — Ordinarily mentioning that clause of S. 110 applicable to case is sufficent but where clause refers to two or more offences, offence appropriate should be mentioned.

Ordinarily it is sufficient under S. 112 if that portion of the clause of S. 110 which is applicable to the particular case is specified in the notice that is given. But where the particular clause refers to two or more offences, the particular offence or offences which is appropriate to the particular case should also be mentioned in the notice. This applies more particularly to Cl. (d) : *A. I. R.* 1927 *Oudh* 306, *Appr.* [P 274 C 2]

(b) Criminal P. C., Ss. 241 to 259—Before accused appears he is not entitled to information about detailed evidence of prosecution.

In the trial of an ordinary summons or warrant case before a Magistrate an accused person is not entitled, before he appears in Court, to any information as to what detailed evidence the prosecution is going to lead. [P 275 C 1]

(c) Criminal P.C., Ss. 256 and 110—S. 256 applies to cases under S. 110.

Section 256 is applicable to inquiry into cases under S. 110, so far as practicable : *A.I.R.* 1927 *All.* 660, *Foll.* [P 275 C 1]

(d) Criminal P. C., S. 110—Mere fact of allegation of substantive offence does not preclude proceeding under S. 110 : *A. I. R.* 1929 *All.* 813 and *A.I.R.* 1925 *All.* 250, *Overruled.*

The mere fact that there is an allegation of a substantive offence is no obstacle to the using of the evidence such as it is in regard to the commission of that offence in proceedings under S. 110: **A. I. R. 1929 All. 813 and A. I. R. 1925 All. 250, Overruled ;** *A. I. R.* 1925 *All.* 694, *Ref.* [P 275 C 2]

L. M. Roy—for Applicants.

M. Waliullah—for the Crown.

Boys, J.—This is an application of three men on the revisional side of the Court asking that an order under S. 110, Criminal P. C., for filing security be set aside. There are no less than 11 grounds in the application for revision, of which some five have been argued before this Court.

It has already been held by the single Judge who referred this case to the present Bench that there is no force in ground 1 that the applicants had no notice under S. 112 before they were arrested. We agree that the terms of S. 113 were fully complied with and that no notice before arrest is necessary.

Next, it is urged that the applicants were not given the substance of the information against them in accordance with the terms of S. 112. We have no hesitation in agreeing with the decision in *Emperor* v. *Ramghulam* (1), in which it was held that ordinarily it is sufficient under S. 112 if that portion of the clause of S. 110 which is applicable to the particular case is specified in the notice that is given. To this we would further add that where the particular clause refers to two or more offences, the particular offence or offences which is appropriate to the particular case should also be mentioned in the notice. This applies more particularly to Cl. (d). It is unnecessary to repeat the arguments in the case to which we have referred. But we would note, if the principle which we have approved be not accepted, the utter impossibility of drawing the line at any place or of offering the Magistrates any guiding

(1) A. I. R. 1927 Oudh 306=2 Luck. 157.

principle which would assist them in in determining how much information is to be given. We may state a specific example. The evidence in this type of case generally consists of something like the evidence of 20 witnesses, who are expected to speak each of them possibly to a separate incident, sometimes one witness being supported by the evidence of another. Is the information to give the substance of the evidence that one witness is likely to give, or two witnesses or three witnesses, or where is the detailing of the information to stop? It is manifest that it would not be of any value for the purposes of giving notice of the evidence of witness 20 to give even in full the evidence that the earlier 19 witnesses were going to give. This practical difficulty only supports the view that it is sufficient if the particular clause of the charge, or where there are more than one offences named in charge, the particular offence or offences is given in the notice. In the trial of an ordinary summons or warrant case before a Magistrate an accused person is not entitled, before he appears in Court to any information as to what detailed evidence the prosecution is going to lead. What we have said on this point refers of course only to S. 110 and has not necessarily any bearing on Ss. 107 and 109.

The next point taken was that S. 256, Chap. 21, Criminal P. C. is applicable to inquiry into cases under S. 110. One of the members of this present Bench in *Tirlok* v. *Emperor* (2) has already held that the terms of S. 256 are applicable so far as practicable. This is in accordance with S. 117 (2), Criminal P. C., and we see no reason to hold otherwise. It is contended for the applicants that the accused were not asked to state whether they wished to cross-examine or not. Counsel was not prepared to suggest that there was the smallest possibility of there having been any prejudice to the accused from their not having been so asked, and this is manifest when counsel was asked whether they were represented or not, and he had to reply in the affirmative. There is no force in this contention and it need never have been raised.

Next, it is contended that proceedings under S. 110 cannot be instituted or at least are inappropriate where there is an allegation on behalf of the prosecution that the accused have committed a substantive offence under the Penal Code. This again is wholly untenable, and is based on an entire misappreciation of the principles properly applicable. There is not the slightest reason whatever why the police should not institute proceedings under S. 110 despite the fact that there may be some reason to suppose that the accused have committed some substantive offence under the Penal Code. It is only necessary again to give a concrete case. It may be that the accused is suspected in six cases of house-breaking. The police may have adequate grounds for believing that the accused is really guilty of those six cases of house-breaking, but in regard to any individual case it may be that the evidence would be almost certain to prove inadequate for a conviction. It does not follow, of course, that such evidence, that there is, is not trustworthy. There is manifestly here nothing whatever to prevent the police saying "if we institute a case of house-breaking it will only involve a useless expenditure of time and money. The evidence such as we have is trustworthy, but it would be inadequate for a conviction for the substantive offence."

There is no reason for holding that proceedings under S. 110 would be improper in such a case. It would be possible to multiply the reasons for holding that the mere fact that there is an allegation of a substantive offence is no obstacle to the using of the evidence such as it is in regard to the commission of that offence in proceedings under S. 110.

It is, however, desirable to consider the earlier decisions of this Court relevant to this ground. In 1924 the case of *Ram Prasad* v. *Emperor* (3) came before a single Judge of this Court. In that case the notice to the applicants was to the effect that they were "habitual dacoits and belonged to the dangerous gang of Dhani and Ram Kishan dacoits." The learned Judge of this Court side :

"On a reference to S. 110, Criminal P. C. it will be found that it does not provide for any person being called upon to furnish security on the ground that he was by habit a dacoit and belonged to the gang of a dacoit.

(2) A. I. R. 1927 All. 660.

(3) A. I. R. 1925 All. 250.

It is not for the Courts to find out the motive for the ommission, but if it were necessary one could easily be found. Being a member of a gang of dacoits is a definite offence defined and punishable under the Penal Code and it was for that reason that under the preventive sections, action could not be taken for having committed a specific offence."

We are unable to agree with the learned Judge in the suggestion that he makes for the reason of the omission. In our view, being a member of a gang of persons associated for the purpose of habitually committing dacoity does come within the purview of S. 110, and is not excluded merely because there is an allegation of facts pointing to an offence under S. 400, I. P. C. Similarly, we are of opinion that where the facts alleged are that the person belongs to a gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, those facts are susceptible to proceedings under S. 110. Let us suppose the case of a person *A* being accused of being by habit a thief. Similarly *B*, *C*, *D* and *E* are each accused of being by habit thieves. It is manifest that the accusation against each one of these persons could be the subject of a separate proceeding directed against him individually under S. 110, Cl. (a). Now, if we turn to S. 117, Cl. (5) it says :

"Where two or more persons have been associated together in the matter under inquiry they may be dealt with in the same or separate inquiries as the Magistrate shall think just."

From this it is clear that where two or three or four or five or more persons are accused of being associated together, or, in other words, forming a gang, for the purpose of habitually committing thefts, the legislature has contemplated that those facts may be the subject of a case under S. 110: otherwise there is no meaning in the two clauses read together. This is sufficient to show that the state of facts we have named does come both within S. 401, I. P. C. and S. 110, Criminal P. C. Nor is there any statutory provision forbidding the application of S. 110 to facts which happen to come also within S. 401, I. P. C.

Nor do we consider that as a matter of policy or convenience or justice it is even desirable to hold that where the facts come within either section, it should follow that only the section of the Penal Code should be applied, and that there must be a regular trial for the substantive offence. Let us consider the distinction between the two sections. Where a charge in the full sense of the term is laid under a section specifying a substantive offence such as section 401, I P. C., the evidence and the only evidence which can be led is that of persons who saw acts or heard words, etc. with their own eyes and ears. On the other hand, evidence which is admissible under S. 110, Criminal P. C. includes evidence of "general repute." Manifestly, therefore, evidence which might be insufficient for a conviction under S. 401, I. P. C. punishable directly with imprisonment, may, though the facts to be proved are identically the same with the facts to be proved upon a case under S. 110, Criminal P. C. be sufficient for a conviction under S. 110, Criminal P. C. involving merely in the first place furnishing of security, for further evidence to support the prosecution, e. g., that of "general repute" is admissible, where the lesser consequence follows, of a nature which is not admissible where the graver consequence follows. We are, therefore, of opinion that it is not illegal to institute proceedings under S. 110 merely because the facts alleged would, if proved, establish an offence under S. 401, I. P. C. Nor is it necessarily improper to institute such proceedings. A case under S. 401, I. P. C. which might necessarily fail for want of the essential evidence might well and properly result in a conviction under S. 110, Criminal P. C., The same reasoning will mutatis mutandis apply to S. 400, I. P. C., and S. 110, Criminal P. C. We do not think it necessary to enter into speculation as to the reason for mentioning theft and robbery in S. 110 and not mentioning dacoity. We have stated why we do not agree with the reason given by the learned Judge in the case to which we have referred.

We have also been referred to the decision of one of us sitting with another Judge reported in *Budhan* v. *Emperor* (4). That case was referred to a Bench of two Judges by a single Judge who did not, as we have said we do not, agree with the proposition laid down in the

(4) A. I. R. 1925 All. 694=47 All. 733.

case of *Ram Prasad* v. *Emperor* (3), which we have just discussed. In *Budhan* v. *Emperor* (4), however, the Bench held that the case of *Ram Prasad* v. *Emperor* (3) was distinguishable, and therefore cannot be interpreted as having overruled *Ram Prasad* v. *Emperor* (3) on the point which we are now considering. Finally there is the case of *Ramrup Bhar* v. *Emperor* (5), That case naturally followed the decision in *Ram Prasad* v. *Emperor* (3) which was correctly noted as not having been overruled in *Budhan* v. *Emperor* (4). As our present decision overrules *Ram Prasad* v. *Emperor* (3), it follows that it also overrules *Ramrup Bhar* v. *Emperor* (5).

The application is dismissed.

V.B./R.K. *Application dismissed.*

(5) A. I. R. 1929 All. 813.

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YOUNG AND SEN, JJ.

Emperor

v.

Bindeshwari Singh—Respondent.

Criminal Appeal No. 561 of 1929, Decided on 9th September 1929, from order of Sess. Judge, Azamgarh, D/- 18th April 1929.

Criminal Trial—False plea of enmity put forth by accused aggravates offence and affects question of sentence.

In a great majority of cases, the plea used in defence is the stereotyped plea of enmity. The plea is characterised by a wanton disregard of truth and in spite of laborious attempts, no malice is established between the accused and the Crown witnesses including the complainant. It ought to be generally known that a false defence of this character has a tendency to aggravate the offence and is a factor which may affect the question of sentence. [P 277 C 2]

U. S. Bajpai—for the Crown.

Nehal Chand—for Respondent.

Young, J. – Bindeshwari Singh was convicted by a Magistrate of the First Class under S. 384, I. P. C. for having extorted Rs. 10 from one Balle Halwai by holding out threats to him of physical injury and of the institution of legal proceedings charging him with the commission of a criminal offence. The learned Magistrate gave him the sentence of one year's rigorous imprisonment and a fine of Rs. 100.

The learned Sessions Judges reversed the decision of this trial Court and directed the acquittal of Bindeswari Singh.

The Local Government has filed an appeal to this Court.

The complaint which gave rise to these proceedings was instituted by one Balle Halwai of Deogaon on 29th August 1928. The story of the Crown it shortly this:- Bindeshweri Singh purchased puris and sweets from the shop of Balle Halwai and owed him Rs. 10. A demand was made for the money. Bindeswari Singh took offence at this and told Balle "I shall set you right. I shall get a false case brought against you and shall cause you to be sent to jail."

On 30th March 1926, one Jamna Prasad filed a complaint against Balle, his wife Mt. Kishen Dei and Ganga Barnwar under S. 498, I. P. C. in the Court of a Special Magistrate of Deokali, in the District of Ghazipur. The allegation was that Mt. Kishen Dei was the wife of Jamna Prasad and that Balle and Ganga Barnwar had taken or enticed away the wife with intent that she may have illicit intercourse with them. Summonses were issued but could not be served. Warrants were applied for and were duly executed and 15th May 1926 was the date fixed for the hearing of the complaint. On that date the complainant did not appear in Court and the complaint was dismissed.

In the meantime, on some date between 8th May and 15th May 1926, Bindeshwari Singh came to the shop of Balle Halwai and told him that it was now time for him to realize the insecurity of his position, as a complaint under S. 498 had already been launched against him and the only thing which remained to be done was to press the complaint and send Balle Halwai to jail. Bindeshwari Singh told Balle that if he was anxious to enjoy his liberty, he ought to pay him Rs. 50. A settlement was arrived at for a sum of Rs. 10 and Balle paid Rs. 10 to Bindeshwari Singh. The above is proved from the evidence of Balle and is supported by the depositions of Misri Halwai, Bishnath Kalwar, Jattan and Kundar Kandu.

There is also very strong corroboration of this evidence in the fact that the complaint of Jamna Prasad came to nothing as the complainant allowed the complaint to go by default.

Balle Halwai is the complainant in this case and his statement ought to be carefully scrutinised. The complaint

had been instituted after a very long time. Balle may be presumed to have a natural partiality in favour of his own complaint. The unusual delay in the institution of the complaint had got to be explained.

Balle had been subjected to a lengthy cross-examination and has not broken down in the least. His statement is clear and consistent. The delay in the institution of the complaint, has been accounted for. Bindeshwari Singh is a bully and evidently the complainant was afraid of him. It was not till proceedings were initiated against Bindeswari Singh under S. 110, Criminal P. C. that Balle could venture to come forward against such a formidable opponent.

The statement of Misri Halwai has been rejected by the Court below upon the ground that he was the brother of Mahabir, who filed the complaint in the connected case. That is not a sound reason for discrediting the statement, but it ought to have been a good ground for scrutiny. It does not appear that any portion of the statement of Misri is intrinsically improbable, nor does his statement conflict with the statement of Balle or those of other witnesses for the prosecution. We are of opinion that the learned Sessions Judge has discredited the statement of Misri upon grounds flimsy and insufficient.

No reason whatsoever has been assigned for not accepting the statements of Bishnath, Jattan and Kundar who appear to be thoroughly independent witnesses. We are not surprised bearing in mind the character of Bindeswari Singh that the demand was made at a public place in broad day light and in the presence of many witnesses. Bindeswari Singh believed that he was the master of the situation and was running no risks.

We consider that on the evidence for the prosecution the case against Bindeshri Singh has been clearly established.

The defence in this case is exactly the same as was put up in the connected case of *Mahabir*. There is no evidence to support this defence, It has not been made out that Rai Sahib Dindayal Sahu had engineered this case to satisfy his malice against Bindeshwari Singh. The case set by the defence is that there was a widespread conspiracy and that the police and the district authorities had made common cause with Rai Sahib Dindayal. This defence was absolutely false and baseless.

In a great majority of cases, the plea urged in defence is the stereotyped plea of enmity. The plea is characterised by a wanton disregard of truth and in spite of laborious attempts, no malice is established between the accused and the Crown witnesses including the complainant. It ought to be generally known that a false defence of this character has a tendency to aggravate the offence and is factor which may effect the question of sentence.

Three witnesses were examined for the defence; of those Munshi Ramanad Lal and Babi Swami Nath Singh had appeared as witnesses for Bindeshwari Singh in the connected case. They say no more than this that there was a contest between Raghuraj Bali Sahu, nephew of Sahu Dindayal and certain other persons for a seat in the Distict Board of Azamgarh. They do not state that there is an enmity between Bindeshwari Singh and Sahu Dindayal. The third witness Babu Sham Narain Singh is a mukhtar and member of District Board. He states that four five months ago when he was sitting in Bar Library at about 11 a. m. he was called by Bindeshwari Singh who told him that the police daroga was getting a complaint written against him by Balle Halwai. He did not go near them but he saw Balle and daroga together when the complaint was being written. We do not believe a word of this and we are of opinion that this witness is not only false but radiates falsehoods.

The judgment under appeal appears to us to be extremely unsatisfactory. We are sorry to note that the findings of the learned Judge in this and the connected case, *Criminal Appeal No.* 560 *of* 1929, are against the weight of evidence and no serious attempt has been made to meet the excellent reasons given by the primary Court.

In the result, we allow the appeal, set aside the order of the Sessions Judge dated 18th April 1929, and convict Bindeshwari Singh under S. 384, I.P. C. We maintain the sentence of fine passed by the trial Court and sentence him to two years' rigorous imprisonment, The sentences in the two cases are to run consecutively. Bindeshwari Singh must sur-

render to his bail. The complainant ought to be paid Rs. 50 out of the fine if realized. If the fine is not recovered from Bindeshwari Singh, he must undergo three months' rigorous imprisonment in addition.

V.S./R.K. *Sentence enhanced.*

A. I. R. 1930 Allahabad 279

YOUNG AND SEN, JJ.

Emperor

v.

Maiku—Accused.

Criminal Ref. No. 429 of 1929, Decided on 4th September 1929, made by Dist. Magistrate, Agra, on 4th June 1929.

Criminal Trial — Sentence — Sentence should be proportionate to nature and gravity of crime in each case—Giving certain sentence given in hundred other cases does not make it obligatory upon the Court to award the same sentence.

It is an elementary proposition in criminal jurisprudence that sentence in each case should be proportionate to the nature and gravity of the crime, and a Magistrate cannot claim a right to inflict a particular sentence in a particular case because he had done so in hundred other cases—some of which were more serious—without any regard to nature of facts, upon which each and every case has to be decided.

[P 279 C 2]

M. Waliullah—for the Crown.

Young, J.—Maiku Kahar has been convicted by Mr. S. M. Ahmed, Excise Magistrate of Agra under S. 60, Excise Act and has been sentenced to a fine of Rs. 50. The District Magistrate of Agra has through the Sessions Judge referred the case to this Court "for examination and enhancement of sentence if thought proper."

Mr. Sheodan Lal, an Excise Inspector, raided the house of Maiku Khar which is situated in Sadar Bazaar of the city of Agra. Maiku was caught in the act of distilling liquor. A large quantity of illicit liquor and a complete paraphernalia of instruments for manufacture of illicit liquor was discovered in his house. Maiku was put on his trial and he made no pretence of innocence. He pleaded guilty. The Excise Magistrate considered that he had properly discharged his function as a Magistrate by sentencing Maiku to a fine of Rs. 50.

Excise cases are not easy to detect and are difficult to prove. The distiller, not unoften, prepares liquor for purposes of traffic. The game is a profitable one. Illicit distillation of liquor does not only mean a loss of revenue to the Government but is a serious menace to the health and the moral well being of the community. The Local Government, by its letter No. 579-13-55 dated 21st December 1928, had accentuated the fact that the crime was widely prevalent and that the actual distiller or trafficker should be sentenced to a substantial term of imprisonment. Under the Act, the maximum punishment, in the case of first offenders, is one year's rigorous imprisonment and a fine of Rs. 1000.

The explanation given by the Excise Magistrate is ridiculous. He says :

"I had been Excise Magistrate of Allahabad for over a year and I had to do no other work than excise, as the work is so heavy there. The present Excise Commissioner had been Excise Inspector under me there and he knows well that in all such cases Rs. 50 was considered proper punishment. I decided at least some hundred such and more serious cases with fine but the excise department there never considered the punishment inadequate."

It is difficult to understand the above statement together with its implications. Are we to take it that this Magistrate has ignored and pigeon-holed the Govermet notification which we have alluded to above? Does the Magistrate claim a right to inflict a sentence of fine in all cases because he has done so in hundred other cases—some of which were more serious—without any regard to the nature of facts, upon which each and every case had to be decided? The Magistrate would have been well advised not to bring in the aid of prescription in his favour. It is an elementary proposition in criminal jurisprudence that sentence in each case should be proportionate to the nature and gravity of the crime.

The learned Magistrate submits that a fine of Rs. 50 for a man of no means and status is "quite adequate punishment." It is worthy of note that there was not a scrap of evidence before the trial Court concerning the means of Maiku. Granting that the financial position of Maiku was not sound why was not the sentence of imprisonment passed?

There is an insinuation that the Excise Inspector was shielding the principle culprit and that Maiku was playing the second fiddle. A Magistrate with any sense of responsibility ought to have hesitated and paused before

making any insinuation against the Excise Inspector which was not justified by the evidence on the record. In the present case the attack upon the Excise Inspector was wholly unwarranted.

The Magistrate's grievance is that the Excise Inspector has moved in this matter and submitted his report for enhancement with a view to "minimise the blame brought against the Excise Inspector in the Peoples' Herald." Any publication in the Peoples' Herald is outside the judicial record. Here we have another insinuation and nothing to support it. We hold that the Excise Inspector in bringing the sentence to the notice of the District authorities had done the right and proper thing. The sentence is ridiculous. We sentence Maiku to six months' rigorous imprisonment and maintain the fine of Rs. 50.

V.B./R.K. *Sentence enhanced.*

A. I. R, 1930 Allahabad 280

PULLAN, J.

Balkishen—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 357 of 1929, Decided on 29th May 1929, made by Sess. Judge, Aligarh, D/- 27th April 1929.

(a) Criminal P. C., S. 250—Case prima facie triable by Magistrate but if facts were proved constituting offence exclusively triable by Sessions Court—Award of compensation by Magistrate is not illegal.

Where a Magistrate tries an accused for an offence prima facie triable by him, when really if the facts had been proved the offence would have been one triable exclusively by the Sessions Court, an award of compensation made by the Magistrate under S. 250 is not illegal : *A. I. R.* 1922 *Mad.* 223, *Ref. A. I. R.* 1926 *All.* 159, *Dist.* [P 280 C 2]

(b) Criminal Trial—Court's duty—Magistrate is not bound to find whether case exclusively triable by Sessions would arise if facts before him were proved.

It is not incumbent upon a Magistrate to go out of his way to find that a case exclusively triable by a Court of Sessions might arise from facts before him, if they were proved. [P 280 C 2]

Judgment.—This is a reference by the learned Sessions Judge of Aligarh requesting this Court to set aside an order passed by a Magistrate under S. 250, Criminal P. C., directing a certain complainant to pay compensation to the accused. It is not suggested that the order was otherwise improper, but merely that it was without jurisdiction. The case before the Magistrate was under Ss. 463 and 323, I. P. C. both being within the Magistrate's jurisdiction and prima facie he was entitled to pass the order in question. The learned Sessions Judge bases his reference on the assumption that if there was any offence it was one under S. 467, I. P. C. and exclusively triable by the Court of Sessions. But it has been found by both Courts that there was no offence, and the Judgment appears to me to have gone too far when he assumes that if the offence had been committed it would have been one under S. 467, I. P. C. We have to consider whether the Magistrate was trying the case or merely holding an enquiry with a view to commitment. He says that he was trying the case, and I have no doubt that he is correct in so saying. The case must be distinguished from that reported in *Harihar Datt* v. *Maksud Ali* (1) which refers to a case where one at least of the offences charged is exclusively triable by the Court of Sessions. The case which is parallel to the present is noted in the judgment in *Harihar Datt* v. *Maksud Ali* (1). It is *M. Venkatrayar* v. *K. Venkatrayar* (2). It was not in my opinion incumbent on the Magistrate to go out of his way to find that a case exclusively triable by a Court of Sessions might arise from the facts before him, if they were proved. He was trying a case apparently within his jurisdiction. He found that there was no case and that it had been brought frivolously and vexatiously. He was therefore entitled to act under S. 250, Criminal P. C.

I decline to interfere. The reference will be returned.

V.B./R.K. *Reference returned.*

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(1) A. I. R. 1926 All. 159=48 All. 166.
(2) A. I. R. 1922 Mad. 223=45 Mad. 29.

A. I. R. 1930 Allahabad 281

MUKERJI AND BENNET, JJ.

Jagannath Prasad—Objector—Appellant.

v.

Sheo Narain—Decree-holder—Respondent.

Letters Patent Appeal No. 90 of 1927, Decided on 14th December 1929, from judgment of Dalal, J., D/- 27th July 1927.

(a) Execution—Order purporting to shelve papers merely amounts to stay and not dismissal.

An order purporting to shelve papers does not amount to dismissal of an application for execution but only to staying the proceedings for the time being. [P 281 C 2]

(b) Execution—Attachment by civil Courts—Collector cannot withdraw it.

The Collector has no jurisdiction to withdraw the attachment effected by the order of the civil Court. [P 231 C 2]

(c) Practice—New Plea.

A person cannot be allowed in Letters Patent appeal to raise a new point (i. e.,) a point which has not been raised before the single Judge. [P 231 C 2]

S. S. Sastry—for Appellant.

N. P. Asthana—for Respondent.

Mukerji, J.—This appeal has no force. The only point to be decided is whether the order of the Collector dated 4th November 1924 operated to remove the attachment which had been validly made by an order of the civil Court. It appears that a decree was obtained by the respondent Sheonarain against one Ram Lal who died joint with the appellant Jagannath. In the lifetime of Ram Lal, an attachment of his share of the property had been obtained by Sheonarain. After attachment the decree was sent, to the Collector for execution by the Munsiff. While the matter was still pending before the Collector, Ram Lal died. The Collector on 22nd October 1924, was informed by the Tahsildar that Ram Lal was dead and thereupon he directed that the decree-holder should be informed of the fact and the case should be taken on 4th November 1924. On that date the Collector passed the following order:

"The judgment debtor is dead. The decree-holder is absent. It is ordered that the case be removed from the list of pending cases (Kharij ho) and the papers be filed (dakhil daftar ho) and that the papers received from the civil Court be returned to the same."

On the death of Ram Lal the decree-holder applied to the civil Court, which was the only Court before which an application for bringing on the record the legal representative of the judgment-debtor could be made, to bring Jagannath on the record. Jagannath having been duly placed on the record, the decree-holder applied to the civil Court for the papers being again sent to the Collector, so that the latter might proceed with the execution of the decree. The civil Court, however, thought that a fresh application asking for attachment was necessary. Accordingly a new application was put in on 9th December 1924. When a fresh proceeding purporting to be a new attachment was taken, Jagannath came in with the objection that he was the sole owner of the property attached, and whatever interest Ram Lal possessed in the property had disappeared on the principle of survivorship of the Hindu Law. This raised the question whether the attachment, which had been effected on 22nd April 1924, in the lifetime of Ram Lal, was still subsisting.

The first Court upheld the objection of Jagannath and dismissed the application for execution. The lower appellate Court held that although the family of Jagannath and Ram Lal was joint the original attachment held good. That view has been accepted by a learned Judge of this Court and hence this Letters Patent appeal. The only point that was argued before the learned Judge of this Court was that the order of the Collector dated 4th November 1924, was, in effect an order dismissing an execution application for default of the decree-holder, and that therefore the order operated to release the attachment.

We are of opinion that this point has no force at all. To start with, the Collector did not dismiss the execution application for default. We have interpreted, in this Court, an order purporting to shelve papers as an order not amounting to dismissal of an application for execution but only as amounting to staying the proceedings for the time being. Apart from that, the Collector had no jurisdiction to withdraw the attachment effected by the order of the civil Court. In any view of the case the attachment subsists.

A new point was sought to be taken before us. But it is a settled rule in a Letters Patent appeal not to allow a fresh point to be taken, namely a point

which had never been urged before the single Judge. We note that the point sought to be urged was not even taken in the memorandum of appeal. In the result the appeal fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 282

MUKERJI AND BENNET, JJ.

Krishna Das and *another*—Appellants.

v.

Raja Ram Bhatt Lele and *others*—Respondents.

First Appeal No. 123 of 1928, Decided on 6th December 1929, from an order of Dist. Judge, Benares, D/. 30th March 1928.

Provincial Insolvency Act, S. 54—Preference given to one creditor over others by execution of mortgage—Mortgage executed within three months of adjudication—Execution of mortgage amounts to act of insolvency—Provincial Insolvency Act, S. 6 (b).

Where a mortgage, whereby the possession of all the property is handed over to the creditor, has the effect of giving the creditor a preference over other creditors, the mortgage deed, being executed within three months of the application for adjudication, comes under S. 54 and the execution of the mortgage deed amounts to an act of insolvency under S. 6 (b). [P 283 C 1]

K. N. Katju—for Appellants.

P. N. Sapru—for Respondents.

Bennet, J.—This is an appeal by a creditor whose application for an order of adjudication of the opposite party as insolvent has been dismissed by the District Judge of Benares. The opposite party are a joint Hindu family consisting of three members Raja Ram Bhatt Lele, Govind Shastri and Gaja Nand Rao. The application was made mainly on the ground that an act of insolvency had occurred by the execution by the opposite party of a fictitious deed of mortgage in favour of a third party Rai Krishnaji for Rs. 35,000 nominally, on 31st August 1927. Within three months of that date this application was made on 28th November 1927. Therefore it would be open to the applicant to have the benefit of S. 54, Provl. Ins. Act, which applies to a transfer of property in favour of any creditor with a view to giving that creditor a preference over the other creditors.

The case for the applicant is that this mortgage comes under S. 6 (b) or (c) as a transfer of property or part of a property with intent to defeat or delay the creditors or which would provide as a fraudulent preference if he were adjudged an insolvent. The opposite party filed a written statement stating that the mortgage deeds executed in favour of Rai Krishnaji were in good faith and for consideration of his just dues, that Rai Krishnaji had now taken over the concern and invested further sums in it to carry it on with a provision to allow a share of the profits of the opposite party in order to enable the opposite party to pay up the creditors as well. Further, the written statement alleged that the opposite party was prepared to pay the amount due by monthly instalments and that at present the firm owned properties worth more than Rs. 80,000.

The applicant gave his evidence in support of his application and he also tendered a certified copy of a depcsition by one of the opposite party in suit No.92 of 1927 (*Krishen Das* v. *Kamala Kalabattu Karyalaya.*) The opposite party made a statement through their vakil that they did not desire to tender any evidence. The evidence therefore in the case is complete. The District Judge did not come to any clear finding as to whether an act of insolvency had been committed or not. But he dismissed the application on the ground that he had little doubt that the third party Rai Krishnaji would see to it that the decree was liquidated by payments in instalments, as in the case of other creditors. We consider that the District Judge was wrong in not coming to a definite finding as to whether an act of insolvency had been committed. We also consider that he was wrong in finding that Rai Krishnaji would make payment of this debt when there was no evidence before him of Rai Krishnaji to that effect.

The question before us is whether an act of insolvency has been committed. The mortgage of 31st August 1927, for Rs. 35,000 was not for any new consideration, but purported to be entirely on account of the debt then owed by the opposite party and interest on that debt according to the mortgage. Therefore it cannot be said that on that date any new funds were advanced by Rai Krishnaji to the opposite party to enable them to carry on their business. It is true

that after the application a further mortgage for Rs. 15,000 nominally has been executed by the opposite party in favour of Rai Krishnaji. No evidence has been tendered in regard to this mortgage, nor is there any proof that Rs. 15,000 was actually advanced for carrying on the business. As is admitted in the written statement of the opposite party we find it proved that all the property of the opposite party has been handed over to Rai Krishnaji who is now in the position of a secured creditor, whereas the applicant is not a secured creditor. It is clear therefore that the mortgage of 31st August 1927, has the effect of making Rai Krishnaji a creditor with a preference over other creditors and the possession of all the property placed him in an extremely favourable position. The intention of the opposite party in executing that document must have been to give Rai Krishnaji such a preference over other creditors. Therefore that document clearly comes under S. 54, Prov. Ins. Act and therefore its execution by the opposite party amounts to an act of insolvency under S. 6 (b), Prov. Ins. Act. We may also state that even on the pleading in the written statement referred to, if this plea were correct it would amount to an act of insolvency under S. 6 (a). We consider therefore that an act of insolvency having been committed, and as it is admitted that the applicant is a creditor for more than Rs. 500, his debt amounting to Rs. 500 worth of silver wire, the applicant is entitled to present this application in insolvency. Accordingly we adjudicate Raja Ram Bhatt Lele, Govind Shastri and Gaja Nand Rao insolvents. We fix a period of one year within which the insolvent is to apply for discharge from insolvency. We send this record back to the District Judge to take proceedings of insolvency in regard to creditors proving their debts and appointment of a receiver and all other proceedings. The appellants will be granted costs of this appeal and costs so far incurred in the Courts below.

V.S./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 283

SULAIMAN AND KENDALL, JJ.

Kirpal Singh—Plaintiff—Appellant.

v.

Sheoambar Singh and *others*—Defendants—Respondents.

Second Appeal No. 1830 of 1926, Decided on 5th December 1929, from decree of Offg. Addl. Dist. Judge, Cawnpore, D/- 30th July 1926.

(a) Transfer of Property Act, S. 58 (c)—Sale deed coupled with contemporaneous agreement of repurchase — Transaction amounts to mortgage by conditional sale.

Where the whole contract between the parties is to have a sale-deed by one party and an agreement by the other, the sale being subject to the condition of the repurchase, contained in the agreement which is a part and parcel of the same transaction, the mere fact that the single contract is evidenced by two separate but contemporaneous documents does not make any difference and the transaction is a mortgage by conditional sale within the meaning of S. 58 (c): *A. I. R.* 1926 *All.* 670; *A. I. R.* 1927 *All.* 137 and *A. I. R.* 1927 *All.* 321, *Rel. on.* [P 285 C 2]

(b) Transfer of Property Act, S. 60—Restriction that money should be procured otherwise than by sale or mortgage is clog—But condition that redemption should be in Jeth is not clog.

The restriction in a mortgage by conditional sale that the money should be procured otherwise than by sale or mortgage of the property is a clog on the equity of redemption and is not enforceable. But a provision that there should be no redemption except in the month of Jeth is not a clog on the equity of redemption, inasmuch as the intention of the party obviously is to permit redemption at a time when the crops are not standing: 36 *All.* 551, *Foll.* [P 285 C 2]

P. L. Banerji and *Ram Newas Shukla*—for Appellant.

K. C. Mital—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for redemption of an alleged mortgage by conditional sale. On 3rd November 1909 a document, ostensibly a sale-deed, was executed by the plaintiff in favour of the defendants for Rs. 1,300 and on the same date there was an agreement by the defendants in favour of the plaintiff agreeing to retransfer the property on certain conditions. The plaintiff alleged that the two documents were evidence of one and the same transaction which constituted a mortgage by conditional sale and that he was entitled to redeem the property. He also alleged that in the Jeth preceding the institution of the suit he had actually tendered the amount

but the defendants had refused to take it. His suit was instituted within 15 years of the deeds.

The defendants denied the execution of any such agreement, although it had been registered and a certified copy of it was produced. In the written statement the defence taken up was that the transaction was not one of mortgage, and that the plaintiff had not complied with the conditions entered in the deed of agreement, even if that be proved. There was no specific plea that this agreement was in fact a separate or subsequent agreement executed quite independently from the sale-deed and represented a distinct and separate contract.

Both the Courts below have dismissed the plaintiff's suit on the finding that the transaction amounted to a sale out and out. So far as the finding that no tender was actually made by the plaintiff on the Jeth of 1924 is concerned, it is a finding of fact and must be accepted.

The sale-deed as its phraseology stood did not in any way contain anything which would itself indicate that it was a mortgage by conditional sale. The property was sold out and out, though there was a provision that if any prior incumbrance is discovered on the property and any part of it passes out of the possession of the transferee or is advertised for sale or if the latter fails to deliver possession of the property or relinquish the sir and khudkasht lands or any part of the property goes out of his possession on account of any defect in the title, the transferee would be entitled to recover "the amount due to him" together with interest at 1 per cent per mensem from this as well as other property and the person of the transferrer. The deed of agreement stated that the property had been sold to the executants and they "therefore" agreed to retransfer the property on payment of the total amount in any Jeth within 15 years of the deed, provided the seller procured the money out of his own pocket and not by sale or mortgage of the property transferred.

The lower appellate Court has found that the stamps for both these documents were purchased on the same day, that both the documents were executed on the same day and written by the same scribe, that the same set of witnesses attested both the documents, that the same witnesses identified the executants before the registering officer, and that both the documents were presented at the registration office at one and the same time. He has then remarked:

"All these facts are no doubt quite true but they at most show that the transaction of sale and the contract to reconvey the property were settled between the parties to the sale simultaneously before the execution of the sale-deed by Kirpal Singh, plaintiffs."

As against these circumstances the learned Judge has pointed out that the full price was paid for this transfer, and has also laid emphasis on the restriction placed on the transferror that the latter should not procure money by sale or mortgage of the property transferred.

No doubt the first set of circumstances was in favour of the plaintiff's contention, and the last two circumstances were points in favour of the defendants. The facts that the stamp papers for the two deeds were obtained at the same time, that they both were faired out obviously at the same time and by the same scribe and attested by the same witnesses and that they were presented for registration at the same time and that the executants were identified by the same set of witnesses no doubt indicated that the whole thing had been arranged previously between the parties and that it had been intended from the very beginning that there would be one document in the form of a sale-deed by the plaintiff in favour of the defendants and another document in the form of an agreement for retransfer by the defendants in favour of the plaintiff.

Although a clause restricting the source from which the money for re-acquisition of the property may be obtained is not unusual in mortgage-deeds and any such restriction has been held to amount to a clog on the equity of redemption, its existence in the agreement is no doubt a point in favour of the defendants because it is more consistent with the transaction being a sale than a mortgage. Similarly, although it is not impossible that in a possessory mortgage the amount paid may be equal to the full value of the property, inasmuch as no interest is accruing and there may be a prospect of an enhancement in its value by lapse of time, the

fact that full value was paid is a circumstance which must weigh in favour of the defendants. The oral evidence on the point was as usual conflicting. If on all this evidence the learned Additional District Judge had recorded a clear finding that the agreement was wholly independent of and not subsequent to the sale, and the sale had not taken place subject to a condition of a repurchase, we would have accepted his finding, but he has omitted to record any such categorical finding. On the other hand the words quoted by us indicate that he conceded that the transaction of sale and the contract to reconvey the property were settled between the parties to the sale simultaneously and before the execution of the sale-deed in question. He has nowhere said that the agreement for retransfer was an independent, separate and subsequent agreement. His finding therefore connot be regarded as a finding of fact binding on us in second appeal.

If the agreement was to be an entirely independent and subsequent transaction it is difficult to see what the consideration for it was. If it was a part and tparcel of the whole transaction, then the sale and the agreement would be consideration for each other, but if the agreement was entirely independent, separate and subsequent, then there would be no consideration for the same and we would have to hold that the party intended that this agreement would be merely gratuitous and voluntary. This would drive us to the conclusion that they had entered into an agreement which was not enforceable in the eye of the law. In our opinion such a presumption should not be made, and the parties must be deemed to have entered into an agreement which was binding upon them. In the recent cases decided by this Court greater stress has been laid on the definition of a mortgage by conditional sale in S. 58 (c), T. P. Act, and it has been pointed out that if the case falls within the scope of that definition we must hold that it is a mortgage even though ostensibly it purports to be a sale. Unfortunately this case was decided by the District Judge before these recent pronouncements were made, namely *Jagannath* v. *Gauri Shankar* (1), *Lalta Prasad* v. *Jagdish Narain* (2), and *Mathura Kurmi* v. *Jagdeo Singh* (3).

No explanation has been offered on behalf of the executants why a wholly gratuitous agreement without any consideration was executed by them subsequent to a completed contract of sale. Having regard to the identity of the dates and the other circumstances mentioned above, we think that this agreement must have been a part and parcel of the same transaction, and that the whole contract between the parties was to have a sale-deed by one party and an agreement by the other, the sale being subject to the condition of the repurchase. The mere fact that the single contract was evidenced by two separate but contemporaneous documents cannot make any difference. In this view we must hold that the transaction was a mortgage by conditional sale within the meaning of S. 58 (c), T. P. Act.

The next question is what relief the plaintiff is entitled to. We have already remarked that the restriction that the money should be procured otherwise than by sale or mortgage of this property would be a clog on the equity of redemption, *Sarbdawan Singh* v. *Bijai Singh* (4), and is not enforceable. As a matter of fact in this case there is no suggestion that the plaintiff has raised money by a mortgage or sale of his equity of redemption.

The other provision that the amount should be tendered in the month of Jeth cannot have the effect of making the present suit premature. All that the mortgagee is entitled to insist upon is that there should be no redemption except in that month. Such a provision is not a clog on the equity of redemption, inasmuch as the intention of the party obviously is to permit redemption at a time when the crops are not standing. The procedure adopted by this Court in such cases has been to pass a decree for redemption to take effect on the next Jeth, *Raghunandan Rai* v. *Raghunandan Pande* (5) *Het Singh* v. *Bihari Lal* (6).

The result therefore is that we allow the appeal, setting aside the decrees of

(1) A. I. R. 1926 All. 670.
(2) A. I. R. 1927 All. 137=48 All. 787.
(3) A. I. R. 1927 All. 321=49 All. 405.
(4) [1913] 36 All. 551=21 I.C. 705=12 A.L.J. 927.
(5) A. I. R. 1921 All. 353=43 All. 636 (F.B.).
(6) A. I. R. 1921 All. 358=43 All. 95.

the Courts below, decree the plaintiff's claim for redemption on payment of Rs. 1,300 on or before 30th June 1930. In the event of payment the mortgagor will get possession of the mortgaged property in Jeth 1930. An ordinary preliminary decree for redemption of a mortgage by conditional sale under O. 34, R. 7 (d) should be prepared fixing 30th June 1930, as the date for payment. As the plaintiff has succeeded in his claim we direct that he should recover his costs from the defendants who shall bear their own costs.

V S./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 286

BANERJI AND KING, JJ.

Lalta Prasad—Defendant—Appellant.

v

Puran Lal—Plaintiff—Respondent.

Second Appeal No 1131 of 1926, Decided on 3rd May 1929, against decree of Addl. Sub-Judge, Farrukhabad, D/- 19th March 1926.

Civil P. C., O. 2, R. 2.—Mortgage suit—Under mortgage terms mortgagee entitled to sue mortgagor personally for unpaid interest—Mortgagee's suit under mortgage terms to recover such interest against mortgagor personally will not bar his subsequent suit for sale in enforcement of mortgage—Civil P. C., O. 34, R. 14.

Where under the terms of the mortgage the mortgagee is entitled to sue the mortgagor personally for the unpaid interest, and the mortgagee sues the mortgagor for such interest praying for a personal decree, without seeking any relief against the mortgaged property, his subsequent suit for sale in enforcement of the mortgage will not be barred by anything said in O. 2, R. 2 : *A. I. R.* 1922 *P. C.* 23 and *A. I. R.* 1922 *P. C.* 412, *Dist.* 36 *All.* 264, *Ref.* [P 287 C 1]

B. Malik and *H. P. Sen*—for Appellant.

B. E. O'Conor K. O. Carleton and *Ambika Prasad*—for Respondent.

Judgment.—This is a defendant's appeal in a suit for sale on a mortgage of 25th July 1918. Lalta Prasad defendant mortgaged certain immovable property under a deed of 25th July 1918. The mortgage is a simple mortgage and it provided that the mortgagor will pay the principal with interest in five years, that he will pay interest every six months and that the creditor will be entitled to recover the interest by a separate suit. The mortgage provided that on failure of payment of the principal and interest the mortgagee was entitled to recover the principal and interest from the mortgagor as well as from his other moveable and immovable property.

On 28th August 1925, that is after the principal money had become payable, the mortgagee instituted a suit in the Court of the Munsiff of Kaimganj for recovery of interest only due to him up to the date of suit. The plaintiff claimed a personal relief. After contest, that suit was decreed on 22nd October 1925. While that suit was pending the mortgagee instituted the present suit on 2nd September 1925, for the recovery of the principal amount payable under the mortgage. The defence of Lalta Prasad was that the plaintiff having brought a suit for interest only and having omitted to sue for the principal amount of money due under the mortgage in that suit, the claim was barred under O. 2, R. 2, Civil P. C. The Court of first instance repelled the contention of the defendant and granted a decree to the plaintiff as prayed. The defendant went up in appeal to the District Judge of Farrukhabad and his appeal was dismissed.

Defendant has now come up in appeal before us and it is contended by the learned advocate for the appellant that the claim of the plaintiff is barred under O. 2, R. 2, inasmuch as on the date when the plaintiff instituted his suit for interest only, the whole of the mortgage money being payable, he not having claimed the amount of the principal money, the present suit must be deemed to be barred under O. 2, R. 2. It is contended by the learned advocate for the appellant that under the explanation to O. 2, R. 2 the cause of action in respect of the claim for interest and principal is the same and the plaintiff having relinquished a portion of his claim, or having omitted to sue, he cannot institute a fresh suit in respect of the portion so omitted or relinquished. In support of his contention he has referred to the explanation to O. 2, R. 2 and he has further contended that in view of the pronouncement of their Lordships of the Privy Council in the case of *Mohammad Hafiz* v. *Mohammad Zakariya* (1) and the case of *Kishen*

(1) A. I. R, 1922 P. C. 23=44 All. 121=49 I. A. 9 (P.C.).

Narain v. *Palamal* (2) the plaintiff's claim is barred by the provisions of O. 2, R. 2. It appears to us that what was held in those two cases has no bearing on the facts of this case. In our opinion the plaintiff's claim is not barred by O. 2, R. 2, Civil P. C. O. 34, R, 14 is as follows :

"Where a mortgagee has obtained a decree for the ptyment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in O. 2, R, 2."

In our opinion the plaintiff had a right under the terms of the mortgage to recover the interest due on the mortgage from the defendant personally. Plaintiff had not sought in the first suit any relief as against the mortgaged property and under the provisions referred to above the mortgagee was entitled to recover the amount due on the mortgage in spite of the provisions of O. 2, R. 2. O. 34, R. 14 has been interpreted by this Court in various cases and it has been held that a mortgagee in spite of having sued for a simple money decree in respect of a claim arising under a mortgage was entitled to institute a suit for sale: see the case of *Indarpal Singh* v. *Mewa Lal* (3). We are therefore of opinion that there is no force in this appeal and we dismiss it.

S.N./R.K. *Appeal dismissed.*

(2) A. I. R. 1922 P. C. 412=4 Lah. 32=50 I. A. 115 (P.C.).
(3) [1914] 36 All. 264=23 I. C. 429=12 A. L. J. 374.

A. I. R. 1930 Allahabad 287

BANERJI AND KING, JJ.

Ejaz Ahmad and *others*—Defendants—Appellants.

v.

Saghir Bano and *others*—Plaintiffs—Respondents.

Second Appeal No. 1243 of 1926, Decided on 18th March 1929, against decree of Dist. Judge, Bareilly, D/- 29th April 1926.

Civil P. C., S. 11 — Scope.

The decree, passed in a partition suit in which for the purpose of giving relief to the plaintiff, if a question has to be decided as between the different parties, whether they are arrayed as plaintiff or defendant, must be binding on all the parties : 32 *All.* 469 and *A. I. R.* 1914 *P.C.* 31, *Foll.*; *A. I. R.* 1922 *All.* 19 and *A. I. R.* 1923 *Bom.* 103, *Dist.* [P 288 C 1]

Syed Mohammad Husain—for Appellants.

K. N. Katju—for Respondents.

Banerji, J. — The four appellants were defendants in a suit for partition. The property in which the plaintiffs claim a share belonged to one Hafiz Nias Ahmad. He left behind several heirs and the plaintiffs claim specified shares against the other heirs of Niaz Ahmad. The defence of the appellants and the other defendants was that the house in question was given to Mt. Wilaiti Begam by Hafiz Niaz Ahmad in lieu of her dower debt and the plaintiffs have no right to the house, and in no case can they have their share apportioned without payment of the proportionate share of the debt. The defendants averred that Mt. Wilaiti Begam's dower was Rs. 40,000 but the plaintiffs say that it was Rs. 1,000.

In the year 1910 one of the heirs of Niaz Ahmad transferred his share and the transferee instituted a suit for partition of that share. In that case some heirs supported the claim of the transferee but the present plaintiff and the appellants pleaded that Mt. Wilaiti Begam's dower was Rs. 40,000 and that she was in sole possession of her husband's assets in lieu of dower debt. The issue then raised was whether Wilaiti Begam's dower was settled at Rs. 40,000, whether the share was still due to her, and whether she was in sole possession of her husband's assets in lieu of the dower debt.

In the present case the same issue arises and the question that we have to decide in this appeal is whether judgment and the decree that followed the 1910 suit binds the parties with regard to the issue just set out by us.

The Courts below have held that the finding in the previous litigation was binding, although the plaintiffs and the appellants were co-defendants in the case.

It is unnecessary to go into the reasons given by the learned District Judge in appeal, but in our opinion the question is concluded by what was held in the case of *Parsotam Rao Tantia* v. *Radha Bai* (1). The decree passed in a

(1) [1910] 32 All. 469=6 I.C. 692=7 A.L.J. 451.

partition suit in which for the purpose of giving relief to the plaintiff if a question has to be decided as between the different parties whether they are arrayed as plaintiff or defendants, must in our opinion, be binding on the parties. No doubt in an ordinary suit a finding on an issue as between co-defendants is not binding unless it is necessary to give relief to the plaintiff and if there is a conflict between the defendants, but the decree in a partition suit stands on a different footing. In the case of *Parsotam Rao Tantia* v. *Radha Bai* (1) it was distinctly pointed out that there was no conflict in interest between the two defendants who had in the previous suit resisted the claim of the plaintiffs. In the present case no doubt there was no conflict between the appellants and the plaintiffs, but for the purpose of giving relief to the plaintiffs it was absolutely necessary to decide the issue regarding the dower of Wilaiti Begam and regarding the question of the possession of the assets of her husband. The principle of that case has been recognized in various other cases and reference may be made to the judgment of their Lordships of the Privy Council in the case of *Nalini Kanta Lahiri* v. *Sarnamoyi Debya* (2) where it was held that in a partition suit where the interest of different parties had to be ascertained the decree passed in the case cannot be ignored by a party afterwards in a suit that he may institute in spite of the previous ascertainment of shares.

The learned advocate for the appellant has strenuously contended before us that the case of *Mohammad Ahmad* v. *Zahur Ahmad* (3) and the case of *Gangaram Balkrishna* v. *Vasudeo Dattatraya* (4) lay down that there can be no res judicata where there was no conflict between the defendants inter se. On an examination of the two cases it is clear that there the issue in the second case was not identical with the issue that had to be decided in the previous case to give relief to the plaintiff. We are therefore of opinion that there is no force in this appeal and we dismiss it with costs.

S.N./R.K. *Appeal dismissed.*

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(2) A.I.R. 1914 P.C. 31=41 I.A. 247 (P.C.).
(3) A.I.R. 1922 All. 19=44 All. 334.
(4) A.I.R. 1923 Bom. 203=47 Bom. 534.

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MUKERJI AND BENNET, JJ.

In the matter of, Basant Rai Takhat Singh of Agra.

Misc. Case No. 794 of 1929, Decided on 19th December 1929.

Income-tax Act, S. 6 (6)—Assessee taking land on lease and erecting temporary shops for purposes of letting—Such income comes under S. 6 (6) and should be assessed under S. 12.

Where the assessee has taken land on lease and has erected on a part thereof temporary houses and shops which are let out on rent and has let out the rest to squatters on rent, the income derived from such rents comes under S. 6 (6) and must be assessed as income from "other sources" under S. 12. [P 289 C 1, 2]

N. P. Asthana—for Applicant.

U. S. Bajpai—for the Crown.

Mukerji, J.—This is a reference by the Commissioner of Income-tax at the instance of Messrs. Basant Rai Takhat Singh of Agra.

It appears that the assessees are members of a Hindu joint family and are assessed as such. They carried on different kinds of business, but for the present, they have got some house property and they hold a lease from the Cantonment. The leased property consists mostly of vacant land let out to the assessees for one year. One of the conditions of the lease is that no permanent structure shall be erected on the land leased and the structure that is erected should be removable within 12 hours. What the assessees do is to let out the sites, with or without any shelter constructed by themselves over them, to different persons and realise ground rents from the sub-lessees. The Income-tax Officer of Agra assessed the income from the property of the assessees which consisted of various buildings in various parts of Agra and he also considered the income from the lease as income from property. The result was that, as it was discovered that what was received by the lessees from the land was less than the rent payable to the Cantonment authorities, a deduction was made from the income of other house property of the deficit in the contract. The total income from house property came to Rs. 51,000 and odd (after the necessary deductions), and the difference between the rent payable to the Cantonment authorities and the rent realised, namely Rs. 9,000 and odd was deducted from

the sum of Rs. 51,000 and odd. The assessees were assessed with a tax on the balance.

The assessees were not satisfied with this assessment and their grounds were these. They said that the contract obtained from the Cantonment authorities was a 'business' and, further, as they had borrowed certain moneys in earlier years for other kinds of business, and, as they were paying interest on money so borrowed in previous years, they should be credited under S. 10 (2) (3), Income-tax Act with the interest they had to pay. In other words, they wanted that the interest which they paid should be treated as an outgoing on the head of business and, therefore, the balance left after deducting the interest from the income, should be treated as their income from the business.

The assessees wanted that three matters should be referred to the High Court, but the learned Commissioner accepted their prayer as regards two points only. The questions which the Commissioner framed are as follows:

(a) Where, as in the present case, the assessee has taken land on lease and has erected on a part thereof houses and shops which are let out on rent and has let out the rest to squatters on rent, should the income derived from such rents be assessed under Ss. 9 and 12 or under S. 10, Income-tax Act, 1922?

(b) Whether the interest on money borrowed for the purpose of a particular business in some particular year, and paid during the "previous year" when the business for which the money was actually borrowed did not exist, is an admissible deduction within the meaning of S. 10, Cl. 2 (3), Income-tax Act?

As regards question (a), on the facts stated by the learned Commissioner himself, the language does not appear to be very happy. We understand, and the learned Government Advocate accepts the facts, that the buildings that have been erected on the land leased to the assessees are entirely of a temporary nature. The buildings cannot be substantial under the terms of the lease itself and, therefore, the houses and shops that have been erected are mere stalls which are to give shelter to people coming to keep their goods or do other business at the place. The lessees have certain houses, in the proper sense of the word, and they have been taxed as property. The property in Anaj Mandi mentioned in the lease at p. 11 of the printed book, is not a part of the leased property, the list of which is given at p. 10. For the purposes of our answer, we have to take it, therefore, that several pieces of land belonging to the Cantonment authorities were taken on lease for one year only with the idea that parcels of it should be let out to sub-lessees for a period not more than one year, and rent should be received from these sub-lessees for the benefit of the lessee. The question then is whether this contract which the lessees obtained from the Cantonment authorities is 'property' or it is 'business.' In our opinion it is neither 'property' nor is it 'business.' The income from this source must come under Cl. (6), S. 6, Income-tax Act and it must be assessed as directed in S. 12, Income-tax Act.

We are of opinion that the income from the contract is to be assessed as income from "other sources."

That being our opinion on Q. (a), Q. (b) does not at all arise. That question was framed because the Commissioner did not know what the High Court was going to hold on the contention of the parties. As we have held that the income from the contract has to be treated as income from 'other sources,' we do not think that we can be properly called upon to pronounce an opinion on a question which does not arise.

We direct that a copy of this judgment be sent to the Commissioner as our answer to the question put by him. The assessee must pay the costs of this reference. We direct that the learned Government Advocate's fee be assessed at Rs. 150 provided he files his certificate of fee within the period allotted.

V.S./R.K. *Answered accordingly.*

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SEN, J.

Ram Dayal—Plaintiff—Appellant.

v.

Asghar Khan—Defendant—Respondent.

Second Appeal No. 1004 of 1928, Decided on 13th December 1929, from decree of Sub-Judge, Budaun, D/- 5th March 1928.

Transfer of Property Act, S. 52 — Lease for adequate rent of mortgaged holding during pendency of mortgage suit or consequential proceedings in ordinary course of management—Transfer is not obnoxious to S. 52 and lessee holds subject to mortgagee decree-holder's rights.

Where during the pendency of a mortgage suit or of the proceedings consequential upon a decree passed in such suit the mortgagor in the ordinary course of the management of his property grants a lease of the mortgaged property in whole, or in part for an adequate rent, the lease is not obnoxious to the provisions of S. 52. The lessee holds the property subject to the rights of the mortgagee decree-holder.

[P 230 C 2]

N. P. Asthana—for Appellant.

Shabd Saran—for Respondent.

Judgment.—This is an appeal by the plaintiff which arises out of a suit for possession of plot 1028 having an area of 5 bighas 12 biswas pukhta situate in village Sheikhpur. One Mt. Rafatunnissa was the owner of certain zamindari properties including the plot in dispute. On 19th July 1908, she executed a simple mortgage of the entire properties in favour of the plaintiff appellant. This mortgage was put into suit in 1920. During the pendency of the suit, the original mortgagor having died, the name of her son and heir Ishtiaq Ahmad was substituted in his place. A preliminary decree was passed in due course of law. After the passing of the preliminary decree, Ishtiaq Ahmad, on 25th February 1924, executed a lease of the plot in dispute in favour of Asghar Khan defendant-respondent for a term of five years. Plaintiff applied for a final decree and impleaded Asghar Khan, the lessee in the said proceedings. A final decree was passed against the mortgagors' representatives on 25th February 1925. In execution of the said decree, the property was sold and was eventually purchased by the plaintiff decree-holder on 24th July 1926. Formal possession was obtained over the zamindari property comprised in the mortgage on 13th October 1926. No possession was obtained over plot 1028 which is the subject-matter of the present suit as the lessee in enjoyment of his rights under the lease dated 25th February 1924 continued to remain in possession.

The defendant contested the suit upon the ground that he was the tenant of the plaintiff's predecessor-in-title under the lease dated 25th February 1924 and must be taken to be a statutory tenant under S. 19, Act 3 of 1926 (local). The Court of first instance referred an issue to the revenue Court for the determination of the question as to whether the defendant was a tenant of the plaintiff. The issue was decided in favour of the plaintiff and the Court of first instance held that the relation between the parties was that of landlord and tenant, that the legal position of the defendant was that of a statutory tenant under S. 19, Agra Tenancy Act, that the lease is still operative and in force and that the plaintiff's suit for ejectment is not, therefore, maintainable. The lower appellate Court has affirmed this decision.

The lease dated 25th February 1924 does not offend against the provision of S. 52, T. P. Act. Where during the pendency of a mortgage suit or of the proceedings consequential upon a decree passed in such a suit, the mortgagor in the ordinary course of the management of his property grants a lease of the mortgaged property in whole or in part for an adequate rent, the lease is not obnoxious to the provision of S. 52, T. P. Act. The lessee holds the property subject to the rights of the mortgagee decree-holder.

Act 3 of 1926 came into force on 6th September 1926. Asghar Khan defendant-respondent was under his lease dated 25th February 1924 a tenant of plot 1028 at the commencement of this Act. He was, therefore, a statutory tenant within the meaning of S. 19. The finding of the revenue Court that the relation between the parties was that of landlord and tenant is obviously correct and cannot be displaced.

It has been further contended that Asghar Khan was impleaded in the proceedings relating to the preparation of the final decree and he might and ought to have pleaded the legality and validity of his lease dated 25th February 1924 and that the omission of Asghar Khan to put forward that plea precludes him from raising it now in answer to the present action. It is contended, therefore, that the defence is barred by the rule of constructive res judicata. It does not appear why or how a question as regards the legality of the lease dated 25th February 1924 could arise in the proceedings about the

passing of a final decree. The plaintiff mortgagee was entitled to a decree for sale of the zamindari property. It would have been wrong on the part of Asghar Khan to resist the application for the passing of the final decree and he acted properly in not contesting the application. His position was merely that of a tenant and he could not assail the plaintiff's title as the decree-holder to put to auction the right, title and interest of the mortgagor in the zamindari property hypothecated to him. The plea put forward by the plaintiff is, therefore, clearly, untenable and is rejected. The result is that this appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Allahabad 291

MUKERJI AND BENNET, JJ.

Sukhram Puri—Defendant — Appellant.

v.

Mohammad Ashfaq—Plaintiff — Respondent.

Letters Patent Appeal No. 72 of 1927, Decided on 17th December 1929, from judgment of Lindsay, J., D/- 22nd April 1927, reported as in *A. I. R.* 1927 *All.* 779.

*** Agra Tenancy Act (2 of 1901), S. 154—Grant of land rent free to secure performance of certain puja falls within S. 154 (c) :** *A. I. R.* 1927 *All.* 779, *Reversed.*

Where the terms of the wajibularz state that the lands were in possession of a muafidar for the purpose of performing puja and it was also directed that the muafidar would remain in possession as long as he performed the worship, reserving the right to the landlord to hand over the land to somebody else on failure of the muafidar, so that the puja may be performed,

Held : that the grant fell within the ambit of S. 154 (c) and was not resumable under Cl. (b) : **A. I. R. 1927 All. 779, Reversed.**

[P 291 C 2 ; P 292 C 1]

Haribans Sahai—for Appellant.

Mukhtar Ahmad—for Respondent.

Mukerji, J.—This appeal arises out of a suit instituted by the landlord to resume a certain muafi land on the allegation that the grant was made for services which are no longer required by the proprietor. The services were the worship of a certain idol in a certain temple.

The first Court dismissed the suit, the lower appellate Court decreed it and a learned Judge of this Court dismissed the appeal.

The decision of the case before us depends on a proper construction of the wajibularz which contains the terms of the grant. The wajibularz runs as follows :

"In this mahal 38 bighas 17 biswas are held by Gayapuri Goshain Chela of Bhagwanpuri for the purposes of the performance of puja of Mahadeoji. The muafidar will remain in possession of the land so long as he performs the worship. If he fails to perform the worship, the landlord will be entitled to hand over the land to somebody else, so that the puja may be performed."

The question that arises, on a true construction of this document, is whether the grant is resumable at the will of the proprietor within the meaning of Cl. (b), S. 154, U. P. Tenancy Act 1901, or whether the grant falls under Cl. (c) of the same section of the same Act.

Having regard to the nature of the grant, it was not at all likely that the proprietor making the grant, should ever have thought of resuming the land by not requiring the worship of the deity to continue. As to the actual language that is used, there is no provision for resumption at all. On the other hand, the idea is that the worship is to continue. Only, the land might be transferred from the possession of the holder to another if the former failed to perform the services. It is not with respect to every rent-free grant that the law permits resumption. Three different cases are defined. One is where the rent-free grant is held at the pleasure of the grantor. The argument of the learned counsel for the respondent, if acceded to, would bring the case really within Cl. (a). He, however, contends that the case falls within Cl. (b) which is defined as : "for performance of some specific service, religious or secular, which the proprietor no longer requires."

The argument is that whenever there is a grant for service, it must depend on the will of the proprietor whether the service will continue or not. If that were so, it would have been enough for the legislature to say as to the grant : "for performance of some specific service, religious or secular;" and the words "which the proprietor no longer requires" would be entirely unnecessary. There may be services the termination of which was not made dependent on the will or requirement of the proprietor. The present grant is like that. As we have already said, the proprietor could never have contemplated

that he was looking at any distant time to terminate the services. In our opinion, the case falls within Cl. (c) which runs as follows :

"Conditionally or for a term, and the condition is broken or the terms expires,"

and the 'condition of holding the grant' was the performance of the puja. So long as the holder was prepared to perform the puja the condition was performed and the grant stood unresumable.

In the result, we hold that the rent-free grant is not resumable under Cl. (b), S. 154, U. P. Tenancy Act 1901, that it falls within Cl. (c) and further that the condition has not been broken.

We allow the appeal, set aside the decree of this Court and that of the lower appellate Court and restore the decree of the Court of first instance. The appellant will have his costs throughout.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 292

SULAIMAN AND KENDALL, JJ.

Sri Nath and *others*—Plaintiffs—Appellants.

v.

Jagannath and *others*—Defendants—Respondents.

First Appeal No. 157 of 1925, Decided on 18th November 1929, against decree of Sub-Judge, Allahabad, D/- 4th December 1924.

(a) Hindu Law—Alienation—Antecedent debts—Recital of debts in sale-deed does not make debts antecedent debts.

Mere recital of debts in the sale deed amounting to an acknowledgment by the manager of the joint family executing the sale-deed does not make those debts antecedent debts. [P 295 C 1]

(b) Hindu Law—Alienation—Legal necessity is not couclusively established by attestation of other members.

The mere fact that other members of the joint family attested the sale-deed does not conclusively establish any legal necessity. [P 295 C 1]

(c) Hindu Law—Alienation—Legal necessity—Substantial portion for necessity—Due enquiries made—Consideration adequate—Sale should be upheld.

The mere fact that a part of the consideration, however small, is not substantiated by legal necessity would not necessarily nullify a deed or show that there was no justification for its execution. The material question that has to be considered is whether the sale itself was for the legal necessity. And if on such consideration it is found that the substantial portion of the consideration was for legal necessity, that due enquiries as to legal necessity were made by the purchaser, and that the consideration was adequate, even though the purchaser may not be in a position to prove how the surplus was applied, the sale-deed can be upheld. *A. I. R.* 1927 *P. C.* 37, *Foll.* 1 *I. A.* 321 (*P. C.*) and *A. I. R.* 1927 *P. C.* 246 ; *A.I.R.* 1929 *P. C.* 143, *Ref.* [P 298 C 1, 2]

B. K. Mukerji and *Iqbal Ahmad*—for Appellants.

B. E. O'Conor, *P. L. Banerji* and *Damodar Das*—for Respondents.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for recovery of possession of immovable property by avoidance of a sale-deed dated 13th September 1910, executed by Mathura Prasad, the ancestor of the plaintiffs, in favour of defendant 1. Defendants 2 and 3 are the sons of the vendee and are joint with him. Almost all the members of Mathura Prasad's family, eleven in number, excluding one son Ram Partap and one grandson Bhairon Prasad who have been impleaded as pro forma defendants, have joined in the suit. A large number of these plaintiffs are still minors. The case put forward in the plaint was that Mathura Prasad was a very old, deaf and blind person and was a member of a joint Hindu family which owned the property in dispute jointly; that the defendant obtained a sale-deed from Mathura Prasad of property worth Rs. 10,000 on the date mentioned above without any legal necessity or without any need for the payment of any antecedent debt for a sum of Rs. 6,000 only, which was not binding on the family. There was a further allegation that even out of Rs. 6,000 a good part had been entered fictitiously. There was not any specific allegation of any fraud or undue influence having been committed on Mathura Prasad, though it was alleged generally that he had been induced to enter into this transaction. The contesting defendants pleaded that the sale was for legal necessity, and denied that any part of the Rs. 6,000 was fictitious, and further denied that property was worth anything like Rs. 10,000. They urged that the sale consideration was required for the payment of antecedent debt and lawful necessity of the plaintiffs' family and that the transaction had been entered into with the advice and consultation of Ram Pratap that after the completion of the document no member of the family ever took any objection in

respect of it or of the possession of the defendants, and that the family had accordingly acquiesced in the transfer. The learned Subordinate Judge has found that the family was joint at the time when the sale took place and that the property transferred was joint family property. He has also found that there was no evidence to prove any fraud or undue influence. These findings are not challenged before us in this appeal. He has further found that the sale-deed was executed for family necessity and for the payment of certain antecedent debts. He has not recorded any finding as to the value of the property transferred and has not expressed his opinion whether the consideration was or was not inadequate. Examining the sale consideration in detail he has come to the conclusion that all the items of it were either for antecedent debts or for family necessity. Some of the debts which had been paid off by the defendants were debts incurred on documents executed, not by Mathura Prasad himself, but by some of his sons and grandsons, and with regard to these the learned Subordinate Judge has expressed the view that Ram Partap and Bhairon Prasad were really managing the affairs of the family and were practically transacting all its business and that these debts, having regard to the fact that Mathura Prasad in the sale-deed acknowledged his liability to pay them, must have been incurred for the family and were therefore binding on the family. He has in the alternative held that the acknowledgment of these debts by Mathura Prasad in the sale-deed would in any case make them antecedent debts, so as to justify his alienation of the family property in order to pay them off.

There was no specific plea in the written statement that the defendants had made due enquiry before the sale and were satisfied that legal necessity existed. There was also no specific issue on this point. When two of the plaintiffs were examined, no questions were put to them on behalf of the defendants to show whether any enquiry had been made from them. But the question was assumed to be covered by issue 5 which related to the existence of legal necessity. The learned Subordinate Judge has believed defendant 1's statement that he had made enquiries as to these previous debts and was satisfied that they existed and that in fact he had paid them off. On these findings the learned Subordinate Judge has dismissed the plaintiffs' suit in its entirety. The plaintiffs have accordingly come up in appeal and on their behalf most of these findings are challenged.

The sale-deed of 13th September 1910 was executed by Mathura Prasad for Rs. 6,000. Out of this Rs. 900 were paid in cash before the Sub-Registrar. Rs. 119 were taken in order to meet the expenses of execution and registration of the deed. The rest was left in the hands of the vendee in order to pay off certain named creditors and to discharge certain named debts. This sale-deed was attested by the executant's son Ram Partap and his grandson Bhairon Prasad. His son Ram Partap was also present at the time of its registration.

So far as Rs. 900 is concerned, the recital in the deed was that it was required to meet the plaintiffs' household necessity. The oral evidence led on behalf of the defendants was that the gauna ceremony of Sidh Narain's daughter was to take place soon after and the money was borrowed for that purpose. The plaintiffs' witness Bindhachal has admitted that the gauna ceremony of the girl took place about that time. In view of this statement the learned Subordinate Judge has accepted the defendants' case that this sum was required for that purpose. We see no good ground for taking a different view. It must therefore be held that Rs. 900 were required for family necessity.

Rs. 119 were required for purposes of execution and registration of the document and they would be valid or invalid according as the document in dispute stands or falls. Of the rest of the amount, Rs. 1180, were left in the hands of the vendee for payment of amount due on a mortgage deed dated 4th November, 1907, executed by Mathura Prasad in favour of Suraj Partap. prima facie, this was an antecedant debt which Mathura Prasad had authority to pay off by alienation of a part of the family property. The only objection raised against this amount is that the mortgage-deed of 1907 has not been

proved to have been duly attested. It is suggested that two of the attesting witnesses are dead and the remaining attesting witness, viz. Ram Partan, was not called, and accordingly the deed has not been proved to have been a mortgage-deed. In our opinion it was wholly unnecessary in this case to produce any attesting witness. The defendant is not trying to enforce this deed as a mortgage deed, and it was only proved in order to show that the amount was due on it from Mathura Prasad. The execution of this document which was a registered one was within three years of the sale-deed and the proof of execution was sufficient to establish that the amount as due from Mathura Prasad. There can therefore be no valid objection to this item.

The second item of Rs. 1370 consisted partly of interest due on the mortgage-deed of 1907 and amount due on other document. So far as the interest on the previous deed is concerned it undoubtedly goes with the first item and is equally good. The rest of this amount as well as the balance of the amount in the hands of the vendee can be split up into two portions. Rs. 2381 represent the amount due on documents executed either by Mathura Prasad alone or executed by him jointly with some other members of the family. In our opinion when there was joint liability of Mathura Prasad to discharge these debts they became antecedent debts in lieu of which the property could be transferred. There can therefore be no question that they are valid and binding. The second portion, aggregating about Rs. 2,600, consists of the amounts due on a large number of promissory notes and bonds for every small sums of money varying from Rs. 49 to Rs. 99 executed between the years 1910 mostly by Ram Partap and some by Batuk Prasad, Bhairon Prasad and Sri Nath. These were due to three sets of creditors. In the sale deed of 1910 these various debts were not specifically mentioned but it was generally stated that Rs, 1,370 were due to one creditor, Rs. 350 to the second, Rs. 950 to the third, Rs. 675 to the fourth and Rs. 481 to the fifth creditor Jumna Dat who was the father of the vendee himself. The recitals in the deed show that Mathura Prasad directed the vendee to pay off debts due to these creditors on documents executed by himself with instructions to pay them off and keep the documents as authority. The language employed in the sale deed further shows that Mathura Prasad had in mind the existence of one document in favour of each of these three sets of creditors. As the deed stands, it is therefore impossible to connect the amounts left in the hands of the vendee for payment to these creditors with the debts due on the documents executed by Mathura Prasad's sons and grandsons. On the face of that document it is impossible to hold that Mathura Prasad acknowledged his own liability for payment of the debts due on documents which had not been executed by him but might be executed by the other members of the family. The learned Subordinate Judge, however, has held that there was possibly some mistake and misapprehension. According to him the real facts seem to be that neither Mathura Prasad nor defendant 1 at the time of the execution of the sale deed in dispute knew the nature of Parbhu Nath's debts. He has expressed the same view with regard to the debts due to other creditors. His conclusion is that there is nothing on the record to prove that there was any other debt due to these creditors and therefore it could not be urged that the debts which had been paid off by the defendants were fictitious debts. He has attributed the peculiar language of the saledeed to "some mistake of describing it." Apart from the fact that Mathura Prasad acknowledged his liability to pay these amounts to the creditors named, there is no evidence on the record to show that the debts which had actually been discharged by the vendee and which were due on documents executed by other members of the family were debts which had been required for family necessity or were debts which were in the contemplation of Mathura Prasad at the time when the document was executed. The burden is on the defendants to establish that these debts were binding on the family and in our opinion the defendants have not discharged that burden.

We do not agree with the view expressed by the learned Subordinate Judge that the recitals in the sale deed amounted to an acknowledgment by

Mathura Prasad of the debts which made those debts antecedent debts. In the first place, as has been pointed out above, the acknowledgment did not specifically refer to these debts. In the second place, that acknowledgment being itself a recital in the saledeed could not make those debts antecedent debts. The mere fact that two other members attested the deed does not conclusively establish any legal necessity. In the absence of any proof of legal necessity of these debts it is impossible to hold that the alienation in lieu of these debts would be good. It has not been contended on behalf of the respondents that a manager of a Hindu family is entitled to alienate property in order to pay off debts incurred by the other members of the family. There is here no proof that the debts incurred by the other members had really been incurred on behalf of the family.

At the time when the judgment was pronounced by the Court below the view which had prevailed in view of certain rulings of this Court was that in order to establish legal necessity the Court had to find whether a substantial portion of the sale consideration had been required for such purposes ; in view of the subsequent pronouncement of their Lordships of the Privy Council in the case of *Sri Krishen* v. *Nathu Ram* (1) and subsequent cases, the true question which calls for an answer in such cases is whether the sale itself was one which was justified by legal necessity. Whether any portion was or was not required for family necessity is not the most important question. What we have to decide is whether the sale of the property was itself for necessity. As mentioned above, the plaintiffs had put forward in the forefront of their plaint the statements that the property transferred was worth Rs. 10,000 at the time of the sale and that it was sold for a grossly inadequate consideration. The defendants denied this allegation. In support of their case the plaintiffs produced a copy of a saledeed dated 11th November 1912, executed by Mathura Prasad in respect of one anna share in this very village for a sum of Rs. 2,000. They also produced a copy of a compromise decree obtained by the vendee Jagannath under which he pre-empted this property. At the rate at which this property was sold, the value of the disputed property would come to considerably more than Rs. 10,000. When the defendant Jagannath was in the witness-box a question was put to him as to his having pre-empted this property and of course he had to admit it. In re-examination he offered no explanation as to why he had paid such a high price. On the other hand, as regards the disputed share his reply was that he had purchased it at the rate of 9½ p. (i. e., per 100) which would give it a very high value. But no revenue papers were produced on his behalf to show the actual profits of this share and all that we know is that the Government revenue assessed on the entire property sold is Rs. 155-13-7. Of course, there was no specific issue on the question of the value of the property and we have no express finding by the Court below on this point. In our opinion, in order to decide whether the sale of this property in 1910 for a sum of Rs. 6,000, out of which only a part was for legal necessity was good it must be ascertained what was the actual value of the property at that time.

As regards the finding relating to bona fide enquiries having been made by the defendants we find that that finding also is unsatisfactory. We have already remarked that there was no such express plea in the written statement that there was no express issue on the point and that no question was put to two of the plaintiffs when they were in the witness-box. Defendant 1 in his examination-in-chief also did not say a word about having made any bona fide enquiries and being satisfied that the legal necessity existed before he took the property. In cross-examination however he was questioned about the matter, and did state that he made enquiries and asked Sheo Garul Ram, Kedar Nath (creditors) Sri Nath, Batuk Prasad, Raghunath Prasad and Jagadamba Prasad as to whether the sale deed was necessary or not. We asked Sheo Garul Ram as to whether any debt was due to him or not whereupon he replied that a debt of Rs. 2,550 was due to him and that a suit would be brought in respect of it if the sum were not

(1) A. I. R. 1927 P. C. 37=49 All. 149=54 I. A. 79 (P.C.).

paid. But Sheo Garul Ram gave no details. Kedar Nath told him that after an adjustment of accounts a sum of Rs. 2,550 had been found due and that he was ready to bring a suit. As regards the plaintiffs, Jagannath stated that he asked Sri Nath why it was necessary to execute a saledeed. He replied that the execution of a saledeed was necessary as he had to pay the debt which had become considerable, that he he had to defray the expenses of the gauna ceremony of his daughter the time for which was approaching, that he required money for cultivation of fields, that he could not meet the expenses without executing a sale-deed, and that he required the money for meeting the expenses of education of the children. Batuk Prasad told him that the saledeed was going to be executed on account of the payment of former debts the marriage of his daughter and other necessities.

As regards the creditors, it is significant that the defendants did not get particulars from them. Furthermore, the defendant has not even clearly stated that the creditors told him that the debts were due from Mathura Prasad himself much less that they were debts due under documents executed by Mathura Prasad. The statement as it stands is undoubtedly very vague and not definite. As regards the enquiry from the members of the plaintiffs' family we have already remarked that no question was put to Sri Nath and Jagadamba Prasad when they were examined. We might also point out that Jagadamba Prasad must have been a minor in 1910, and it is absurd to suggest that an enquiry was made from him. Even in 1917 when Jagannath Prasad himself sued Jagadamba Prasad he treated him as a minor under the guardianship of his uncle. It is further to be borne in mind that part of the debt was due to Jumna Dat, the father of the vendee himself, as to which there would be no need for enquiry from third parties. The defendant vendee was in a position to prove why those debts had been taken by the other members of the family from his father himself. The learned Subordinate Judge has overlooked the fact that Jagannath Prasad was an interested party to the suit and his oral statement cannot be accepted wholesale as it would have been if it were the statement of an independent person of respectability. No explanation has been offered by the defendant as to his having acquired one anna share in this village two years after the sale for a sum of Rs. 2,000. If the property was actually worth considerably more than the amount required for the transfer it would be difficult to hold that the defendant acted as a bona fide transferee in good faith. We therefore think that a material point which ought to have been gone into by the Court below has not been enquired into and in the absence of clear evidence to show the real value of the property in 1910 it is very difficult to come to a conclusion whether the sale itself was for necessity or not.

Before disposing of the appeal finally we therefore think that it is necessary to have a clear finding as regards the actual value of the shares sold on the 13th September 1910. Under the circumstances mentioned by us above we think it would be just to allow the parties to adduce further evidence on this issue. We accordingly direct that that the issue noted above be sent down to the Court below and that after taking fresh evidence which the parties may tender it should record its finding and send it to this Court within three months, if practicable. On return of the finding the usual ten days will be allowed for filing objections. (On return of the finding their Lordships gave the following judgment). The facts of this case are fully set forth in our order dated 29th February 1928. In this suit the plaintiffs were seeking to avoid a sale deed dated 13th September 1910, executed by their ancestor in favour of defendant 1, on the ground that the transfer was unauthorised and was not for legal necessity. The defendants pleaded that the transaction was justified. The learned Subordinate Judge found that the entire consideration was good and was supported by legal necessity, and further found that the vendee had made enquires to satisfy himself that a necessity existed.

In appeal we examined the various items of the sale consideration and did not agree with the Court below with regard to several heads. As a result our

conclusion was that including Rs. 119 which had been taken for the expenses of the execution and the registration of the deed legal necessity for Rs. 3,281 had been established but no necessity had been proved for Rs. 2,600.

We did not actually consider it necessary at that time to record a categorical finding on the question of due enquiries having been made by the defendant but we gave reasons in our order for our view that the finding on that point also was unsatisfactory. For the reasons given in our previous order we have no hesitation in saying that the vendee had failed to prove that he had made due enquires and was satisfied that the whole of Rs. 6,000 was required for legal necessity. We called upon the Court below to find the market value of the property transferred in order that we may be able to answer the question whether the sale itself was for legal necessity or not.

The Court below has returned a finding that the value of the property sold was between Rs. 6,000 and 7,000 and that Rs. 6,000 was not an unfair price.

Objections have been taken to this finding on behalf of the plaintiffs, but there is no objection on behalf of the defendants. Numerous documents were filed by the parties to serve as exemplers, and the learned Judge has taken into account the rates of purchase shown in those documents. We may point out that none of those saledeeds can be a correct criterion for determining the market rate because these rates vary considerably. Most of these saledeeds are of small shares in the village sold for a few hundreds of rupees. In such transactions the exact market rate is not always insisted upon the actual sale price depending mainly on the anxiety of the vendor to sell or the vendee to purchase the property. None of these documents is of the year 1910. The rates generally shown by the documents produced by the defendants were about Re. 0-0-9 per cent per mensem, whereas the plaintiffs produced one document showing much higher rates viz., Re 0-1-6 per cent per mensem. In particular there was one sale deed dated 11th November 1912 under which a one anna share had been ostensibly transferred for Rs. 2,000. In a litigation following upon it the plaintiff Jagadamba Prasad was examined and stated that the real consideration was Rs. 1,000. The Court also found that actual consideration was Rs. 1,000 only (vide judgment at p. 51 of the supplementary book). In this litigation Jagadamba Prasad was one of the plaintiffs, and the judgment is admissible against him. Taking this rate as the basis of calculation the Court below has thought that the rateof Re. 0-1-8 was not unfair. On this the price of Re 0-7-0 would amount to Rs. 7,000. In addition to this Re. 0-7-0 share, another share of Re 0-1-0 and odd in another village was also sold which according to the learned Subordinate Judge might have been worth Rs. 700. Having considered these circumstances he came to the conclusion that the value of the shares sold was between Rs. 7,000 and 6,000. As generally there are fewer purchasers for large shares in a village, we agree with the Court below that the price of this property might have been between Rs. 6,000 and 7,000. Certainly the evidence does indicate that it could not have been less then Rs. 6,500 though it might have been more.

It is therefore impossible to say that the sale was for an unreasonably low price, though the amount required for legal necessity at the time was only just about half the price.

As regards the setting aside of the sale deeds, where only part of the consideration was for legal necessity the view which had prevailed in this Court was not quite in harmony with that which prevailed for instance in the Calcutta High Court. Their Lordships of the Privy Council in the leading case of *Sri Kishen Das* v. *Nathu Ram* (1) expressed their disapproval of the view which has been expressed in some of the cases of this Court. At the time when we sent down an issue to the Court below only this pronouncement of their Lordships was before us. Since then two more pronoucements have been made, and they are to be found in the cases of *Gauri Shanker* v. *Jiwan Singh* (2) and *Ram Sunder Lal* v. *Lachhmi Narain* (3). It is to be noted that in all these cases

(2) A. I. R. 1927 P. C. 246=25 A. L. J. 937.
(3) A. I. R. 1929 P. C. 143 = 51 All. 430. (P. C.).

the High Court had set aside the transfers and their Lordships upheld the transactions. The first thing which is clear from these pronouncements is that the view which was expressed in at least one of the cases of this Court to the effect that:

"if any part of the consideration was invalid and not binding on the plaintiff, the plaintiff would be entitled to have the sale set aside."

is not sound.

It is obvious that the mere fact that a part of the consideration, however small, is not substantiated by legal necessity would not necessarily nullify the deed, or show that there was no justification for its execution.

In execution where the entire consideration is shown to have been advanced for legal necessity, no difficulty whatsoever arises, and there is no longer any further question as to any enquiry having been made by the transferee. But in cases where only part of the consideration is good difficulties are sometimes undoubtedly experienced.

The learned advocate for the plaintiffs has argued before us that in view of the opinion expressed by their Lordships it is no longer proper to consider whether a substantial portion of the consideration has been duly accounted for. We do not think that this is the effect of their Lordships' pronouncements. On the other hand in *Sri Kishen Das's* case (1) at p. 156, their Lordships re-affirmed the statement contained in *Girdharee Lal* v. *Kantoo Lal* (4):

"where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds is accounted for, the fact that a small part is not accounted for will not invalidate the sale."

Their Lordships remarked that this in tself was a correct statement of the law so far as it went, but that it was not a complete statement of the law. Their Lordships then observed:

"it does not by any means follow that the sale will be invalidated wherever a part of the consideration not accounted for cannot be described as small."

Similarly in *Gauri Shanker's* case (2) at p. 968 their Lordships condemned the practice which had crept up when necessitating and settling such cases upon principles of accounting, viz. that:

"if upon strict accounting it is found that it be completely established that by far the most substantial part of the consideration was for family necessity, yet if a certain balance of the price remains unaccouted for or insufficiently proved then by that result the parties' interests are to be judged and the sale be set abide conditionally upon repayment by the vendor or his representatives of the substantial part referred to."

In view of what their Lordships have remarked it is now obvious that no hard and fast rule as regards any proportion can be laid down nor can one adopt any rule of thumb based on fractions or any graded scale. In each case the Court must consider the main question whether the sale itself was for necessity.

If the whole consideration is for necessity, no difficulty arises, and there need be no further inquiry. If the "bulk of the proceeds is accounted for," and "a small part is not accounted for," that will not invalidate the sale. But even where "part of the consideration not accounted for could not be described as small" the sale is not necessarily invalid. We must then inquire further into its circumstances and find out whether the sale itself was not for necessity.

In *Gauri Shanker's* case (2) their Lordships have explained their meaning on pp. 969 to 997 in the following words.—

"The real question that has to be considered is this whether the sale itself was justified by necessity their Lordships could not go back upon that decision. If the purchaser has acted honestly, if the existence of a family necessity is made out, and the price is not unreasonably low, he (the purchaser) is not bound to account for the application of the price."

This view has been reaffirmed by their Lordships in *Ram Sundar Lal's* case (3) where at page 437 after remarking that "the material question, however, is whether the sale itself was one which was justified by the legal necessity,"

their Lordships proceeded to point out that a substantial portion of the consideration had been used for legal necessity, that due inquiries as to the necessity had been made by the purchaser, and that the consideration was adquate. Their Lordships at page 438 upheld the deed on the finding that the sale was effected after due inquiry, that the sale was for adequate consideration and that legal necessity had been proved to the extent of Rs. 7,744 out of Rs. 10,767, even though the defendants after a long interval of time had not been able to prove how the surplus was applied.

These cases lay down the principles

(4) [1874] 1 I. A. 321=14 B. L. R. 187=22 W. R. 56=3 Sar. 390 (P. C.).

which ought to guide our decision in this case.

On the facts found we must hold that the sale of this property for Rs. 6,000 was not for an unreasonably low price, but that only Rs. 3,281 out of Rs. 6,000 (including Rs. 119 required for expenses) have been proved to be for legal necessity, and that the defendants have failed to prove that they made sufficient inquiries to satisfy themselves that Rs. 6,000 were required for legal necessity.

Although we cannot enter into the question of proporations or ratios and try to base our judgment on such proportions or ratios, the fact that nearly half of the amount has not been shown to have been justified cannot be lost sight of in arriving at the conclusion that the sale itself was really not for legal necessity. The defendants have made no attempt to show that there was really any urgent pressure on the vendor or on his estate which required an immediate raising of the whole amount or the sale of the entire -/7/-. share.

Our conclusion therefore is that, taking the transaction as a whole and bearing in mind all the circumtances of the case, it is not established that the sale of -/7/- and odd share in 1910 was really for necessity.

It is not disputed before us that before the plaintiffs can claim prossession of this property they must make good to the vendee that part of the consideration which has been found to be for necessity. We accordingly allow this appeal, and setting aside the decree of the Court below decree the plaintiff's claim for possession of the property transferred on condition of their paying Rs. 3,281 plus a proportionate amount of Rs. 119 within four months from this date. In case the amount is deposited within the time allowed in the Court below the parties will receive and pay costs in proportion to their success and failure. If the amount is not deposited within the time fixed the suit shall stand dismissed with costs in both Courts.

V.B./R.K. *Order accordingly.*

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* A. I. R. 1930 Allahabad 299

SULAIMAN AND KENDALL, JJ.

Tika Ram—Plaintiff—Appellant.

v.

Moti Lal—Defendant—Respondent.

Second Appeal No. 77 of 1927, Decided on 3rd December 1929, from decree of Dist. Judge, Agra, D/- 21st October 1926.

*** (a) Evidence Act, S. 116 — Tenant can set up his own title against third person though not against landlord.**

The mere fact that a person has taken a lease from the Municipal Board cannot estop him from setting up his own title as against a third person, who was no party to that lease. If any estoppel arose, it would have been only as between the lessor and the lessee. [P 300 C 1]

(b) Evidence Act, S. 39—Admissibility — Only pertinent and not all recitals in document are admissible.

Because a document is admissible for a certain purpose all recitals, statements and references therein cannot be used as proof of the facts to which they relate. [P 301 C 2]

(c) Evidence Act, S. 32 (3)—Dispute regarding nature of land — Recitals in sale deeds in favour of one party to suit showing nature of same land are admissible not only under S. 32 but also under Evidence Act, S. 13 (b).

Where in a suit between two persons the question is whether or not the adjoining piece of land is nazul land, the recitals made by successive vendors of one of these persons whereby they purported to transfer the house with all the lands, boundaries and rights appertaing thereto but expressly admitted that the land in dispute did not belong to them but was Nazul land are admissible in evidence not only under S. 32 but also under S. 13 (b): 11 *A. L. J.* 139, *Rel. on.* 23 *Bom.* 63; 16 *C. W. N.* 252; 17 *C. W. N.* 103; *A. I. R.* 1924 *Cal.* 1067; 45 *Cal.* 159 and *A. I. R.* 1922 *Cal.* 251, *Ref.* [P 302 C 1, 2]

N. P. Asthana—for Appellant.

S. K. Dar—for Respondent.

Judgment.—This case has been referred to a Bench of two Judges by a learned Judge of this Court because in his opinion the point raised in it is one which arises almost every day in civil litigations as to title, and it is desirable that an authoritative opinion be laid down.

The plaintiff appellant claimed possession of a piece of land in front of his house by demolition of certain constructions made by the defendants on a portion of it adjoining his own house, as well as for injunction and damages. The defendant had succeeded in obtaining a lease from the Municipal Board of this plot of land, which, however, was subsequently revoked by the Board at the

instance of the plaintiff. The plaintiff claimed the land as his own property and repudiated the assertion that is was Nazul land. On the other hand the defendant pleaded in the first place that the north-western portion of it on which his constructions stood was his own land, and also pleaded that the rest of the land was Nazul land under the charge of the Municipal Board of which he held a lease.

The Court of first instance decreed the claim, and almost reaffirmed its findings when fresh issues were remanded by the lower appellate Court. The latter Court, however, has dismissed the claim. The plaintiff's title to that portion of the land which abuts on his house and is marked by a red line CD in Ex. A was not disputed before the lower appellate Court and has not been challenged before us. It is necessary to make this point clear so that there may be no future difficulty arising out of the dismissal of the plaintiff's case.

The defendant's house lies on the west of this land, and the plaintiff's house and the land appertaining thereto lie on the south of it.

The learned Munsiff briefly speaking held that inasmuch as the defendant had obtained a lease of this land from the Municipal Board he was estopped from putting up his own title to this land in supersession of the title of the Municipal Board: and he also held that inasmuch as the Municipal Board had subsequently revoked the lease and disclaimed their right the defendant could not set up the right of the Municipal Board.

The learned District Judge has repelled both these contentions. In our opinion he was right.

The mere fact that the defendant had taken a lease from the Municipal Board cannot estop him from setting up his own title as against the present plaintiff, who was no party to that lease. If any estoppel arose it would have been only as between the lessor and the lessee. Similarly the defendant cannot be estopped from setting up this claim simply because the Municipal Board has chosen to resolve that the lease should be revoked. The lease is for a period of twenty five years, and the defendant cannot be bound by any admission of the Municipal Board made subsequent to the grant of that lease. These points however need not be pursued any further, because the learned Judge has left the question of the defendant's ownership of the north-western corner of this plot open. He has dismissed the suit on the main ground that the plaintiff has failed to discharge the onus of proving his title to this land or that it was not Nazul land. This finding is prima facie a finding of fact which cannot be challenged in second appeal.

The learned advocate for the plaintiff, however, contends that the finding is vitiated by the circumstance that the learned Judge has relied on two pieces of evidence which were not legally admissible. These are a sale deed dated 14th October 1902, by Kalyan Singh in favour of Sita Ram of the defendant's house and a sale deed of 24th March 1916, by Sita Ram in favour of Chajju Mal. This Chajju Mal was the vendor of the elder brother of the present defendant. The learned District Judge after remarking that the mere assertion of title to this plot of land in the sale deed executed by the plaintiff's vendor Akhay Ram in the latter's favour on 15th March 1917, cannot be conclusive has pointed out that there were contrary assertions in the two sale deeds mentioned above in which when describing the easten boundary of the house sold there was a recital that Nazul land adjoined it.

The question before us is whether the recitals in these two deeds, showing that the house sold was bounded on the east side by Nazul land, were any evidence legally admissible to prove that it was Nazul land and did not belong to the plaintiff.

On this point there are numerous rulings of the Calcutta High Court and they are professedly conflicting. The earliest case which has been brought to our notice is the case of *Ningava* v. *Bharmappa* (1) where it was distinctly laid down that the boundaries given in a mortgage deed relating to an adjacent land at a time when there was no dispute, was a statement within Cl. (3), S. 32, Evidence Act, and was admissible under that section. This view was followed by the Calcutta High

(1) [1899] 23 Bom. 63.

Court in the case of *Abdullah* v. *Behari* (2). The learned Judged held that such a statement was one against the pecuniary or proprietary interest of the party making it, and was therefore admissible under that clause. The same view was followed by the same High Court in *Imrit Chamar* v. *Sridhar Pandey* (3) but was expressly dissented from in *Pramatka Nath Chaudhri* v. *Krishna Chunder Bhattacharjee*, *A. I. R.* 1924, *Cal.* 1067, *Ambar Ali* v. *Lutfe Ali* and *Soroj Kumar Acharji* v. *Umed Ali Howladar* (5). In spite of this serious conflict of opinion it does not appear that the question has yet been referred to a Full Bench of the Calcutta High Court. A modified view has been taken in a later case of *Keetabuddin* v. *Nafar Chandra* (6) where a recital was admitted as corroborative evidence of the testimony of the executant in the witness box.

So far as this High Court is concerned there is only one case to which our attention has been drawn and this is *Natwar* v. *Alkhu* (7) decided by a single Judge. There is a misprint in the head-note. According to the judgment, not only S. 32 (3) was held to be applicable but the learned Judge also also thought that the document was admissible under S. 13, Evidence Act.

Before taking up the main question it would be convenient to dispose of two subsidiary points which have been urged by the learned advocate for the respondent. Chajju Mal, the defendant's vendor, has been examined and thereof can be no doubt that a similar recital in the sale deed of 14th May 1917 executed by him would be admisble under S. 157, Evidence Act to corroborate his testimony. But under that section only the previous statement made by the witness himself can be admitted. S. 157 is of no help to us when the question of the admissibility of the deeds of 1902 and 1916 have to be considered for the recitals therein cannot by any stretch of the language be considered to be statements made by the witness Chajju Mal, even though the latter deed was in his own favour and the former in favour of his vendor.

In the same manner we are not inclined to accept the contention urged before us by the respondent that because the sale deeds have been formally proved and admitted in evidence, therefore all the recitals contained therein can be legitimately looked into as proof. In support of this contention reliance is placed on the last paragraph of the judgment in *Keetabuddin's* case (6) where it was remarked that

> "documents in favour of purchasers of adjoining lands could be used as corroborative evidence of the oral testimony of these witnesses, because they proved that those witnesses had purchased those lands."

and it was remarked that

> "once being admissible in evidence the Court was entitled to look into the contents of the document and make such use of the contents as it thought fit because there is no provision in the Evidence Act which says that it cannot be done."

We do not think that vendees who themselves have not made such statements contained in documents in their favour can utilise such documents under S. 157, Evidence Act. Nor are we prepared to say that, because the document is admissible for a certain purpose, all recitals, statements and references therein can be used as proof of the facts to which they relate.

We agree with the view expressed by Chamier, J. following the earlier *Calcutta* and *Bombay* cases, that a statement of a neighbour disclaiming his own title to a land and recognising another's title is a statement against the proprietary interest of the person making it and is admissible under S. 32 sub-Cl. (3) Evidence Act. The recognition of another's title to the land is undoubtedly a statement against the proprietary interest of the person making that statement. But before it can be admitted in evidence the requirements contained in the opening part of that section must be fulfilled, and it must appear that it has been made by a person who is dead or cannot be found, or has become incapable of giving evidence, or whose attendance cannot be procured without an unreasonable amount of delay or expense. Unfortunately in this case the learned District Judge, although he has admitted the statements contained

(2) [1912] 16 C. W. N. 252=12 I. C. 149=14 C. L. J. 467.
(3) [1913] 17 C. W. N. 108=13 I. C. 120=15 C. L. J. 7.
(4) [1917] 45 Cal. 159=25 C. L. J. 619=41 I. C. 116=21 C. W. N. 996.
(5) A. I. R. 1922 Cal. 251.
(6) A. I. R. 1927 Cal. 230.
(7) [1913] 11 A. L. J. 139=18 I. C. 752.

in the earlier documents, has omitted to say whether the executants of those documents were dead or whether their attendance could not have been procured without an unreasonable amount of delay or expense. This would be a defect in his finding if we were to hold that the only section applicable was S. 32, sub-Cl. (3).

But Chamier, J., also expressed the view that the case would fall under S. 13 also. We may note that this was also the view expressed by a Bench of the Calcutta High Court in some of the earlier cases which was subsequently resiled from. vide observations in *Pramatha Nath Chaudhri* v. *Krishna Chandra Bhattacharjee*. (8).

There is considerable force in that view expressed by the learned Judges of the Calcutta High Court in subsequent cases that, inasmuch as the transaction of transfer does not relate to the adjoining land mentioned in the boundaries, it is not possible to hold that the statement was a transaction by which such a right was recognized or asserted and that therefore it would not fall under sub-Cl. (a) S. 13. But we see no reason why it should not be held that under certain circumstances recitals in deeds coupled with the omission of the executant to transfer such land, may amount to an instance in which such right was recognized.

In the case before us Kalyan Singh and after him Sita Ram purported to transfer the house now in the possession of the defendant, together with all the lands boundaries and rights appertaining thereto, but omitted to transfer the adjoining land now in dispute on the ground that the boundaries of their house did not include this land, in which the right of the Secretary of State was recognised by them. A mere statement may not by itself amount to an "instance', and may only fall under S. 32, but where it is coupled by conduct even though by omission, we fail to see why it cannot be treated as an instance in which such right has been recognised. According to Murray's New English Dictionary the word "instance' is wide enough to include in its broader sense a case accruing, a recurring occasion. Both Kalyan Singh and Sita Ram were purporting to transfer their house with all the lands, boundaries and rights appertaining thereto and yet they omitted to transfer the land now in dispute and expressly admitted that that land did not belong to them but was Nazul land. Following the view of Chamier, J., we would therefore hold that the recitals in the two deeds were admissible under S. 13, sub-Cl. (b) also.

In this view of the matter the finding of fact arrived at by the learned District Judge must be accepted as final. The appeal is accordingly dismissed with costs.

v.s./R.K. *Appeal dismissed.*

(8) A. I. R. 1924 Cal. 1067.

A. I. R. 1930 Allahabad 302

DALAL, J.

Pokh Pal and *another*—Defendants—Applicant.

v.

Lal Madho Ram—Plaintiff—Opposite Party.

Civil Revn. No. 76 of 1929, Decided on 25th April 1929, against order of Sm.C.C. Judge, Mainpuri, D/- 18th December 1928.

Contract Act, S. 70—Lambardar selling his property but continuing to be recorded as lambardar—He paying revenue on citation being issued by revenue authorities—He can recover money so paid—His suit does not lie to revenue Court—Agra Tenancy Act, Ss. 159 and 160.

Where a person continues to be recorded as lambardar in spite of his having sold his property, and on citation being issued to him by the revenue authorities pays the revenue, he can recover the sum so paid from his vendee, for the revenue cannot be said to be paid gratuitously by him. His suit, however, will not lie to the revenue Court either under S. 159 or S. 160, Agra Tenancy Act : 28 *All.* 563; 3 *All.* 66 (*F.B.*), *Foll.* and (1882) *A. W. N.* 150, *Dist.*

[P 303 C 1]

Baleshwari Prasad—for Appellants.

G. Agarwala—for Opposite Party.

Judgment. — The plaintiff Madho Ram while he was recorded as lambardar of a certain property paid a certain sum of money as revenue on citation being issued to him by the revenue authorities. At that time though recorded as lambardar he had sold his property to the defendants who were really liable to pay the revenue. He sued the defendants in the Court of Small Causes for recovery of the sum. The pleas were that such a suit was cognizable by a revenue Court, and, secondly, that payment was a voluntary payment and not recoverable under any section of the

Contract Act. No suit can lie in the revenue Court because Madho Ram is no longer lambardar or cosharer and cannot sue either under S. 159 or 160, Tenancy Act of 1901. The payment was not gratuitous, and, in my opinion, Madho Ram paid lawfally because his name continued in the village record as lambardar and he was, therefore, bound to make the payment to Government. It was the fault of the defendants that they did not get the plaintiff's name removed from the village record on obtaining transfer of his property from him. In *Tulsa Kuar* v. *Jageshar Prasad* (1) Banerji, J., held on similar facts that the payment was not made voluntarily or gratuitously and that therefore the case fell within the purview of S. 70, Contract Act. A similar view was taken in the case of *Nath Prasad* v. *Baij Nath* (2). The learned counsel for the respondent quoted a ruling of 1881, *Chunia* v. *Kundan Lal* (3). So far as I understand the facts of that case, the plaintiff was not recorded either as a cosharer or a lambardar at the date of the payment and was in no way bound to make any payment to Government. I dismiss this application in revision with costs.

S.N./R.K *Revision dismissed.*

(1) [1906] 28 All. 563=3 A. L. J. 372=(1906) A. W. N. 114.
(2) [1880] 3 All. 66 (F.B.).
(3) [1882] A. W. N. 150.

A. I. R. 1930 Allahabad 303

MUKERJI AND BENNET, JJ.

Radha Balabh Pathak—Plaintiff—Applicant.

v.

Bhullo and *others*—Defendants—Opposite Parties.

First Appeal No. 182 of 1928, Decided on 10th December 1929, from an order of Addl. Sub-Judge, Muttra, D/- 23rd July 1928.

Civil P. C., O. 1, R. 10 (2)—Party joined as defendant by appellate Court—Lower Court cannot strike off same on case being remanded.

Where an appellate Court has joined a party as defendant, it is not open to the lower Court to strike off the same under O. 1, R. 10 (2), on the case being remanded to that Court for determination of the case after bringing the party on record. [P 303 C 2]

S. C. Das—for Applicant.

N. P. Asthana and *Baijnath Sahai*—for Opposite Parties.

Bennet, J.—This is an appeal by the plaintiff against an order of remand. The facts are that the plaintiff sued for possession of certain property against four defendants, of whom Motilal, Chandra Bhan and Lala Ram were three brothers, and Goswamini Rohini Debya, as the manager of a temple. The suit was decreed by the Munsiff and an appeal was brought by the Shebait, defendant 4. In that appeal, inter alia, the defendant 4 urged that the idol, the Thakurji, was a necessary party to the suit. The lower appellate Court passed an order on 7th January 1927 as follows:

"The plaintiff has put in an application to make the Thakurji a party in the case and the Thakurji has now been brought on the record. Inasmuch as all the issues will have to be tried on the evidence adduced on behalf of the Thakurji, this decision of the learned Munsiff cannot stand. It is accordingly set aside and the suit is remanded for retrial. The parties shall have a right to produce fresh evidence."

The plaintiff made an application in the Court of the Munsiff when the case was heard on remand, asking that the Thakurji and the Shebait, defendant 4 should be removed from the array of defendants and that application was granted by the Munsiff. The Munsiff again decreed the suit of the plaintiff for possession. An appeal was filed in the lower appellate Court by the heirs of Lala Ram, the original defendant 1, and the ground urged before the lower appellate Court was that it was not open to the Munsiff to strike off the name of the Thakurji which had been added by the lower appellate Court. That plea has been accepted by the lower appellate Court and the case has been again remanded to the Munsiff for determination after bringing the Thakurji and the Shebait on the record as defendants. The plaintiff appeals against that order of remand.

We consider that the application to the Munsiff to strike off the Thakurji was an application under O. 1, R. 10 (2). That rule authrorises a Court to strike off the names of any person improperly joined as party. Inasmuch as the lower appellate Court had found that the Thakurji should properly be joined as a party, we consider that it was not open to the Munsiff, a Court subordinate to the lower appellate Court, to come to the opposite conclusion in regard to

that matter, and therefore we consider that the Munsiff was not authorised to strike off the name of the Thakurji as a party. Similarly, we consider that the Munsiff should not have struck off the name of the Shebait as a party. We further consider that as the question at issue was whether this particular shebait, Goswamini Rohini Debya had improperly granted a perpetual lease of property to the plaintiff, that she was not the proper person to represent the Thakurji before the Courts. Accordingly we consider that the Thakurji should be represented by some other representative.

Accordingly we dismiss this appeal with costs and the order of the lower appellate Court of remand should be carried out with the directions given above.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 304

MUKERJI AND BENNET, JJ.

Mt. Raji—Defendant—Applicant.

v.

Ram Lagan and *others*—Plaintiffs—Respondents.

First Appeal No. 214 of 1923, Decided on 18th December 1929.

(a) Agra Tenancy Act (3 of 1926), Ss. 44 and 230—Suit by landlord against trespasser lies in civil Court.

A suit by a landlord against a trespasser lies in the civil Court and although S. 44, would also give a remedy with a limited amount of damages in the revenue Court, still S. 230 of that Act does not bar the jurisdiction of the civil Court: *A. I. R.* 1927 *All.* 369, (*F.B.*), *Foll.* [P 304 C 2]

(b) Agra Tenancy Act (3 of 1926), S. 19—"Statutory tenant" explained

Definition requires that a statutory tenant should be a person in possession as a tenant at the commencement of the Act or a person who is after the commencement of the Act, admitted as a tenant. [P 304 C 2]

Janaki Prasad—for Applicant.

Harnandan Prasad—for Opposite Parties.

Bennet, J.—This is an appeal by the defendant against an order of the lower appellate Court remanding a suit for disposal by the Court of first instance on the question of mesne profits. The plaintiff, a landlord, sued for possession and damages against the defendant appellant on the ground that the defendant appellant was a tenant who had been ejected and who was in possession as trespasser. The defendant pleaded that the relation of landlord and tenant existed between the parties and a reference was made by the civil Court of first instance to the revenue Court under S. 273, Act 3 of 1926. The finding of the revenue Court was that the relation of landlord and tenant existed between the parties and the civil Court of first instance being bound by that decision dismissed the suit of the plaintiff. The plaintiff filed an appeal and the lower appellate Court came to a decision on the question of fact that the defendant was a trespasser and not a tenant of the plaintiff. Accordingly the lower appellate Court set aside the decree of the Court of first instance dismissing the suit of the plaintiff.

The argument which has been addressed to us is that S. 44, Act 3 of 1926 would enable the plaintiff to bring a suit against the defendant as a trespasser in a revenue Court and accordingly that under S. 230, Act 3 of 1926, the jurisdiction of the civil Court was barred. That question has already been settled by the Full Bench case of *Manohar Singh* v. *Sheo Saran* (1), where it was held that a suit by a landlord against a trespasser lies in the civil Court and although S. 44, Act 3 of 1926 would also give a remedy with a limited amount of damages in the revenue Court, still S. 230 of that Act does not bar the jurisdiction of the civil Court.

On one other point we were addressed and that was that the appellant had become a statutory tenant and therefore was not liable to ejectment. The expression "statutory tenant" is defined in S. 19, Act 3 of 1926 and that definition requires that a statutory tenant should be a person in possession as a tenant at the commencement of the Act or a person who is, after the commencement of the Act, admitted as a tenant. The defendant has been held as a matter of fact, by the lower appellate Court to be a trespasser and therefore the defendant does not come within the definition of a statutory tenant.

These were the only points raised before this Court. Accordingly this first appeal from order is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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(1) A. I. R. 1927 All. 369 (F.B.).

A. I. R. 1930 Allahabad 305

SULAIMAN AND PULLAN, JJ.

Ram Jas Singh and *others* — Defendants—Appellants.

v.

Ram Harakh Pandey and *others*—Plaintiffs—Respondents.

First Appeal No. 75 of 1928, Decided on 25th July 1929, from order of Sub-Judge, Basti, D/- 30th January 1928.

(a) U. P. Land Revenue Act, Ss. 33 (2), 39, 40, 42 and 44—Suit for declaration by landlord—Tenant setting up plea of tenancy—Issue referred to revenue Court under Agra Tenancy Act, S. 273— Revenue Court returning finding based on previous decision holding existence of tenancy — Dismissal of suit—Appellate Court remanding case to revenue Court with direction to decide case on merits—Remand held to be right.

In a suit brought by *A* against *B* for declaration that the lands mentioned in the plaint were owned and possessed by *A*, *B* pleaded that he was the tenant of *A*. The Court of first instance referred the issue to revenue Court under Agra Tenancy Act, S. 273 The revenue Court without trying the issue on merits held that it was bound by a previous decision of the same Court which had been affirmed on appeal and therefore returned the finding that *B* was the tenant of *A*. The dispute in the previous case related to the existence of the tenancy itself and not to its class or tenure. The trial Court accepted the finding and dismissed the suit. On appeal the lower appellate Court held that the revenue Court ought to have decided the case on merits and not held itself bound by the previous decision, it accordingly remanded the case to that Court with directions that the issue might be sent back by the trial Court to the revenue Court and a finding called for afresh.

Held: that the revenue Court was wrong in thinking that the matter had already been finally adjudicated between the parties by means of a previous suit. That Court ought to have have gone into the question on the merits although in such an enquiry it was entitled to give due weight to the previous decisions arrived at between the parties. The order of remand was therefore right.

[P 307 C 1]

(b) U. P. Land Revenue Act, S. 42—Scope.

Per Sulaiman, J. — A clear distinction exists between the case where the tenancy itself is disputed and the case where the tenancy is admitted but its class or tenure is in dispute. [P 306 C 2]

(c) U. P. Land Revenue Act, S. 40 (1) and (3)—Order of revenue Court regarding entries as to possession passed in dispute over mutation proceeding is order within meaning of sub-S. (3).

Per Sulaiman, J.—If in a mutation proceeding under S. 40 (1) the possession of either party is disputed and the revenue Court goes into that question and finds that possession is with one party and maintains his possession and orders the entries in the registers accordingly, it is an "order as to possession" passed under this section within the meaning of sub-Cl. (3) with the result that such an order does not debar the defeated person from establishing the right to the property in any civil or revenue Court having jurisdiction.

[P 306 C 2]

U. S. Bajpai—for Appellants.

P. L. Banerji—for Respondents.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for a declaration that the lands mentioned in the plaint are owned and possessed by the plaintiffs and the defendants have no longer any connexion with them and in the alternative for the dispossession of the defendants. The defendants pleaded that they were the tenants of the plaintiffs and therefore the Court of first instance referred the issue to the revenue Court under S. 273, Agra Tenancy Act. The revenue Court did not go into the question of fact on the merits but held that it was bound by a previous decision of the revenue Court dated 4th February 1925 which had been affirmed on appeal and therefore returned the finding that the defendants were the tenants of the plaintiffs. The learned Munsiff was bound to accept that finding and dismissed the suit. On appeal the lower appellate Court has taken a contrary view and come to the conclusion that the revenue Court ought to have decided the case on the merits and not held itself bound by the previous decision.

It has accordingly set aside the decree of the Court of first instance and remanded the case to that Court with directions that the issue may be sent back by the learned Munsiff to the Assistant Collector and a finding called for afresh and then the suit be disposed of by the learned Munsiff.

Mr. Gaur who has argued the case on behalf of the appellants with great ability has contended before us that the former decision of 4th February 1925, operated as res judicata so far as the Assistant Collector was concerned and that therefore the finding returned by the revenue Court must be accepted.

We have got before us the order dated 4th February 1925, as well as that passed on appeal on 20th April 1925, but they do not show specifically under which section of the Land Revenue Act they purported to have been passed. The case was described as one

of the correction of jamabandi but an issue as regards possession was framed and decided. The dispute related to the entry of the names in the khatauni jamabandi which is a register maintained by the Collector under S. 32 (c) Land Revenue Act. If the matter had been merely a correction of an error in the previously prepared register the case would have fallen under para. 2, S. 33 (2), Land Revenue Act. In that case it is conceded that the order could not be binding even on a revenue Court in a subsequent case. Although the section does not expressly say so I am inclined to concede that it contemplates a case where there is no real dispute between the parties and the only question is whether any accidental or clerical error was made in the previously prepared register.

Disputed cases relating to the entries in the khatauni arising out of transfers or charges would ordinarily fall under S. 39 of the Act. But sub-Cl. 3 of that section provides that all disputed cases shall be referred to the Tahsildar who shall make an enquiry and submit a report and then the Assistant Collector may pass orders thereon. Unfortunately the copies of the judgment filed do not in any way suggest that any report had been submitted by the Tahsildar and it therefore makes it doubtful whether the proceedings were started under S. 39 of the Act.

I am however prepared to assume in favour of the appellants that the application which was dealt with on the former occasion was an application under S. 39. The case put forward on behalf of the present plaintiffs who were then the applicants was that about 1920 the lands which had been mortgaged to the present defendants were redeemed and had ceased to be mortgaged lands and had become the khudkasht lands of the applicants and that the applicants had since redemption secured possession over those plots. The learned Assistant Collector held that the possession of the applicants was not at all proved but that on the other hand the defendants objectors had been in possession. He accordingly rejected the application. That order was affirmed on appeal. Now if it were even a disputed case relating to changes affecting interest in a land it seems to me that the order passed by the Collector under S. 39 would not be final and would not operate as res judicata by virtue of S. 44 because the latter section does not mention S. 39 at all. It therefore follows that even in this view of the matter there could be no res judicata.

The learned advocate who has argued this case contends that Ss. 39 and 42 should be read together and it must be assumed that the Collector decided the dispute respecting the class or tenure of the tenant. I am unable to accept this argument. The dispute at that time related to the existence of the tenancy itself and not to its class or tenure and was therefore not covered by S. 42 of the Act. In my opinion a clear distinction exists between the case where the tenancy itself is disputed and the case where the tenancy is admitted but its class or tenure is in dispute.

If the case did not fall under S. 39 then it might be treated to have been under S. 40 (1), Land Revenue Act. No doubt the Board has expressed the view in some cases that this section applies to disputes relating to transfers and succession and not to changes of the character which were the subject matter of the dispute in 1925. The section however is more widely worded and taken literally would include all disputes regarding entries in the annual registers. But even if the case fell under S. 40 (1), I am opinion that the provision in sub-Cl. 3 of the section would not debar even a revenue Court from trying that question in a subsequent case. It seems to me that if in a mutation prceeding under S. 40 (1) the possession of either party is disputed and the revenue Court goes into that question and finds that possession is with one party and maintains his possession and orders the entries in the registers accordingly it is an "order as to possession" passed under this section within the meaning of sub-Cl. 3 with the result that such an order does not debar the defeated person from establishing his right to the property in any civil or revenue Court having jurisdiction. S. 44 also makes an exception in favour of the decisions to

which the provisions of sub-S. 3, S. 40 are applicable.

I am therefore clearly of opinion that the learned Assistant Collector was wrong in thinking that the matter had already been finally adjudicated between the parties by means of a previous order. He ought to have gone into the question on the merits although in such an enquiry he was entitled to give due weight to the previous decision arrived at between the parties. The order of remand is therefore right and in my opinion the appeal should be dismissed.

Pullan, J.—I agree in the order proposed. The difficulty in the case has arisen largely from the failure of the revenue Courts to state under which section of the Land Revenue Act they passed their orders. The issue seems to be narrowed to three possible sections, viz., Ss. 33 (2), 39 read with Ss. 42 and 40. As to S. 33 (2) I am of opinion that this cannot apply to the disputed case. It refers I believe to mere corrections made at the time of preparation of the annual registers and I agree with the view expressed by Mr. Fremantle in *Lachman Prasad* v. *Mt. Farrukh Begam* (1) that this clause refers to purely clerical errors or undisputed claims. As to S. 39 I am of opinion that this section comes into operation where there is a dispute as to the correct entry of a transfer at the time when the papers are prepared. In such cases the Tahsildar is required to make an enquiry if necessary and submit his proceedings to the Collector who passes the necessary orders. I do not consider that the section would be applicable where parties bring to light a dispute as to an entry in the papers five years after a change, which is only a change caused by redemption and in the view of the Court in 1915 could not have involved any transfer as the mortgage which was redeemed did not cover the land which was in the occupation of the tenants. Even had S. 39 applied I do not consider that S. 42 would meet this case because the decision of the revenue Courts was not as to the class or tenure of a tenant. The question which they had to decide was whether the land had passed into the possession of the zamindar, and therefore the tenant's name should be expunged. Thus the only section which I consider applicable is S. 40. This was in my opinion a dispute regarding an entry in the annual rigisters. The finding of the revenue Courts was that the persons in possession were the appellants before us and not the landlords. This was the sole question in issue, for had the landlords been in possession the entry in their favour that they were kabiz would be correct. Cl. 3, S. 40 lays down that no order as to possession passed under this section shall debar any person from establishing his right in the Courts. Had this referred solely to Cl. 2 of the section surely the words would have been "no order passed under Cl. 2" and not "no order passed under this section." Thus the words must apply to both Cl. 1 and Cl. 2 and they must be taken to cover a case where the order of the Court establishes possession after dispute and such an order may be either under Cl. 1 or Cl. 2. On this view of the case I find that the orders passed were orders under S. 40, sub-Cl. 3, that they are therefore not final orders and that the question may be further litigated. I agree therefore in the order proposed.

By the Court.—The appeal is dismissed with costs including in this court-fees on the higher scale.

V.S./R.K. *Appeal dismissed.*

(1) Unpub. Dec. of the Board of Rev. Vol. 5 Page 219.

A. I. R. 1930 Allahabad 307

DALAL, J.

Kali Pratap Misir—Plaintiff — Appellant.

v.

Amla Pat Tewari and *others*—Defendants—Respondents.

Second Appeal No. 471 of 1928, Decided on 5th July 1929, against decree of Second Addl. Sub-Judge, Gorakhpur, D/- 13th February 1928.

(a) Limitation Act, Art. 141 — Adverse possession against widow is not binding on reversioner.

A suit for possession by the reversioner is governed by Art. 141 and adverse possession against one female heir is not effective and binding on the reversioner : *A. I. R.* 1928 *All.* 561 (*F. B.*), *Rel. on.* [P 308 C 1]

(b) Hindu Law—Widow—Widow not taking possession—Judgment against her is not effective against reversioner.

A female who has never taken possession cannot be said to represent the estate effectively

in any proceeding relating to the possession of the estate; and an order entirely overlooking the rights of the widow and not giving opportunity to her of defending the estate cannot be effective against the reversioner: *A. I. R.* 1925 *P. C.* 241, *Dist.* [P 303 C 1, 2]

A. P. Pande—for Appellant.

P. L. Banerji and *N. Upadhyaya*—for Respondents.

Judgment.—The plaintiff sued for possession of a property of his mother's father Jurawan from a reversioner of his grandfather, who is in possession. After Jurawan's death his widow Mt. Suraj Bansi took possession. She appears to have died about 1898 when mutation proceedings took place. The papers of those proceedings are not available except the two judgments, one of the trial Court dated 6th August 1898 and the other of the appellate Court of the Collector dated 20th December 1898. On the basis of these two judgments it was alleged by the defendants that the plaintiff's mother Mt. Harpali surrendered her rights and accelerated the reversion of the plaintiff and that, therefore, the defendants had been in adverse possession as against the plaintiff since 1898. The suit on this ground was alleged to be time barred.

Point 2 taken up by the defence was that adverse possession as against Mt. Harpali was tantamount to adverse possession against the plaintiff reversioner. The last point is easily disposed of. It has been held by a Full Bench of this Court in *Bankey Lal* v. *Raghunath Sahai* (1), that under the circumstances of the present case the suit was governed by Art. 141, Lim. Act and adverse possession against a Hindu female heir could not be affective and binding on the reversioner. Mr. Sen, on behalf of the defendants, pointed out that in his opinion this Full Bench had the temerity to disagree with the opinion expressed by their Lordships of the Privy Council in *Vaithialinga Mudaliar* v. *Srirangath Anni* (2). That ruling does not apply to the circumstances of the present case. The female never took possession, so she cannot be said to represent the estate effectively in any proceeding relating to the possession of the estate. It is not as if she had taken possession and there had been a subsequent suit in the civil Court wherein she may have defended to the best of her ability and knowledge before Judges who understood the elementary principles of Hindu Law. In the present case the two judgments disclose a lamentable lack of the knowledge of Hindu Law. The trial Judge seems to be of opinion that among Hindus a daughter's son is the direct heir having preference over more distant reversioners while the learned Judge of the appellate Court was of opinion that a daughter's son was merely an outsider who had no rights in his maternal grandfather's property. It will be important to notice this when we consider the question of surrender that neither Judge knew that a Hindu daughter had any right whatsoever in the property of a separated Hindu. The appellate Court observed:

"by her marriage this daughter lost all rights to property in her own family and her son is according to Hindu Law a mere outsider."

Possibly the learned Judge would have allowed the daughter some right if she had not the misfortune to marry. The rights of Mt. Harpali were overlooked entirely and in proceedings of this nature there was no opportunity given to the female heir of defending the estate. The conditions laid down by their Lordships of the Privy Council in the Madras case to make a finding against Hindu female effective against a reversioner do not exist here. There is certainly no bar of limitation to plaintiff claiming the property on the death of his mother Mt. Harpali.

I have partly decided point 2 also. There is no paper recording the fact of Mt. Harpali divesting herself of her inheritance from her father's property. No reference whatever is made in either of the two judgments to any divesting of property or acceleration. One may be certain that the Judges who delivered the two judgments would not have understood these doctrines of Hindu Law. In the judgments the claim of Mt. Harpali was not considered at all and the question was discussed as if the plaintiff claimed to be the direct heir of Jurawan without any reference to the rights of her mother. On the basis of such judgments it would be most unsafe to presume action of divest-

(1) A. I. R. 1928 All. 561 (F.B.).
(2) A. I. R. 1925 P. C. 249=48 Mad. 883=52 I. A. 322 (P.C.).

ing or acceleration on the part of Mt. Harpali. I hold that Mt. Harpali never divested herself of her rights.

In the result I set aside the decrees of both the Subordinate Courts and decree the plaintiff's suit with costs of all the Courts.

P.R./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 309 (1)

MEARS, C. J.

Ram Dulare Lal—Plaintiff.

v.

Chhangamal and *others*—Defendants.

Appln. in Civil Suit No. 17 of 1929, Decided on 19th April 1929, pending in the Court of Sub-Judge, Farrukhabad.

Legal Practitioner—Lawyer in his profession has to do his duty—He cannot refuse te accept party's case though other party is lawyer if all conditions are fulfilled and no honest execuse exists. cf. *A.I.R.* 1929 *All.* 367.

The lawyers in their profession have got to do their duty and they cannot refuse to take up a party's case even if the other party is also a lawyer, when all the conditions are fulfilled viz., the tender of a proper fee, the willingness to give complete instructions and the case of the character that the pleader is accustomed to take, and when no allowable, reasonable and honest excuse exists.

[P 309 C 2]

Nizam Uddin Ahmed Siddiqui—for Defendants.

Judgment.—This is another application in which professional misconduct is alleged generally against local counsel at Farrukhabad, that is to say, the defendant having had a suit brought against him by a plaintiff, who is a legal practitioner, says that he could not secure the services of a local counsel even for writing a petition for adjournment and had to get it drawn up by a petition-writer and they have all refused to accept his case on one ground or the other. Apparently the valuation of the case is considerable, being Rs. 29,705-5. Chhangamal must adopt the same procedure, as I have indicated before that is to say, that he should write a letter to a local vakil expressing his readiness to pay him a fee, appropriate and proper, for the case. He should at the same time offer to furnish him with all the instructions necessary to defend the case and he should keep a copy of that letter. If the Vakil is not willing to accept the case and makes excuses of a dubious character a copy of the letter sent by Chhangamal to the lawyer and the letter of the lawyer should be sent to me and I will deal with the matter.

Again, there has been made the surprising suggestion in this Court that the result of requiring lawyers to do their public duty may be that a lawyer may accept the case and will deliberately refrain from putting up a good fight. Whether a lawyer puts a good fight or not is a matter that can be ascertained from the record, when the case is completed. It can then be seen, if he asked proper questions and if he examined his witnesses with care and cross-examined the witnesses of the opposite party on material matters with discretion. If on enquiry it comes to light that a lawyer deliberately refrained from doing his duty, one step alone must be taken and that is, to remove his from profession, which he has so manifestly disgraced by his conduct. In Farrukhabad, as elsewhere, lawyers have got to learn that in this profession they have got to do their duty, and if Chhangamal can bring to my notice a clear case of a pleader refusing to take his brief, when all the conditions are fulfilled, namely, the tender of a proper fee, the willingness to give complete instructions and the case of the character that the pleader is accustomed to take and no allowable, reasonable and honest excuse is put forward I will see that justice is done in the matter.

A copy of this order is to be sent to Chhangamal and to the Subordinate Judge of Farrukkabad and let all proceedings in the case be stayed until one hears with what success Chhangamal has met.

S.N./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 309 (2)

NIAMATULLAH, J.

Chaudhri Jahangira — Plaintiff—Appellant.

v.

Sarup and *others*—Defendants—Respondents.

Second Appeal No. 999 of 1928, Decided on 11th December 1929, from decree of Dist. Judge, Saharanpur, D/- 16th April 1928.

U. P. Tenancy Act (2 of 1901), S. 194—One cosharer alone suing to recover arrears of whole rent and joining other cosharers after period of limitation—Suit though bad at inception becomes flawless on joining

other cosharers so far as regards plaintiff's share and he is entitled to recover his share—Limitation Act, S. 22.

One of the cosharers cannot sue to recover the arrears of the whole rent even though the right to recover it is conceded to him by the other cosharers. But if one cosharer alone sues to recover the whole rent and joins the other cosharers after period of limitation prescribed for a suit to recover the arrears of rent, though the suit is bad at its inception, it becomes absolutely flawless on other cosharers being joined as parties so far as the plaintiff's right to recover his own share of rent is concerned and he is entitled to recover his share of rent. [P 311 C 1]

M. L. Agarwala—for Appellant.

H. P. Sen for *P. L. Banerji*—for Respondents.

Judgment.—This appeal arises out of a suit for arrears of rent brought by the plaintiff-appellant for recovery of rent for the years 1329 to 1331 Fasli. Defendants 1 and 2 are the tenants of the land in respect of which the rent is claimed. The plaintiff is one of three cosharers of the "mahal" in which the holding in question lies. The suit, as framed, was one for recovery of the whole rent payable by defendants 1 and 2. The plaintiff relied upon an agreement between his cosharers and himself entitling him (plaintiff) to realize the whole rent from defendants 1 and 2.

Defendants 1 and 2 contested the plaintiff's right to recover the rent without other cosharers being joined as co-plaintiff with him. At a later stage the plaintiff impleaded defendants 3 and 4, who are the other cosharers in the "mahal." The latter stated that they had no concern with the rent in question. In other words, they did not object to the plaintiff recovering the rent in suit. Their statement supports the plaintiff's allegation made in the plaint that there was an arrangement among the cosharer under which the plaintiff alone was entitled to sue for the whole rent from defendants 1 and 2.

The Court of first instance decreed the suit ; but the lower appellate Court has dismissed it, holding that the plaintiff alone could not sue for recovery of the entire rent and that the period of limitation for a suit for arrears of rent had expired when the other cosharers were impleaded as defendants. It appears that the suit remained pending for some reason or other, for several years, and when defendants 3 and 4 were made parties the period of limitation for even the last of the years in suit had run out.

It is contended on behalf of the appellant on second appeal that the plaintiff-appellant is entitled to sue for the whole rent, notwithstanding the provisions of S. 194, because the other cosharers have ceased to be landholders, as defined in the Tenancy Act. This proposition is apparently based on what the cosharers stated when made parties to the case. I do not think their statement can be construed as meaning that they had no interest left in the land. As I construe it, they merely declared that, in consequence of an arrangement for enjoyment of profits, the plaintiff was assigned the right to recover the rent from defendants 1 and 2. The right of the other cosharers in the holding is not put an end to by an arrangement of this kind. which is generally of a temporary character. There is no other evidence on this question, and the utmost that can be said on the strength of what the cosharers stated is that the plaintiff is conceded, by his cosharers, the right to recover rent from defendants 1 and 2. I am, therefore, unable to accept the contention that the plaintiff alone should be considered as landholder with reference to the holding of defendants 1 and 2.

The view of the lower appellate Court that the plaintiff is not entitled to recover even his own share of the rent in respect of the years in suit cannot be supported. S. 194, Tenancy Act (2 of 1901) precludes one of several cosharers from suing for the whole rent except through an agent appointed by them conjointly. Sub-S. 2 of that section enables one of several cosharers to sue for his share of rent if there is a subsisting agreement among the cosharers authorizing the plaintiff to sue for his share of the rent. As pointed out in *Mankohar Lal* v. *Baldeo Singh* (1), the special contract, referred to in that subsection, is not one relating to the right of one of the cosharers to recover the whole rent. Sub-S. 3, S. 194 provides every one of several cosharers to institute a suit for recovery of his share of the rent if the other cosharers refuse to be joined as plaintiffs; but in such a case such other cosharers must be impleaded as defendants. The difference between a case governed by sub-S. 2 and the one

(1) A. I. R. 1927 All. 505=49 All. 918.

under sub-S. 3 is that in the former case the other cosharers need not be joined, whereas in the absence of a special contract, referred to in sub-S. 2, the cosharers who refuse to be joined as plaintiffs should be impleaded as defendants; but the plaintiff's claim must be limited to his share of the rent in either case.

In view of the attitude exhibited by the other cosharers, when joined as defendants, it is obvious that they were not willing to join with the plaintiff in a suit for arrears of rent to be brought against defendants 1 and 2. Even when made parties as defendanes, they disclaimed all interests in the matter. Under these circumstances, I think that the defect of nonjoinder due to the other cosharers of the plaintiff not being impleaded as plaintiffs or defendants originally was cured by subsequent addition of defendants 3 and 4 in the array of parties. If they had been joined as coplaintiffs within limitatisn, the suit would have been good for the whole rent; but having been impleaded only as defendants, the plaintiff is entitled, if at all, to recover only his share of the rent under S. 194 (3).

It is contended by the learned advocate for the respondents that the other cosharers having been joined after the expiry of the period of limitation, the whole suit must fail. His contention is that the suit was bad in its inception and it was only when defendants 3 and 4 were made parties that the suit for the first time became one that could be entertained in law. I am unable to accept this line of argument. On defendants 3 and 4 being made parties, the suit which should be deemed to have been instituted on the date the plaint was presented became absolutely flawless so far as the plaintiff's right to recover his own share of the rent is concerned. The question of limitation stands altogether on a different footing, and must be decided in accordance with S. 22, Lim. Act, which provides that :

"if, after the institution of a suit, a new defendant is added, the suit shall as regards him be deemed to have been instituted when he was so made a party."

It follows that as against the defendants originally impleaded the suit should be deemed to have been instituted when the plaint was presented and as against the newly added defendants the date of institution for purposes of limitation is to be the date on which they were made parties.

The suit as against defendants 1 and 2 having been instituted within time, any relief to which the plaintiff is entitled as against them should be granted. The plaintjff is not entitled to any relief against the newly added defendants and indeed, he does not claim any. They have been made parties to indemnify defendants 1 and 2 against any possible claim which may be made by other cosharers in respect of the rent claimed by the plaintiff and to be decreed to him in case the suit suceeeds. The case is not one in which the right of the plaintiff and the pro forma defendants, who are his cosharers, is one and indivisible. S. 194, Tenancy Act creates a division of interests in respect of the rent payable to them jointly, where one of the cosharers is unable to obtain the joinder of his cosharers for bringing an action for the whole rent. The law expressly allows one of the cosharers in such a case to sue for and recover his share of the rent. Under these circumstances, I am of opinion that the joinder of defendants 3 and 4 after the expiry of the period of limitation prescribed for a suit for arrears of rent cannot affect the liability of the tenant defendants for the plaintiff's share for which they were sued within time. For the foregoing reasons, I allow the appeal, set aside the decrees passed by both the Courts below and remand the case to the Court of first instance through the lower appel late Court with the direction that the plaintiff's share of the rent in suit be ascertained and a decree be passed for that amount. Parties shall pay and receive costs in proportion of success and failure.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 311

MUKERJI AND BENNET, JJ.

Ali Raja Khan—Defendant—Appellant.

v.

Muhammad Zafar Khan and *others*—Plaintiffs and Defendants—Respondents.

Letters Patent Appeal No. 142 of 1929, Decided on 12th December 1929,

(a) Agra Tenancy Act (2 of 1901), S. 79—Scope.

• Tenant not in possession and hence not ejected does not come under S. 79 : 13 *A. L. J.* 329, *Ref.* [P 312 C 1, 2]

(b) Transfer of Property Act, S. 101—Usufructuary mortgage of sir plots—Proprietor's share subsequently purchased by mortgagee subject to his mortgage — There is merger and proprietor is entitled to be ex-proprietary tenant.

M mortgaged his *sir* plots to *A* with possession. Subsequently there was an auction-sale of a share of mortgagor and in the sale proclamation it was stated that the share was sold subject to the usufructuary mortgage of plots to *A*. *A* purchased the share.

Held : that there was merger of mortgagee rights of *A* with proprietary rights and *M* was entitled to be ex-proprietary tenant [P 312 C 2]

A. P. Pandey—for Appellant.

Judgment.—These are two Letters Patent appeals against the decision of a learned single Judge of this Court dismissing the appeals of the defendants. The plaintiffs obtained decrees for ejectment of the defendants in the revenue Courts under Ss. 58 and 34, Act 2 of 1901. The facts in S. A. No. 525 of 1927 are that in 1897 the plaintiffs mortgaged four *sir* plots to the defendants with possession and the defendants have been in possession of these four *sir* plots ever since. In 1917 there was an auction sale of a two anna share held by the mortgagors of the plots and in the sale proclamation it was specified that it was to be sold subject to the usufructuary mortgage of these four plots in favour of the defendants. At the auction sale the defendants bought this share and took possession on 2nd August 1921. Subsequently, the plaintiffs claimed ex-proprietary rights and obtained a final order of the revenue Court in appeal dated 31st October 1924 to the effect that plaintiffs were the ex-proprietary tenants of these plots.

The case was argued on appeal in this Court on the ground that the period of limitation of six months allowed under S. 79, Act 2 of 1901, for a tenant to sue his landholder for possession had expired. But that section does not apply to the present case because, as stated in the section, it applies to tenants who are ejected. Now, the present plaintiffs have never been ejected, for plaintiffs have not been in possession from the time when the defendants entered into possession as usufructuary mortgagees.

We may refer to the case of the *Collector of Benares* v. *Shiam Das* (1) for the proposition that a tenant not in possession does not come under S. 79, Act 2 of 1901. We may note that in our opinion the Courts were correct in holding that there was a merger of the mortgagee rights of the defendants with the proprietary rights that the defendants purchased in the auction sale in 1917 and no point as regards a mortgagee in possession has been raised in appeal to the High Court. Accordingly we dismiss this appeal.

V.B./R.K. *Appeal dismissed.*

(1) [1915] 13 A. L. J. 329=28 I. C. 302.

A. I. R. 1930 Allahabad 312

SULAIMAN AND KENDALL, JJ.

Murli Tewari—Plaintiff—Appellant.

v.

Mohammad Idris and *others*—Defendants—Respondents.

Second Appeal No. 2112 of 1927, Decided on 19th December 1929,

Agra Pre-emption Act, S. 12 (2)—Scope.

Khata khewat is the smaller subdivision of the mahal within the meaning of S. 12 (2).

[P 312 C 2]

A. P. Pandey—for Appellant.

Iqbal Ahmad—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for pre-emption. The defendants had acquired under a deed of gift a share in the same mahal but in another khata khewat. The plaintiff is a cosharer with the vendor in the same khata khewat in which the property sold is situated. The Courts below have held that a khata khewat cannot be taken to be a subdivision of a mahal within the meaning of S. 12, Cl. 2, Pre-emption Act. In our opinion they are wrong. The khewat shows that there are separate khatas assigned to separate groups of co-sharers which have specific areas fixed and on which Government revenue is separately assessed. There cannot be the least doubt that they are smaller sub-divisions of the same mahal. The plaintiff being a cosharer in a smaller subdivision has undoubtedly preference over the defendants. We accordingly allow this appeal and setting aside the decree of the lower appellate Court remand the case to that Court under O. 41, R. 23 for the determination of the issues that have remained undecided and for disposal according to law.

P.N./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 313 (1)

MUKERJI AND BENNET, JJ.

Chhatarmal and *others*—Appellants.

v.

Jugul Kishore and *another*—Respondents.

Letters Patent Appeal No. 156 of 1929, Decided on 13th December 1929, from judgment of Sen, J., D/- 28th January 1929.

Easements Act, S. 13 (e)—Suit for injunction restraining owner of intervening fields from interfering with flow of water from well further away—Question having arisen as result of partition of field and well—If flow across intervening field necessary for field in question, as also irrigated before partition, party has right of easement and could rightly claim injunction.

Originally a well and certain fields were joint property of *J*. There was a partition in which the well was allotted to *J* and the intervening fields to *C* which were followed by fields in question allotted to *J*. Three fields of *J* were irrigated by water of the well by channels across the fields of *C*, before partition as well as after it. It was found that *C* subsequently interfered with the flow of water. *J* applied for injunction restraining *C* from so interfering :

Held : that it was necessary for *J* to have an easement of water channel over *C's* field and that injunction could be granted.

[P 313 C 2]

K. Verma and *S. S. Shastry*—for Appellants.

Judgment.—This is a Letters Patent appeal from a decree of a learned Judge of this Court granting the plaintiffs an injunction against the defendants from interfering with the water channel which runs from the well of the plaintiffs, across two plots 1296/1 and 1296/3 which belong to the defendants, and from which water irrigates the fields of the plaintiffs. Originally all these fields and the well were joint property, and there was a partition in 1907 in which the well was allotted to the plaintiffs and the intervening fields to the defendants, and then come certain fields allotted to the plaintiffs. Plaintiffs claimed in the plaint that it was necessary for them to irrigate their fields from this well, and an issue was framed by the trial Court (issue 2) :

"Have plaintiffs been enjoying a right of easement to flow water through the channel and did defendants obstruct them from using it? Were the plots in question irrigated through that channel ?"

On this issue the trial Court found in favour of the plaintiffs, and the lower appellate Court did not disturb that finding of fact. It accepted that finding, and then proceeded to find as a point of law that such user by the plaintiffs before the partition could not give them the right which they claimed after the partition. Moreover the lower appellate Court stated :

"Now in this case it is admitted that the water has to be taken through two fields, namely 1293/1 and 1296/3 which belong to Chittarmal (defendant)."

The lower appellate Court dismissed the suit of the plaintiffs on the ground that there was no easement, and the learned Judge of this Court has decreed it on the ground that the plaintiffs obtained this right from S. 120, Land Revenue Act. We do not consider that the case for the plaintiffs can be supported by S. 120, Land Revenue Act, But we consider that the case for the plaintiffs can be based on S. 13 (e), Easements Act, which lays down :

"Where a partition is made of the joint property of several persons :

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement."

On the findings of fact of the lower appellate Court it is necessary for the plaintiffs to have this easement of a water channel over the two fields of the defendants in order that the plaintiffs may irrigate their own fields, as they were irrigated before the partition. Accordingly we uphold the decree of the learned Judge of this Court granting the plaintiffs an injunction against the defendants, and we dismiss this Letters Patent appeal.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 313 (2)

BANERJI AND KING, JJ.

Digambar Singh—Defendant—Appellant.

v.

Birendra Singh—Plaintiff—Respondent.

Second Appeal No. 795 of 1926, Decided on 28th November 1929, from decree of Dist. Judge, Agra, D/- 8th February 1926.

(a) Agra Tenancy Act (3 of 1926), S. 165—Cosharer though member of Hindu joint family with lambardar can obtain his share.

In a suit by a cosharer for profits under the Tenancy Act the cosharer can obtain his share of profits, if he is recorded as entitled to a separate share, notwithstanding the fact that he may be a member of a joint family with

the lambardar : 5 *U. D.* 127, *Foll.* ; *A. I. R.* 1924 *Oudh* 118, *Ref.* (1899) *A. W. N.* 205, *held no longer good law* [P 314 C 1]

(b) Agra Tenancy Act (3 of 1926), S. 271 —Suit for profits between cosharers — Question of proprietary title—Civil Court's decree as to proprietary title must be given effect to even though subsequent to decision of revenue Court of first instance.

In a suit on collection of profits between cosharers, the Courts are bound to give effect in appeal to a decree of proprietary title passed by a civil Court, even when the civil Court's decree is passed after the decision by the revenue Court of first instance : *A. I. R.* 1922 *All.* 355 and 31 *All.* 253, *Foll.* [P 315 C 1]

(c) Cosharers—Though profits not in excess of share of lambardar he is liable to pay share of other cosharers when collection is on behalf of all.

Where a lambardar makes a collection not only on his own account but also for other cosharers, even if the profits may not be in excess of his own share, the lambardar is liable to pay other cosharers their share in collection. [P 314 C 2]

S. C. Das—for Appellant.

Judgment.—These five connected appeals arise out of suits for profits. The first group of suits relating to appeals 795, 681 and 796, were decreed against the principal contesting defendant, Digambar Singh, under S. 165 as a cosharer. The other two suits relating to appeals 793 and 794 were decreed against the same defendant as a lambardar, under S. 164, Tenancy Act of 1901.

One ground of appeal is common in all the cases. It is argued that the plaintiff is a member of a Hindu joint family consisting of himself and the defendants and that under the rule of Hindu Law a member of a Hindu joint family cannot sue the manager for his share of profits. It has been held by the civil Court in a partition suit, which was decided after the decision of the appeal by the Court below, that the parties are members of a joint family. We need not consider the effect of this decision on this point since in our opinion it is immaterial on the point at issue. The rule of Hindu Law cannot be contested, but it has been held that in a suit by a cosharer for profits under the Tenancy Act he can obtain his share of profits, if he is recorded as entitled to a separate share, notwithstanding the fact that he may be a member of a joint family with the defendants.

The learned advocate for the appellant relies upon a ruling in *Chandi Prasad* v. *Jawala Prasad* (1). This ruling no doubt does support his contention, but it is a very old ruling based upon the provisions of the Tenancy Act of 1881, and so far as we have been able to ascertain it has never been followed in any reported decision. It has once been referred to in the case of *Sohbat Kuar* v. *Raj Devi* (2) but in that case it was not followed. In our opinion it can no longer be taken as a good authority.

On the other hand, we have a clear authority in the ruling: *Sheo Narain* v. *Bala Rao* (3) by a Bench of this Court, to the effect that a cosharer who is recorded as owning a specific share is entitled to sue for profits in respect of that share even though he may be in fact a member of a joint family with the defendants. This was the ruling relied upon by the Courts below, and in our opinion they were correct. We, therefore, repel the appellant's contention on this point.

Another argument has been advanced which is common to all the suits decreed against the defendant under S. 165. It is contended that the defendant is only liable for profits collected by him in excess of his own share. It has not been held that he has made collections in excess of his own share and, therefore, it is urged that he is not liable to pay anything to the plaintiff. The contention may be sound in a case where, by agreement between the cosharers, each cosharer makes separate collections on his own account. In the present case, however, it is clear that the defendant-appellant has been making collections not only on his own account but on account of the plaintiff who is his nephew and a minor. The defendant himself pleaded that he was making the collections in the capacity of karta of the joint family. It is clear from his own statement, therefore, that he was making collections in the capacity of agent of the plaintiff. For this reason we are of opinion that the plaintiff is entitled to his share of the collections made by the defendant who was collecting not only on his own account but on the plaintiff's account.

A third point has been argued based

(1) [1899] A. W. N. 206.
(2) A. I. R. 1924 Oudh 118.
(3) 5 U. D. 127.

upon the decision of the civil Court in a partition suit between the parties decided on 28th February 1927, that is, after the decision of the Court below. In that suit it was decided that the parties were members of a joint family and that the plaintiff was entitled to one-fourth of the joint family property including the property in suit. In the khewat the plaintiff was recorded as proprietor to the extent of one-third and the Courts below have, therefore, decreed the plaintiff's share at one-third of the collections. The learned advocate for the appellant relies upon a ruling of this Court in *Surjan Singh* v. *Chatura Kunwar* (4) in which it was held, following a Full Bench case in *Bhawani Singh* v. *Dilawar Khan* (5) that in a suit of this nature the Courts are bound to give effect in appeal to a decree of proprietary title passed by a civil Court, even when the civil Court's decree is passed after the decision by the revenue Court of first instance. No authority has been shown to us why the principle of this ruling should not be applicable to the present appeals, and we consider that it is applicable. As it has been held that the plaintiff's share is only one-fourth he should only be decreed his profits at the rate of one-fourth of the collections instead of at the rate of one-third as decreed by the Courts below.

We, therefore, allow all the appeals to this extent and modify the decrees of the Courts below by decreeing to the plaintiff his share of profits at the rate of one-fourth instead of one-third. Let fresh decrees be prepared on this basis. Parties will pay and receive costs proportionate to failure and success in all Courts.

V.B./R.K. *Decree modified.*

(4) A. I. R. 1922 All. 356=44 All. 250.
(5) [1909] 31 All. 253=1 I.C. 886=6 All. 145.

A. I. R. 1930 Allahabad 315

NIAMATULLAH, J.

Raghunath Tewari—Defendant—Appellant.

v.

Buddhu Ram Tewari and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 940 of 1928, Decided on 10th December 1929, from decree of 2nd Addl. Sub-Judge, Jaunpur, D/- 25th February 1928.

(a) Agra Tenancy Act (2 of 1901), S. 20—Landlord can create tenancy which is heritable and transferable.

The power of transfer, if conferred by lease, is inoperative if it is opposed to some law so as to defeat its provisions or is opposed to public policy and so on this principle under Agra Tenancy Act or any law, there is nothing which prevents a landlord from creating a tenancy carrying heritable and transferable rights; 28 *All.* 747, *Dist.*; *A. I. R.* 1925 *All.* 63, *Diss. from.* [P 317 C 2]

(b) Agra Tenancy Act (3 of 1926), S. 16—Joint family can acquire occupancy rights under lease.

There is nothing to prevent occupancy rights being acquired by a joint Hindu family under a lease. 40 *All.* 314, *Expl.* [P 317 C 2]

Mushtaq Admad—for Appellant.

Harnandan Prasad—for Respondents.

Judgment.—This is an appeal by defendant 1 (Raghunath) arising out of a suit brought by his brother, Buddhu Ram (plaintiff-respondent), for joint possession of 4·60 acres of land in a village in Jaunpur district. Defendants 2 and 3 are the other two brothers of the plaintiff and defendant 1. The land in dispute was leased by its proprietors, Raja Amarpal Singh and Sheikh Kifayatullah by an instrument, dated 21st January 1925, ostensibly to Raghunath defendant 1 and one Sat Narain, a stranger to the family, on receipt of a premium of Rs. 2,000 at an annual rent of Rs. 24-8-0. The lease confers heritable and transferable rights on the lessees in express terms (*naslan bad naslan wa batalan bad batalan qabili warasat we qabili intiqal*), like those of a fixed rate tenant.

The plaintiff alleged that defendant 1 was not the lessee in his individual capacity but that it was the joint family consisting of all the four brothers that had taken the lease in the name of defendant 1 for the benefit of the whole family and that a disruption of the family occurred a few months after the date of the lease. The plaintiff claims one-eighth share in the leasehold, the whole family being entitled to one half, the other half belonging to the stranger Sat Narain; The defence of defendant 1 was that the family was no longer a joint Hindu family when the lease was taken, that he represented no one but himself in taking that lease and that he had been in possession of the land in dispute to the exclusion of his brothers, who had no interest, whatever, in the land in dispute.

Both the Courts below have found

that the name of defendant 1 was entered in the lease as representing the entire family. The plaintiff's suit has been accordingly decreed. Defendant 1 has preferred the present second appeal.

It has been contended by the appellant's learned advocate that the findings arrived at by the Courts below cannot affect the right of defendant 1 under the lease. He does not question now the facts found by the lower appellate Court. To appreciate his argument, it is necessary to state the findings arrived at by the lower appellate Court on certain questions of fact. It finds (1) that the family was joint when the lease in question was obtained, (2) that the premium of Rs. 2,000 was paid by the family and (3) that the plaintiff and one of the brothers, namely, Raghubir, took the lease for the family in the absence of defendant 1 (appellant), whose name was entered in the lease at their instance. There can be no doubt that, under ordinary circumstances, any property acquired in the manner stated above, cannot but be regarded as joint family property in which every member of it will have a share. It is, however, contended on behalf of the appellant that the terms of the lease must be given effect to and that S. 92, Evidence Act, precludes evidence to show that persons other than the ostensible lessee were the lessees. It is argued that the lease confers heritable rights on defendant 1 and that, on his death, the property must go to his heirs alone. I am unable to accept this line of argument. S. 92, Evidence Act, excludes evidence of oral argument to vary or contradict the terms of any grant as "between the parties to" it. The dispute here is between one of the parties to the instrument and third persons, namely, members of his own family. If this argument is correct, no 'benami' transaction can ever be recognised. No sale, mortgage or other transfer in favour of a joint Hindu family, if the deed evidencing it is in the name of an individual member of it, can enure for its benefit. There is no difference in principle between an ordinary 'benami' transaction and a transfer in favour of a joint Hindu family evidenced by a deed in the name of one of its members. It is contended that, in so far as it has been found by the lower appellate Court that the entire joint family took the lease from the grantors, they should be deemed to be parties to the instrument. If that is so, the terms of the instrument, namely, the lease, are not in any way varied. The very proposition which it is sought to be established by the respondents is assumed in arguing the contrary. For these reasons I am clearly of opinion that, on the findings arrived at by the lower appellate Court, which cannot be questioned and have not been questioned, the plaintiff-respondent was rightly allowed to succeed.

Another line of argument which was pursued by the learned advocate for the appellant is this. He contends, on the authority of some cases to be presently noticed, that whatever may be the terms of the lease before us, the tenancy created thereby must be limited to an occupancy tenure, which cannot become joint family property by its income being thrown into the common stock of the family. Reliance is placed on *Kallu* v. *Sital* (1). Apart from other considerations, I do not think this case has any application to the circumstances before me. It was expressly mentioned in the judgment of this Court (see p. 329) that the member of the joint Hindu family who had acquired occupancy rights under a grant had taken the lease for himself alone and that the joint family was not interested in the holding in its inception. The learned Judges were careful to point out:

"that the letting was to Matola alone and not to Matola as representing the joint family."

They repelled the contention that the income accruing from the occupancy tenure having been thrown in the common stock, it became part of the joint family property, on the ground that such an acquisition by the joint Hindu family is opposed to the provisions of S. 20, Agra Tenancy Act (2 of 1901), because if a member of a joint Hindu family was an occupancy tenant in his own right, the joint family of which he was a member, could only acquire the occupancy rights by transfer in the peculiar manner known to Hindu Law, namely, by throwing the income of property in the common stock. On this ground the learned Judges negatived

(1) [1918] 40 All. 314 = 44 I. C. 717 = 16 A. L. J. 225.

the rights of the joint Hindu family. This case is not an authority for the proposition that a joint Hindu family cannot acquire occupancy rights under a deed taken in the name of one of its members. In the case before me the lower appellate Court has not based its view on the fact that the income of the leasehold property was thrown in the common stock. It has found that the family was the real lessee and party to the transaction by which the leasehold was created. It has not been found that the family had no concern with the transaction when the lease was executed but subsequently the individual member, namely, defendant 1, by his voluntary act transferred it to the joint family, of which he was a member, by treating it to be part of the family property.

Reliance has been placed on *Bachchi* v. *Bachchi* (2), in which a learned Judge of this Court held that a tenant at fixed rate is one described in S. 8, Tenancy Act, and every person who holds at a fixed rate of rent cannot have the rights and obligations of a fixed rate tenant described in S. 8 of that Act, and that it is not open to a landlord to create a tenancy of the character described in S. 8. In that case the lease did not in terms confer transferable rights, though the rights were declared to be heritable. All that was held in that case was that the special rules of inheritance, laid down in S. 20, Act 2 of 1901, were not applicable to the tenancy created by the instrument in question in that case, though it was at a fixed rate of rent. In a later case, viz,, *Qurban Ali* v. *Shaik Majid Hussain A. I. R.* 1925 *All.* 63, another learned Judge of this Court expressed the opinion that a fixed rate tenancy of the kind referred to in S. 8, Tenancy Act, could not be created by acts of parties. If the question were whether special rules of inheritance laid down in S. 20 could be made applicable by private treaty in contravention of the personal law of the grantee, no exception could be taken to that view : but the learned Judge has gone so far as to nullify a clause conferring a transferable right upon the tenant on the ground that transferability is a feature peculiar to fixed rate tenancy, which cannot be created by contracts. With great respeci, I think the view is not supported by *Bachchi* v. *Bachchi* (2), which it professes to follow. There is no law which prevents a landlord from creating a tenancy carrying heritable and transferable rights.

The power of transfer, if conferred by a lease, can be regarded as inoperative, if it is opposed to some law so as to defeat its provisions or is opposed to public policy. That it is not opposed to public policy is obvious. There is nothing in the Agra Tenancy Act, or in any other law, which forbids a landlord conferring a power of transfer on a tenant in perpetuity. In cases governed by the Transfer of Property Act S. 108 (j) specially empowers a lessee to transfer his rights. For these reasons I respectfully take exception to the view expressed in *Qurban Ali* v. *Majid Husain A. I. R.* 1925, *All.* 63.

Even if the view taken in the case last quoted be accepted as correct, the appellant's position is not appreciably improved, in view of the finding of the lower appellate Court that it was the joint family consisting of the plaintiff and the defendants which acquired rights under the lease. If it be assumed that the power of transfer conferred thereby is not valid and the grantee or grantees thereunder have no more than occupancy rights, the question still remains whether it was the joint family that acquired such rights or defendant 1, in whose name the lease was taken. There is nothing to prevent occupancy rights being acquired by a joint Hindu family under a lease. The question which was decided in *Kallu* v. *Sital*, (1), namely, whether occupancy rights acquired by one of the members of the family for himself could be subsequently made part of the family property by throwing the income derived from the occupancy holding into the common stock of the family does not arise in the present case.

For the foregoing reasons I sustain the decree passed by the Courts below and dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

(2) [1906] 28 All. 747=3 A. L. J. 513 =(1906) A. W. N. 219.

A. I. R. 1930 Allahabad 318

YOUNG, J.

Baij Nath—Plaintiff—Appellant.

v.

Janki Prasad—Defendant — Respondent.

Second Appeal No. 161 of 1928, Decided on 6th December 1929, from decree of Addl. Sub-Judge, Moradabad, D/- 28th October 1927.

Co-owner—Party wall—So long as each co-owner uses it reasonably without interfering with enjoyment of that wall by another, or weakening, damaging, or increasing or diminishing it, he is entitled to do as he likes.

In the case of a party wall, each co-owner has reasonable user of the wall owned in common and so long as each co-owner uses it reasonably without interfering with the enjoyment of that wall by the other co-owner, or without doing anything which would weaken, damage, increase or diminish the wall enjoyed in common, he is entitled to do what he likes : 13 *A. L. J.* 473, *Dist.*; *Stedman* v. *Smith*[3] 8 *E. & B.* 1 and *Watson* v. *Gray* 14 *Ch. D.* 192, *Ref.* [P 318 C 2]

M. L. Agarwala—for Appellant.

Panna Lal and *Visua Mitra*—for Respondent.

Judgment. — This is a defendant's appeal. The plaintiff brought an action against the defendant claiming an injunction to restrain the defendant from opening an almirah in the wall between the two houses, and asking that another almirah already made should be closed, and further that certain beams which the defendant was placing or proposed to place on his side of the wall should not be allowed, and an injunction restraining him from so doing be decreed.

It appears that the plaintiff has a house three storey high; the defendant has a house one storey high—both parties using the same wall in common. It has been decided by the lower appellate Court as a matter of fact that the wall between the two houses is held in common by both the parties. The defendant wished to add one storey more to his present house. That would make his house two storeys in height, with the plaintiff's house still a storey higher above the defendant's house. The lower appellate Court refused to grant an injunction. The appellant contends that an injunction ought to issue, and quotes as his authority the case of *Ekramullah Khan* v. *Muhammad Yunis Ali Khan*(1). This case decided that one of two tenants in common is not entitled to build upon a party wall without the consent of the other tenant in common; and in particular he relied upon a portion of the judgment in the case as follows:

"The case of *Watson* v. *Gray* (2) clearly lays down a principle that in such a case as this one of the tenants in common is not entitled to interfere with the party wall without the consent of the other tenant-in-common."

It is clear, in my view, that this decision is distinguishable from the present case. In the above case one of the co-owners proposed to increase the height of the party wall. The defendant in this case does not propose to do anything of the sort. Different considerations arise where there is an increase in the height of the party wall, as Crompton, J., said in *Stedman* v. *Smith* (3):

"You certainly had no longer the use of the same wall; you could not put flower-pots on it, for instance; or suppose he had covered it with broken glass, so as to prevent your passing along it, as you were entitled to do. The plaintiff is excluded from the top of the wall; he might have wished to train fruit trees there, or to amuse himself by running along the top of the wall."

This case of *Stedman* v. *Smith* (3) is quoted with approval in the case of *Watson* v. *Gray* (2) which is alluded to in the case I have just qouted in. 13 *A. L. J.* (1). It is quite clear therefore from a perusal of the authorities in this matter that an injunction issues where there is an alteration, such as an increase in height of the party wall. I am of opinion that in a case like this where there is no alteration of the party wall different considerations apply. Co-ownership implies that each co-owner should have a reasonable user of the thing owned in common, and so long as each co-owner uses a wall reasonably without interfering with the enjoyment of that wall by the other party, or without doing anything which would weaken, damage or increase or diminish the wall enjoyed in common, he is entitled to do what he likes. In this case I am satisfied therefore that the plaintiff has not made out a case for the granting of an injunction. There is no evidence on the record of any damage having been done

(1) [1915] 13 A. L. J. 473=30 I. C. 33.

(2) [1880] 14 Ch. D. 192=49 L. J. Ch. 243=44 J. P. 537=28 W. R. 433=42 L. T. 294.

(3) [1857] 8 E. & B. 1=3 Jur. (n.s.) 1248=26 L. J. Q. B. 314.

to the wall, or that it has been weakened, or of any interference with the reasonable user of the plaintiff of the wall. All that the defendant has done is to use his rights reasonably as a co-owner.

The appeal is, therefore, dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 319(1)

DALAL, J.

Chakrapan—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 68 of 1929, Decided on 3rd July 1929, made by Sess. Judge, Farrukhabad, D/- 19th January 1929.

Criminal P. C., S. 145 (4)—Meaning.

The direction to receive evidence implies a duty on the Court to summon such witnesses as may be mentioned to the Court by either party: 32 *Cal.* 1093, *Dist.* [P 319 C 1]

Kedar Nath Sinha and *Jai Narain Verma*—for Applicant.

M. Waliullah—for the Crown.

Ambika Prasad—for Opposite Party.

Judgment.—I am of opinion that the trial Court was wrong in not giving an opportunity to Cakrapan to produce his evidence. Reference was made by the opposite party to a ruling in the case of *Tarapada Biswas* v. *Nurul Huq* (1), that it was not obligatory on a Magistrate to assist parties to a proceeding under S. 145, Criminal P. C., in producing their witnesses. That ruling, however, was passed long prior to 1923, when Cl. (4), S. 145, was amended by Act 18 of 1923 and the Magistrate was directed to receive all such evidence as may be produced by the parties. The direction to receive evidence implies in my opinion a duty on the Court to summon such witnesses as may be mentioned to the Court by either party. It may be noticed that the information given to the parties under S. 145 (1) is not that they should bring their witnesses along with them. The parties filed written statements, so it may be said that the Court was not put to the necessity of hearing the parties themselves. There can be no doubt that the Magistrate did not give Chakrapan an opportunity of producing his evidence.

I therefore set aside the order of the Magistrate dated 10th November 1928, and direct an enquiry as to possession over again, as laid down by the provisions of S. 145 (4), Criminal P. C.

V.B./R.K. *Order accordingly.*

(1) [1905] 32 Cal. 1093=2 C.L.J. 280.

A. I. R. 1930 Allahabad 319(2)

MUKERJI AND BENNET, JJ.

Kunwar Puran Singh and *another*—Plaintiffs—Appellants.

v,

Mt. Bahal Kunwar and *another*—Defendants—Respondents.

First Appeal No. 284 of 1926, Decided on 21st January 1930, against decree of Sub-Judge, Moradabad D/- 10th March 1926.

(a) Civil P. C., Sch. 2, Para. 1—Agreement to refer should set forth matters in difference between parties.

Any agreement as contemplated by Sch. 2, Para. 1, between the parties should clearly set forth what are the matters in difference between the parties on which the arbitrators are required to arbitrate. Such points should be set forth clearly in the form of issues. [P 320 C 1]

(b) Civil P. C., Sch. 2, Para. 1—Reference of future disputes is not provided by Sch. 2.

There is no provision in Sch. 2, meeting an agreement to refer to arbitration which sets forth that any matters which might in future arise between the parties might also be referred to the decision of the arbitrators on application of the parties. [P 320 C 2]

U. S. Bajpai and *Mushtaq Ahmad*—for Appellants.

Baleshwari Prasad and *S. B. L. Gaur*—for Respondents.

Bennet, J.—There was a first appeal pending before this Court by Kunwar Puran Singh and Nitrapal Singh plaintiffs againts defendants Mt. Bahal Kunwar and Mr. Javitri Kunwar. These persons are related as follows:

Mahtab Singh

Mt. Bhan Kunwar died in 1895.

Narain Singh (died in 1922.)

Puran Singh plff. 1.

Nitrapal Singh plff. 2.

=Mt. Bahal Kunwar, deft. 1.

=Mt. Javitri deft. 2.

The plaintiffs sued for declaration that they were owners in possession by right of survivorship of the whole of the property of Narain Singh alleging that Narain Singh and the plaintiffs had formed a joint Hindu family. The defendants resisted the suit on the ground that Narain Singh died as a separated

P. N. Das
Advocate High Court
Kashmir
Srinagar.

Hindu. This suit was brought in 1925. On 8th February 1926 plaintiff 2 and mukhtariam of plaintiff 1 and mukhtariam of Mr. Javitri Kunwar made an application in Court asking for the names of the plaintiffs to be recorded in place of Mt. Javitri Kuuwar over her share of the property of Narain Singh and stating that in lieu of a payment of Rs. 180 every six months from the plaintiffs to her she agreed that she would have no right of ownership or possession in the disputed property. On 17th February 1926 Mt. Javitri Kunwar applied to cancel the said compromise on the ground that it was made by her mukhtariam without her consent or permission. That application was rejected. But the learned Subordinate Judge held that the compromise did not amount to an alienation by Mt. Javitri Kunwar of her right as a widow in the estate of Narain Singh in favour of the plaintiffs. He further added:

"This may at the best be treated as a surrender, sufficient to effect a valid acceleration of her estate. In that view of the case the other co-widow would succeed to that estate by right of survivorship."

This is a proposition of law to which we do not agree. The Subordinate Judge dismissed the suit of the plaintiffs holding that the family was not joint and that Narain Singh died as a separated Hindu, and that the widows had a right to hold as Hindu widows for their lifetime.

When the appeal was pending in this Court an application was filed for a reference to arbitration. This is on the basis of a registered agreement executed by the parties or their mukhtariams and dated 12th April 1929. It is regrettable that the words of this reference to arbitration are extremely vague and in our opinion not at all in accordance with para. 1, Sch. 2, Civil P. C. That paragraph lays down that where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may apply to the Court. We consider that any such agreement between the parties should clearly set forth what are the matters in difference between them on which the arbitrators are required to arbitrate. Such points should be set forth clearly in the form of issues. On the contrary, the agreement of 12th April 1929 is couched in vague language and makes no attempt to set forth the points at issue. There is a reference to the relinquishment by Mt. Javitri Kunwar, but that reference merely says that the arbitrators are to decide about the relinquishment. In no place is it set forth in this agreement that the arbitrators were to decide between Mt. Bahal Kunwar and Mt. Javitri Kunwar whether any right had accrued to Mt. Bahal Kunwar from this relinquishment alleged to have been made by Mt. Javitri Kunwar. Further this agreement to refer to aribtration sets forth that any matters which might in future arise between the parties might also be referred to the decision of the arbitrators on application of the parties. There is no provision in the Sch 2 for a reference to arbitration of that nature.

The award of the arbitrators was given on 7th November 1929 and is now before us and objection has been taken to the award on behalf of Mt. Javitri Kunwar. The award contains the following passage:

"During the pendency of this suit Mt. Javitri Kunwar defendant executed a deed of relinquishment in respect of all her rights in favour of the plaintiffs, but in our opinion the relinquishment in favour of the plaintiffs is invalid as has already been held by the Court of the Subordinate Judge of Moradabad also. We therefore decide that Mt. Bahal Kunwar defendant is the exclusive heir to all the property left by Narain Singh, and that Mt. Javitri Kunwar defendant is only entitled to maintenance. As regards Mt. Javitri Kunwar we accordingly decide that Mt. Bahal Kunwar aforesaid and her heirs shall duly pay to Mt. Javitri Kunwar for her lifetime the sum of Rs. 360 annually. The entire property of Mt. Bahal Kunwar shall stand pledged and hypothecated against the amount of maintenance."

We consider that there was no authorization in the agreement to refer to arbitration for the arbitrators to decide any matter between Mt. Bahal Kunwar and Mt. Javitri Kunwar defendants. The mere fact that the Subordinate Judge had made a statement of his opinion on the relative rights of these two widows in his judgment does not authorise the arbitrators to come to any decision on this point. In the decree of the Subordinate Judge there was no such order as regards the rights of the defendants, nor could any such matter have been embodied in the decree. Accordingly that matter not being a matter in the case and not being in the refer-

ence to arbitration could not legally be decided by these arbitrators.

Further the portion of the award beginning with the paragraph:

"in addition to the dispute which is the subject matter of the suit and which has been mentioned above, the parties by means of applications in writing submitted other objections before all of us the arbitrators,"

down to the end of the award deals with matters which admittedly were not in the reference to arbitration. Accordingly those matters are matters which the arbitrators could not validly decide. It appears to us that the correct course for us is to act under para 12 (a), Sch. 2, Civil P. C. and separate these matters which have been decided by the arbitrators on matters which were not referred to arbitration from the rest of their award, and correct the award accordingly.

We therefore correct the award in this manner that the decision in the award between the two defendants in regard to the rights of these defendants inter se, and in regard to the payment of maintenance by defendants 1 and 2 will be deemed expunged from the award and also those matters which come in the portion of the award subsequent to the words "in addition to the dispute which is the subject matter of the suit, etc." already quoted. The operative portion of the award which is left is that the family of Narain Singh was not a joint family, and that the suit of the plaintiffs should be dismissed and that each party should bear their own costs. We accordingly accept the award corrected as stated above and direct that a decree be passed in these terms of the award to the effect that the suit of the plaintiffs be dismissed and each party pay their own costs.

V.S./R.K *Order accordingly.*

A. I. R. 1930 Allahabad 321

DALAL, J.

Sitla Bux Chaube and *others*—Defendants—Appellants.

v.

Gopal Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 653 of 1928, Decided on 10th December 1929, from decree of Second Addl. Sub-Judge, Jaunpur, D/- 24th January 1928.

1930 A/41 & 42

(a) Practice — Judge — Court's work not finished by deciding contentions but should pay special attention to preparation of decree.

The work of the Courts is not completed once they have played about with contention of the parties and conflicting rulings, but they should pay special attention to the decree which they prepare [P 321, C 2, P 322, C 1]

(b) Practice — Pleadings — Plaintiff purposely vague should be tied down to definite pleadings.

A plaintiff who is purposely vague in hopes of his case being misunderstood by the Court in his favour ought to be carefully examined and tied down to definite pleadings. [P 322, C 1]

(c) Possession—Leasing out parti land for special purpose—Scraping grass on it does not indicate possession

Where parti land has been leased for a special purpose, e. g., bandh, i. e,, throwing up earth from the tank, the fact that the lessee merely used it for scraping grass does not indicate any posssesion of it by him. [P 322, C 2]

S. C. Goyel and *Haribans Sahai*—for Appellants.

Shiva Prasad Sinha — for Respondents.

Judgment.—The Judge of the lower appellate Court has passed a most careless decree. The suit was in the alternative for declaratory decree as regards so much of present plots Nos. 185 and 202 as may correspond with old plots Nos.286 and 288, and, in the alternative, for possession. The lower appellate Court casually passed a decree in favour of the plaintiff's claim but made no mention whether a declaratory decree was granted or one for possession. Further, at the very commencement of his judgment he wrote that no portion of old plot No. 286 was included in the present plots Nos. 185 and 202, and yet this matter was not cleared up in the lower appellate Court's decree. Matters are left in such a way as to lead to further litigation. As usually happens, the plaintiff litigant on paying the court-fee believed that after that it was the business of the Court to find out what his rights were. The prayer was entirely indefinite and the trial Court ought to have returned the plaint for a specific map and a specific prayer as to what exact area of the plots of the present notation the plaintiffs desired a declaration about or possession. In the decree of the lower appellate Court the matter is left as vague as it was in the unsatisfactory prayer at the end of the plaint. It is much to be desired that civil Courts would pay attention to the decree which

they prepare in order to avoid further litigation and not consider that their task is completed once they have played about with the contention of the parties and conflicting rulings.

Just like the prayer the plaint is also vague and the plaintiffs hedge between a claim outright as owners and a claim by way of easement to use the land as bandh and bhita land. They have purposely done this because the land is no longer used as bandh or bhita and they did not desire to disclose the true facts of easement for fear that the easement not having been used may not be granted to them. A plaintiff who is purposely vague in hopes of his case being misunderstood by the Court in his favour ought to be carefully examined and tied down to definite pleadings. It is to be regretted that this wae not done in this case.

The trial Court dismissed the suit. The lower appellate Court has held that the land which that Court has not defined nor particularised was used for the purposes of bandh, that is to throw mud dug out of the plaintiff's tank in plot No. 186. It is obvious from the evidence that since 1881 at least this land has not served the purpose of a bandh and that the plaintiffs have been too lazy to deepen the tank and throw earth out. The plaintiffs themselves had realized this and had applied in 1926 to the zamindar for lease of this very land. The defendants are lessees from the zamindar and the usual trick was played of barring the jurisdiction of the revenue Court by purposely omitting the zamindar from the array of parties as defendants. Such evasion would not be possible now, but this suit was filed prior to the passing of the Tenancy Act, 1926.

The lower appellate Court itself arrived at the true finding that the land was to be used as bandh and for that purpose there was a license of the zamindar to the plaintiffs to make use of the land. When, however, that Court started inquiring as to the use of the land and possession within the last twelve years of the suit it was easily satisfied by an allegation of the plaintiffs that they had scraped grass over this land. To hold possession as resting with the plaintiffs on such a ground is childish. Wherever there is any grass on parti land a villager would sit down to scrape it. Such scraping of grass does not indicate any possession particularly where the land as held by the lower appellate Court itself was given for a special purpose of throwing up earth from the tank. The land not having been used as a bandh since 1881 in which year in the settlement the land is entered as parti qadimi, the plaintiffs have no right to possession of the land. The lower appellate Court was entirely wrong. I set aside his decree, restore the decree of the trial Court and dismiss the plaintiffs' suit with costs of all the Courts.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 322
Special Bench

MEARS C. J., AND BOYS AND KING, JJ.

Mrs. M. B. Hartley—Petitioner.

v.

Jack Fleming Hartley—Respondent.

Matrimonial Ref. No. 6 of 1929, Decided on 21st January 1930, made by Dist. Judge, Saharanpur.

Divorce Act, S 13– Petition for divorc by wife unopposed—Mere evidence of adultery and cruelty is not enough — Want of connivance and explanation of delay in filing petition, is necessary.

If a petition for divorce by a wife is unopposed, the evidence that the husband committed adultery and had been cruel to his wife, is by itself not sufficient basis for a decree nisi. It is essential to prove want of connivance on the part of the wife at the alleged adultery and if there is delay in filing the petition, the delay must be explained. It is also essential that necessary facts should by stated and recorded with precision. [P 322 C 2;P 323 C 1]

R. I. Wahid—for Petitioner.

Boys, J. — Mrs. Muriel Blanche Hartley asks this Court to confirm the decree nisi granted to her by Mr. Badhwar, District Judge of Saharanpur, for dissolution of her marriage with Jack Fleming Hartley on the ground of adultery and cruelty.

As the record stood when it came before us, we should have had no hesitation in refusing to confirm the decree. Both Mr. Badhwar, the District Judge who tried the case, and Mr. Wahid, who appeared before him and in this Court on behalf of the petitioner, would almost seem to have been under the impression that, if a petition for divorce is unopposed, it is sufficient basis for a decree if there is evidence

that the respondent has committed adultery and has been cruel to his wife. There is not in the judgment one single word to suggest that the learned Judge gave one moment's thought to such very material questions as whether there had been unexplained delay in filing the petition, or whether there had been connivance on the part of the petitioner at the alleged adultery.

Paragraph 4 of the petition alleged:

"that during the the last two years or so one Miss Dorothy Gardiner was introduced into the home by the respondent, the said Miss Dorothy Gardiner continually living with the petitioner and the respondent wherever they were posted except with one or two breaks for a few days at a time."

Paragraph 5 alleges that on divers occasions during these two years the respondent committed adultery with the said Miss Dorothy Gardiner. Subsequent paragraphs set out the charges of alleged cruelty. In para. 14 the petitioner made the usual statement that there was no collusion or connivance.

The facts stated, then, in this petition plainly suggested a long continued course of adultery committed by the respondent over a period of two years, that adultery being well known to the petitioner and being committed actually with the woman living in the house practically throughout the whole period. It moreover suggested that the petitioner had left the house of her husband not in any way because she was displeased at the adultery but because she began to be afraid of her husband's violence.

The petitioner Mrs. Hartley gave evidence on 28th January 1929. She stated that in 1926 (neither the Judge nor her counsel took the trouble to ask to be more precise) her husband brought Miss Gardiner from Kathgodam to Bareilly, where the parties were then stationed, for a dance. The petitioner stated that since that time Miss Gardiner had stayed with her and her husband wherever they went, and that from the very outset respondent and Miss Gardiner were on intimate terms, things becoming very noticeable in November 1927. The petitioner alleged that she saw the respondent and Miss Gardiner kissing each other and Miss Gardiner sitting on Mr. Hartley's lap. Neither the Judge nor the petitioner's counsel Mr. Wahid took the trouble to record or get it recorded (even if the statement was made at all) when these incidents occurred. The next statement is to the effect that "in the hot weather they used to sleep in the same room, while my bed was put aside" There is nothing in this to show to which year reference was being made. Mr. Wahid, petitioner's counsel, when asked by us informed us that it referred to the hot weather of 1927. If that were so, then, in the absence of some very convincing explanation, this statement would in itself be sufficient to wreck the petitioner's chances of obtaining her divorce, particularly when coupled with the failure to obtain any explanation from the petitioner as to whether she objected to this arrangement or not. The petitioner next states that

"whenever Mr. Hartley went out on tour Miss Gardiner accompanied him. Whenever Mr. Hartley had to go to Delhi he took his dinner with us at 9 O'clock at night, after which both Mr. Hartley and Miss Gardiner used to go to the railway station and sleep in an empty carriage to catch the morning train at 4 a. m."

Mr. Hartley's duties as a Police Inspector on the railway manifestly required him to be constantly on tour, and this statement of the petitioner would equally plainly suggest that during all this period of association between Mr. Hartley and Miss Gardiner they were constantly going out all over the place on tour together, without any explanation at all being asked for or obtained from the petitioner as to why she did not resent it or leave her husband. We have, however, taken a further statement from Mrs. Hartley from which it has appeared that instead of Mr. Hartley and Miss Gardiner having made a number of trips to Delhi, as is suggested by the words "whenever Mr. Hartley had to go to Delhi", he only took Miss Gardiner with him once to Delhi, and Mrs. Hartley seized the opportunity of his prolonged absence to leave his house, taking the children with her.

This is all that Mrs. Hartley said in her evidence to the District Judge on the subject of adultery. It is manifest that with her statement left as it was by the District Judge and her counsel Mr. Wahid, there was ample ground for the conclusion that mrs. Hartley had really been a consenting party during

the best part of two years to the long continued course of adultery between her husband and Miss Gardiner, and upon this we should have had no hesitation in refusing to confirm the decree. From the questions we put to Mr. Wahid it appeared that he had given no serious thought whatever, if indeed any, to the questions of delay and connivance. Fortunately, however, for herself, the petitioner was in Court and, therefore, in a position to hear the inevitable comments on her evidence as it stood. At first she had remained seated at the back of the Court, but upon hearing our comments she came forward and took a seat at the side of Mr. Wahid. From an answer which she gave to a remark from one of the members of this Bench, we thought it desirable to take a further statement from her. She explained that though Miss Gardiner was brought to her house for the purpose of attending a dance in March of 1926, Miss Gardiner was in fact a nurse by profession and the petitioner was within a few months of her confinement and Miss Gardiner stayed on to help the petitioner through her confinement and no doubt generally with the children and household work.

Actually before the child was born the petitioner's husband was transferred to Agra. Miss Gardiner also went there with them and took up a post in a hospital for two or three weeks, visiting the petitioner and her husband during the weekends. After the three weeks Miss Gardiner came to live with the petitioner and her husband permanently, at first her father and subsequently her brother paying something towards the cost of her keep. About the end of 1926 all three of the persons concerned went to Saharanpur where they still were, when in June 1928, the petitioner left her husband's house, and very shortly afterwards filed the present petition. Mrs. Hartley says that for a long while she had never remarked anything wrong between her husband and Miss Gardiner, the latter of whom had been very good to her when ill. She explained that the hot weather to which she had referred, and which she has not been asked to specify more precisely in her previous statement in the trial Court, referred not to the hot weather of 1927 but to the hot weather of 1928, which put a wholly different complexion on this incident. She further has explained to us that it was not till April 1928 until a few weeks before she left the house, that her husband took to lying down in the same room with Miss Gardiner and making the petitioner lie down in another room. The earliest incident of cruelty which she mentions dates back from May, or possibly March 1928, and she says that it was not till then that she began to suspect that there was undue intimacy between her husband and Miss Gardiner ; and finally she says that it was his taking Miss Gardiner with him to Delhi and threatening to shoot her, the petitioner, if he found her in the house on his turn, that finally drove her from the house and caused her to file the present petition.

It is manifest that the evidence that she has given in this Court throws an entirely new light on the case. While on the record as it was left by the District Judge and her counsel, Mr. Wahid, there was ample reason for dismissing the petition on the grounds of delay and connivance, we see no reason in the light of the further statement which we have obtained from the petitioner, for refusing to confirm the decree. No further application beyond this is before us.

We cannot leave this case, however, without putting on record our strong disapproval of the total omission by the District Judge to consider the issues of delay and connivance and his negligent failure to get on record with any precision the necessary facts ; and the same comment must indubitably apply to the conduct of the case by the petitioner's counsel, Mr. Wahid, who even here did not appear to have any proper appreciation of the gravity of the omission. We make the decree nisi absolute.

V.B./R.K. *Decree made absolute.*

A. I. R. 1930 Allahabad 324

DALAL, J.

V. S. Dandekar—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 903 of 1929. Decided on 11th December 1929, from order of Dist. Magistrate, Mainpuri, D/- 21st August 1929.

(a) Penal Code, S. 124-A—Speech bringing Government into hatred is not innocuous because contempt already existing has not been increased.

It cannot be said that the speech even if it brought the Government into hatred and contempt can be considered to be innocuous because such hatred and contempt cannot be increased from the standard that already exists in the minds of the people. [P 325 C 2]

(b) Penal Code, S. 124-A — Intention is correlated with natural consequences—Person in his speech saying he is follower of non-violence but at the same time saying that he is nobody to blame people who in their anger at oppression of present Government use more violent methods—He further insinuating various disabilities of village life to be due to present Government — There is an intention to bring present Government into hatred and offence under S. 124-A is committed.

It is true that the gist of the offence under S. 124-A lies in the intention of the speaker or writer. But intention is connected with consequences. To intend a thing is to act in such a way as to expect that certain consequences would follow. Intention, therefore, is correlated with the natural consequences which would follow from a particular act. Where a person says in his speech that he himself is the follower of the precept of non-violence but at the same time says that he is nobody to find fault with people who in their anger at oppression as is witnessed under the present Government use more violent methods and shoot at members of the Assembly and where throughout his speech he insinuates various disabilities of village life to be due to the present Government, there is an intention on his part to bring the Government into hatred and he commits the offence under S. 124-A. [P 325 C 2; P 326 C 1]

K. D. Malaviya and *Vishwa Mitra*—for Appellant.

Sankar Saran—for the Crown.

Judgment.—Mr. Dandekar has been convicted of an offence under S. 124-A, I.P.C., in so far as that he made a speech bringing or attempting to bring into hatred or contempt, or excite or attempting to excite disaffection towards the Government established by law in British India. From such a conviction an appeal is permitted direct to this Court. After reading the statement of the appellant in the Court of the District Magistrate I felt doubt as to his desire to appeal. He seems to glory in his condition and feel very happy in the position which he has created for himself. His learned counsel Mr. Malaviya assured me that though he had received instructions from the friends of the appellants, those friends had consulted the appellant who desired an appeal. That was the reason why I did not think it necessary to make direct enquiry from the appellant himself. Mr. Malaviya has read the entire speech to me. Such a speech should be considered to be seditious or otherwise, according to the impression which it would create on the mind of the audience. When I put this conclusion before Mr. Malaviya he quoted a ruling of the Calcutta High Court that the gist of the offence lies in the intention of the writer. Intention however, is connected with consequences.

To intend a thing is to act in such a way as to expect that certain consequences would follow. Intention therefore is correlated with the natural consequences which must follow from a particular act. His further argument was that there has been so much talk at present of independence of the country, that this talk must have reached the small town of Bewar in the backward district of Mainpuri, that Ahirs and Chamars—that is not what he said but that was the interpretation that I put on what he said—would be full of ideas of independence of the country, that therefore Mr. Dandekar's speech would have little effect in increasing the height to which such ideas had reached in the minds of the cultivators of Bewar. I do not think that Mr. Dandekar himself would relish that his efforts were treated with such little consideration. It is quite true that being in the judiciary I have had no opportunity of going round the country and discovering whether the tenantry in remote places like Mainpuri and Bewar had imbibed the ideas of independence. However that may be, it cannot be said that the speech even if it brought the Government into hatred and contempt could be considered to be innocuous because such hatred and contempt cannot be increased from the standard that now exists in the mind of the tenantry. I do not desire to quote from the speech and to give it a publicity which was not open to Mr. Dandekar himself. The principle that I adopt is to read the speech myself and to discover what my feeling would be if I accepted all the statements made therein to be true. Mr. Malaviya was quite correct in saying that I cannot place myself in the position of the tenantry who listened to the speech because of the difference in education and the want of capacity in the tenants to test the truth

of what Mr. Dandekar stated. To that extent, a speech made to an audience such as was available in Bewar would be more harmful than a speech made to partially educated man like myself. There would be in an audience composed of men like me some desire to test the allegations made by a speaker. There would be absolutely none in the town of Bewar. The speech is a very clever one. It is very easy to see how, with every desire to incite, the speaker, believes that he is keeping within the law by attributing to himself personally peaceful motives and conduct. He is willing to harm and yet afraid to strike. What he has said in effect is that he himself is a follower of the Mahatma whose precept is that of non-violence but at the same time who is he to find fault with people who in their anger at oppression such as is witnessed at present under the present Government use more violent methods and shoot at members of the Assembly. He exhorts his audience to reserve their judgment as regards such acts because such acts have led to the independence of other countries. The impression on my mind is that the speaker desired to tell the audience:

"I am not violent but do not follow my example. I would not blame you if you are violent."

All through the speech he insinuates various disabilities of village life to be due to the present Government. Clearly then there is an intention on his part to bring the present Government into hatred. I am of opinion that Mr. Dandekar has been rightly convicted and dismiss his appeal.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Allahabad 326

SULAIMAN AND NIAMATULLAH, JJ.

B. Madan Mohan Singh—Plaintiff—Appellant.

v.

B. Ram Sunder Singh—Defendant—Respondent.

Second Appeal No. 80 of 1927, Decided on 9th January 1930, against decree of Sub-Judge, Ghazipur, D/- 10th July 1926.

*** (a) Malicious Prosecution—Application under Criminal P. C., S. 436 for ordering enquiry is prosecution.**

The word 'prosecution' has a very wide significance and does not merely mean an actual trial or an enquiry which may result in a conviction and the imposition of imprisonment or fine. Therefore, an application in revision under S. 436, Criminal P. C., for ordering an enquiry or a retrial is a prosecution: 17 *C. W. N.* 554; 19 *C. W. N.* 935; 41 *All.* 503 and *A. I. R.* 1922 *Cal.* 145, *Rel. on.*

[P 327 C 2, P 328 C 1]

*** (b) Limitation Act, Art. 23—Prosecution terminates by order of discharge by Magistrate—But if matter is taken up in revision by higher authority, prosecution terminates when proceedings in revision come to end.**

As soon as the order of discharge is passed the prosecution in a Magistrate's Court terminates. If no further proceedings are taken the prosecution must be deemed to have terminated on that date. But if, as a matter of fact, the matter is taken up in revision to a higher authority which has power of interference and proceedings sanctioned by the Criminal Procedure Code are being pursued, e. g., under S. 436, Criminal P. C., the prosecution can no longer be said to have finally terminated. Its final termination would be only when the proceedings in revision have come to an end in favour of the discharged person. In such a case the prosecution for the purpose of Art. 23, Limitation Act, terminates only when the application for revision is dismissed: 23 *Mad.* 24, *Dist.*; *A. I. R.* 1922 *Bom.* 209, *Diss. from*; 30 *All.* 525; *A. I. R.* 1926 *P. C.* 46, *Ref.*

[P 328 C 2]

A. P. Pandey—for Appellant.

Janaki Prasad—for Respondent.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit to recover damages for malicious prosecution. Both the Courts below have dismissed it on the ground that it is barred by limitation. The only question that arises for consideration in this appeal is one of limitation.

A complaint under S. 500, I. P. C., was filed by the defendant against the plaintiff in the Court of a Magistrate on 26th May 1924. By an order dated 8th August 1924, the accused was discharged. The defendant filed an application before the Sessions Judge for ordering further enquiry under S. 436, Criminal P. C. Notice was issued to the accused to appear and show cause why a retrial should not be ordered. On cause being shown the application was ultimately dismissed on 25th October 1924. The present suit was instituted on 24th October 1925, i. e., more than one year after the order of discharge but within one year of the dismissal of the application by the Sessions Judge.

Article 23, Lim. Act, admittedly applies to this case, and under it one year is to be calculated from the date "when the plaintiff is acquitted or the

prosecution is otherwise terminated." This was not a case of acquittal at all. We have to see when the prosecution terminated. Obviously the article implies the final termination.

The word 'prosecution' has not been defined in any statutory enactment. It is undoubtedly a word of much wider scope than a trial or even an enquiry by a Magistrate. Murray's New English Dictionary explains the word 'prosecution' as meaning in strict technical language a proceeding either by way of indictment or information in the criminal Court in order to put an offender on his trial, the exhibition of a criminal charge against a person before a Court of justice, and in general language the institution and carrying on of legal proceedings against a person.

The question before us is whether an application for further enquiry and for ordering a retrial under S. 436, in the exercise of the revisional jurisdiction of the Sessions Judge can be deemed to be either a continuation of the prosecution or a fresh prosecution in itself. There are two cases in favour of the view taken by the Courts below and there is no direct authority against that view. In *Narayya* v. *Seshayya* (1), it was held that a suit brought within one year from the dismissal of a revision petition filed against an order of acquittal but more than one year after the acquittal was barred by limitation. The judgment is very brief and no detailed reasons are given. The case may also perhaps be distinguished on the ground that the District Magistrate to whom the application in revision had been made from the order of acquittal had himself no jurisdiction to order any further enquiry or retrial or set aside the acquittal; at best he could report the case to the High Court. Moreover in a case where the prosecution ended in acquittal the language of Art. 23 leaves no room for argument, as it provides specifically that limitation is to run from the date of acquittal. It is not, therefore, necessary to consider when the prosecution 'terminated.' It is only in cases which ended otherwise than in acquittal that it falls to be considered as to when the prosecution terminated. *Purushottam Vithal Das* v. *Raoji Hari* (2) is a direct authority in support of the view that limitation begins to run from the order of the discharge and the subsequent revision proceedings do not in any way affect the matter.

Now there is plenty of authority that the word 'prosecution' has a very wide significance and does not merely mean an actual trial or an enquiry which may result in a conviction and the imposition of imprisonment or fine. In the case of *C. H. Crowdy* v. *L. O. Reilly* (3) it was laid down that an action for damages would lie in the case of an application under S. 107 of the Code and that it was not essential that the original proceeding should have been of such a nature as to render the person against whom it was taken liable to be arrested, fined or imprisoned. The same view was followed by the Calcutta High Court in *Bishun Pershad Narain Singh* v. *Phulman Singh* (4). It was there remarked that the term 'prosecution' should not be interpreted in the restricted sense in which it is used in the Criminal Procedure Code and that if a person maliciously and without reasonable and probable cause sets the machinery of the criminal law in motion, he is responsible for the consequences. This view was accepted by our High Court in *Mohammad Nizullah Khan* v. *Jai Ram* (5) where an action was held to lie on account of an application for binding down to keep the peace under S. 107, Criminal P. C.

Indeed, there is one case which has gone still further. *Narendra Nath De* v. *Jyotish Chandra Lal* (6), was a case where the defendant had applied to the Court of the Munsif under S. 195 of the old Criminal P. C., for sanction to prosecute the plaintiff. Although the application for sanction was a preliminary or initial stage in a criminal prosecution and was actually filed in a civil Court, the learned Judges held that the claim for damages for malicious prosecution was maintainable. They held that as the proceedings for sanction had been instituted maliciously and without just reasonable or probable cause they gave rise to a

(1) [1900] 23 Mad. 24.
(2) A. I. R. 1922 Bom. 209=47 Bom. 28.
(3) [1913] 17 C. W. N. 554=18 I. C. 737 =17 C. L. J. 105.
(4) [1915] 19 C. W. N. 935=27 I. C. 449=20 C. L. J. 518.
(5) [1919] 41 All. 503 = 50 I. C. 140 = 17 A. L. J. 776.
(6) A. I. R. 1922 Cal. 145=49 Cal. 1035.

sufficient cause of action. It seems to us that an application in revision for ordering an enquiry or a retrial is on a much stronger footing than a mere application for sanction to file a complaint. If the latter is deemed to be a prosecution, much more should be the former.

In the case of *Gaya Prasad* v. *Bhagat Singh* (7), persons whose names did not appear on the face of the proceedings as complainants but who were directly responsible for the charge and for the production of evidence and for the conduct of the case before the police and in the Court were held to be liable for damages in action for malicious prosecution. Similarly their Lordships of the Privy Council in the case of *Balbhaddar Singh* v. *Badri Sah* (8), held that a man who had given information to the authorities which naturally led to the prosecution, even though he himself was not, in the most literal sense of the word, the prosecutor was liable in an action for malicious prosecution for damages on account of the information supplied by him which caused trouble.

When the application under S. 436 is preferred before a Sessions Judge and notice to show cause has been issued, the Judge has himself power to make further enquiry into the case of the accused person who has been discharged or direct any subordinate Magistrate to make such enquiry. While such a proceeding is pending before a Sessions Judge, the accused, in our opinion, is being prosecuted and in order to save himself from a retrial he must satisfy the Judge that there is no case against him. Taking the word "prosecution" in its wider sense we fail to see why it should not include a criminal proceeding of this nature before a Sessions Judge or a High Court. If this view were not to be accepted the result would be that the discharged person would be compelled to institute his suit for damages even though the matter is still sub judice and is being considered by the Sessions Judge or by the High Court. It seems extraordinary that a plaintiff should be compelled to sue while it is yet a question whether his retrial is not going to be ordered. Of course as soon as the order of discharge was passed the prosecution in the Magistrate's Court terminated. If no further proceedings are taken the prosecution must be deemed to have terminated on that date. But if, as a matter of fact, the matter is taken up in revision to a higher authority which has power of interference and proceedings sanctioned by the Criminal Procedure Code are being pursued, the prosecution can no longer be said to have finally terminated. Its final termination would be only when the proceedings in revision have come to an end in favour of the discharged person.

One may take the case of a Government appeal from an acquittal as an illustration. The order of acquittal terminates the prosecution for the time being. The filing of an appeal does not ipso facto vacate that order; and yet while the appeal is pending it can hardly be said that the prosecution has terminated. We think that in the same way while a revisional application is pending the prosecution must be deemed to be still continuing and not finally terminated.

It has been suggested that inasmuch as a further enquiry cannot be claimed in revision as of right and as there is no statutory period of limitation fixed for an application for revision, time should not be extended after the order of discharge. As a matter of practice revisions are not admitted when the application is very stale and irrespective of the question whether the Sessions Judge exercises his discretion ultimately or not, the complainant has no grievance if while his application for further enquiry is pending it is considered that his prosecution of the accused is still continuing. It is only after the dismissal of such an application that the accused is freed from the worry of the criminal proceedings, and is in a position to think of a civil suit for damages.

As a matter of fact it is conceivable that the original complaint might have been filed on the basis of information received from certain witnesses or documents believed to be genuine and, therefore, might not be without reasonable and probable cause, in which case no suit for damages would lie on ac-

(7) [1908] 30 All. 525=35 I. A. 189=11 O. C. 371 (P. C.).

(8) A. I. R. 1926 P. C. 46=1 Luck. 215 = 29 O. C. 163 (P C.).

count of that. But in the course of the trial it may be disclosed that the oral evidence was false and perjured or that the documentary evidence was forged, resulting in the discharge of the accused. If the complainant persists in taking the matter up to the revisional Court without any reasonable and probable cause there seems no reason why he should not be liable for damages on account of the latter proceedings, though there was no such liability on account of the earlier one.

Differing from the views expressed by the learned Judges of the Bombay High Court we would hold that the prosecution finally terminated when the application in revision was dismissed and that the present plaintiff, if he can make out a case of malicious prosecution which was false and without reasonable and probable cause, is entitled to damages not only on account of the proceedings in the Magistrate's Court but also the revisional proceedings before the Sessions Judge. The latter has given him just as good a cause of action as the former. The appeal is allowed, the decree of the lower appellate Court is set aside and the suit is remanded under O. 41, R. 23 to that Court for disposal. The costs will abide the event and will be on the higher scale.

V.S./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 329

SEN, J.

Ghasi and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 508 of 1929, Decided on 7th September 1929, made by Addl. Sess. Judge, Moradabad, D/- 2nd July 1929.

Penal Code, S. 424—Removal of property under attachment by third person claiming title to it—Question of title has to be determined before conviction.

The crucial question for determination under S. 424 is whether the alleged removal of property is dishonest or fraudulent and therefore if persons claiming title to a property under attachment in execution of a decree on another remove the same, the matter whether such property belonged to the accused or no has to be determined by criminal Court before deciding upon conviction : 22 *Mad.* 151, *Dist.*

[P 329 C 2 ; P 330 C 1]

M. Waliullah—for the Crown.

Judgment.—This is a reference by Mr. P. C. Agarwal, the learned Additional Sessions Judge of Moradabad, recommending that the conviction and sentence passed upon Ghasi, Dari and Gokul under S. 424, I. P. C., be set aside.

One Umar Daraz had a decree against Ganpat, Gangu and Dilsukh. In execution of the said decree, certain crops were attached and one Saadat was appointed shehna or bailiff to guard the crops. Ghasi, Dari and Gokul, in spite of resistance on the part of the shehna, cut and took away half the crops. The shehna lodged a complaint and the result was that Ghasi, Dari and Gokul were convicted under S. 424, I. P. C., and sentenced to a fine of Rs. 20 each. The plea put forward by the accused persons was that they had cultivated the crop and that there was nothing wrong, if they cut the crop and took the same away. The trial Court did not enter into the question whether the plea put forward by the accused was correct.

The learned Magistrate in answer to the referring order observes as follows :

"It is a general principle that a criminal Court cannot determine the title of a person to any property. Moreover the complainant had no opportunity to adduce any rebutting evidence as to the title, because he came to know of the defence only after he had completed his prosecution. In the prosecution, what he had to prove was only this that there was an attachment subsisting on the crops in question and that the accused removed it during the attachment."

Any determination of title by a criminal Court cannot have the force of a decree of a competent Court of civil jurisdiction. It may be necessary in certain cases to adjudicate upon an issue of title with a view to determine whether the offence charged had been brought home to the accused. S. 424, I. P. C., provides that whoever dishonestly or fraudulently. . . . . removes any property of himself or any other person. . . . shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both. Ex hypothesi, the decree of Umar Daraz was not against Ghasi, Dari and Gokul. The latter admittedly removed some property alleging that the said property belonged to them. The crucial question for determination therefore was whether the removal of the crops by these three persons was dishonest or fraudulent. If they were the owners of

the crop and removed the same, their conduct was neither dishonest nor fraudulent. The matter ought to have been determined by the criminal Court whether the property belonged to the accused, but this matter was not enquired into by the criminal Court.

The learned Sessions Judge upon an examination of the record came to the conclusion that the prosecution had utterly failed to establish that the crops belonged to the judgment-debtors of Umar Daraz. He further found upon the evidence that Ghasi was the owner of the crop. The conviction of Ghasi, Dari and Gokul under S. 424, I. P. C., could not therefore be maintained.

My attention has been drawn to a decision of the Madras High Court in *Queen Empress* v. *Obayya* (1). The facts of this case are toto coele different from the case now before me and the decision is not helpful to the prosecution.

I accept the reference and set aside the conviction and the sentence. The fine if paid must be refunded.

V.B./R.K. *Conviction set aside.*

(1) [1899] 22 Mad. 151=8 M.L.J. 259.

A. I. R. 1930 Allahabad 330

MUKERJI AND YOUNG, JJ.

In re, *Union Indian Sugar Mills Co. Ltd.*

Misc. Case No. 36 of 1926, Decided on 18th November 1929.

Companies Act, S 179 (g)—Court ordering winding up of company—Advertisement for sale of its mills—*K* offering to purchase or take mortgage—*K's* offer accepted—Settlement of mortgage terms being unsatisfactory, *K* appealing to Privy Council—Direction by Privy Council to place *K's* offer before shareholders—But *K* applied that he was not willing to keep his offer any longer—*K* held to be estopped from applying—Offer, even though accepted by Court, held to have been accepted for Official Liquidators and hence binding as contract.

On an order by the Court to wind up, a company, in order to pay off the creditors, advertised the sale of its mills. Among the offers that were received, the offer of one *K* was that he would either take a mortgage or would purchase the mills. It was decided that *K* should be mortgagee in possession in consideration of his advancing Rs. 10 lakhs. The consent of the shareholders was obtained. Then it was discovered that this amount was insufficient to pay the creditors and meet the costs of liquidation. *K*, accordingly, offered to pay Rs. 62 thousand more. This offer was accepted and it was not thought necessary to consult the shareholders of the company again. But being dissatisfied with the terms of the mortgage as settled by the Court, *K* went up to the Privy Council in appeal. Their Lordships directed that the scheme of mortgage for 10 lakhs and 62 thousand should be put before the shareholders for their consent. But when the matter came back before the Court *K* applied stating that he was unwilling to keep the offer made by him open any longer.

Held: that *K*, who had induced the liquidators of the company to act on the assertion that he was going to act in a particular manner, should not be allowed to act otherwise than in the way promised, as the liquidators had acted in the manner suggested, and had thereby changed their position: 20 *Cal.* 296 (*P. C.*); *Cairncross* v. *Lorimer* 3 *H. L. C.* 829; 14 *M. I. A.* 203 (*P. C.*); 8, *Cal.* 455 and 1 *All.* 267 (*F. B.*), *Rel. on.* [P 335 C 1]

Held also: that the offer that was accepted by the Court was accepted on behalf of the Official Liquidators and the offer and acceptance should be regarded as a valid and binding contract between *K* and Official Liquidators, although the Judge himself took great interest and an active part in the settlement. [P 336 C 2]

Held further, that *K's* offer to take a mortgage for 10 lakhs and 62 thousand must go before the shareholders of the company for their approval. [P 337 C 1]

K. N. Katju—for Shareholder.

Tej Bahadur Sapru, S. N. Sapru and *R. K. Malaviya*—for Lala Kamlapat.

Mukerji, J.—This is an application on behalf of the Official Liqudators asking the Court to proceed to carry out the orders passed by their Lordships of the Privy Council.

A short history of the case will be necessary to appreciate the situation. When the Union Indian Sugar Mills Co. Ltd., was ordered by the Court to be wound up, the question arose as to how money was to be raised in order to pay off the creditors. The usual method was to sell the assets of the company and raise money and accordingly the method was adopted and advertisements for sale of the mills were put in papers. For the present moment we will skip over what happened, till Mr. Kamlapat appeared on the scene with his offers. It may be mentioned here once for all that Mr. Kamlapat is the principal actor in the scene and Mr. Motilal's name was joined at his instance, probably because that gentleman was a partner or relation to Lala Kamlapat. It would be enough to continue the history with the name of Mr. Kamlapat alone. The offer of Mr. Kamlapat was that he would either take a mortgage (with powers of Managing Agents for 10 years) or he would purchase the mills. It was

decided at a certain stage that Mr. Kamlapat would either be a mortgagee with possession of the property or that he would be its purchaser. He was accordingly put in possession of the same. Ultimately it was decided that Mr. Kamlapat should be a mortgagee in possession in consideration of his advancing Rs. 10 lakhs. The consent of the shareholders of the company was obtained. Then it was discovered that the amount of 10 lakhs would not be enough to pay the creditors and to meet the costs of liquidation. Mr. Kamlapat, accordingly offered to pay Rs. 62 thousand more. This offer was accepted and it was not thought necessary to consult the shareholders of the company again. The terms on which Mr. Kamlapat was to hold as the mortgagee were settled by the Court and the Official Liquidators were directed to execute a deed of mortgage with possession in favour of Mr. Kamlapat. Mr. Kamlapat was, however, dissatisfied with the terms of the mortgage as settled by the Court and it was also one of his contentions that he never undertook to be a mortgagee in possession and that he was to be a simple mortgagee as also the Managing Agent of the mills.

Being dissatisfied with the terms of the mortgage as settled by this Court, Mr. Kamlapat went up to their Lordships of the Privy Council in appeal. Their Lordships were of opinion that the altered scheme of mortgage, viz., a mortgage for 10 lakhs and 62 thousand rupees should have been put before the shareholders for their consent (if they gave one) and their Lordships, therefore, set aside the orders of the Court subsequent to the stage at which, in the opinion of their Lordships, the scheme should have been put before the shareholders. Their Lordships gave directions in the following language:

"A meeting of the shareholders should be summoned to consider the amended scheme; and it seems advisable that the scheme as laid before the shareholders should be more detailed than before and should reserve the power to the Court to approve modifications. Meanwhile the proceedings in the liquidation should be confined to the steps necessary for laying the scheme before the meeting and reporting thereon to the Court."

Their Lordships expressed the opinion that the proposed mortgage in favour of Mr. Kamlapat was to be a usufructuary one.

When the matter came back to this Court, Mr. Kamlapat made an application to the Court stating:

"they were unwilling to keep the offers made by them or either of them open any longer. Your petitioners hereby withdraw and revoke such offers unequivocally."

It is significant that the applicants did not ask for any refund of the money (10 lakhs 62 thousand) they had handed over to the liquidators. On this application being made to the learned Company Judge, he directed that the withdrawal of the offer be recorded. The learned Judge left it open to the liquidators to take such steps as they might be advised. It was in pursuance of this last order that the liquidators made the application as stated in the earlier part of this order.

When the application of the Official Liquidators came up for hearing, Messrs. Kamlapat and Moti Lal who had been given previous notice of the application appeared by counsel. It was argued on one side that it was open to Messrs. Kamlapat and Motilal to withdraw the offer and it was argued on the other side that they could not withdraw the offer and the directions given by their Lordships of the Privy Council must be carried out.

We have now to determine whether we can allow Messrs. Kamlapat and Moti Lal to withdraw the offer or whether the modified scheme of mortgage with possession should be placed before the shareholders. We have also to determine whether, in the case of any matter going before the shareholders, we should not also ask them to consider the offer of purchase made by Mr. Kamlapat, in the event they preferred it to the mortgage for 10 lakhs and 62 thousand rupees. If we decide that the matter should go before the shareholders, it would be necessary for us to frame the questions in some detail as to what were the points which the shareholders should consider as directed by their Lordships in their judgment and we have also to reserve power in suitable language to approve modifications.

The main thing for the present to consider is, whether it is open to Lala Kamlapat to withdraw his offer. The main argument on behalf of Lala Kamlapat is that a party who has made an

offer is entitled to withdraw it before it has been accepted by the other side. It is urged that it was for the shareholders to accept the offer and as the offers have not yet gone before them it is open to the person making the offer to withdraw it. On the other hand, the contention on behalf of the Official Liquidators and Dr. Katju who represented some of the shareholders is that Mr. Kamlapat is estopped from withdrawing his offers in the circumstances of this case.

The argument on behalf of Mr. Kamlapat presupposes that he is in the position of a person making a proposal and the shareholders are in the position of the person to whom the proposal has been made and there is no other party concerned in the affair. Their Lordships of the Privy Council have not decided whether S. 153, Companies Act was applicable to the case of the offer made by Mr. Kamlapat, but has directed that whether it was applicable or not, the procedure laid down in S. 153 should be followed as it was once followed. Looking therefore into S. 153, we have to determine the position of the shareholders. A reading of sub-S. (2), S. 153, will show that a mere agreement on the part of the members or shareholders is not enough for the acceptance of a scheme. It is ultimately for the Court either to sanction it or not to sanction it. It may, however, be argued that, as the modified scheme of mortgage has not yet been put before the shareholders and has not yet been sanctioned by the Court, it is open to Mr. Kamlapat to withdraw the offer to take a mortgage or to become the purchaser. It is therefore, necessary to examine whether the contention of of the Official Liquidators and the shareholders that Mr. Kamlapat is estopped is right.

The plea of estoppel is based on two grounds, first, it is urged that Messrs. Kamlapat and Motilal were bound to mention before their Lordships of the Privy Council that they intended to withdraw the offer, in case their Lordships held that the modified scheme of mortgage should go before the shareholders. As matters now stand, if the offer is validly withdrawn, this Court will not be in a position to carry out the orders of their Lordships of the Privy Council. We think that this contention of the liquidators is correct, though we would not content ourselves with this opinion and would like to enter into the merits of the case and examine how far Kamlapat is estopped by his conduct in the proceedings in India the second ground of alleged estoppel.

In order to find out how far Mr. Kamlapat is estopped from withdrawing his offers, it will be necesssry to go, with some detail, into the previous history of the case. We may state here that although there is the Official Liquidators' petition stating certain facts, we have not accepted those facts for the purposes of this decision and for two reasons. The statement is not contained in an affidavit and, at the date of hearing, on behalf of Mr. Kamlapat a petition was put in, stating some facts rather differently. We felt that it was not necessary to take evidence either by calling witnesses or by affidavits. We decided to accept only such facts as already appeared on the record.

The references which we are going to make will be references to the paper book printed for the use of their Lordships of the Privy Council. The winding up order in the case after some contest by some of the shareholders was made and two gentlemen being members of the Bar were appointed Official liquidators (see p. 7). Notices for sale were issued by the Official Liquidators and one of the notices will be found printed as No. 7 on p. 9. The reserve price was Rs. 8 lakhs. On 23rd October 1926, the Official Liquidators made a report to the Court, in which they said that the maximum offer so far received by them came from two gentlemen, Lala Girdhari Lal and Lala Hazari Lal of Jhusi, who offered 11 lakhs of rupees and also to bear all the conveyancing charges, which would by no means be small. The Company Judge, to whom the application was presented, at a late hour, did not decide to accept the offer at once and passed orders printed at p. 15. He proposed to confirm the sale on 18th November 1926. It was discovered, shortly after that better offers were likely to come and it would not be desirable to conclude the sale with the gentlemen from Jhusi. On 22nd November 1926, the Court had be-

fore it at least three offers of importance. One was for the sale of the entire property for 11 lakhs made by the Jhusi gentlemen. Another was made by Lala Harkishen Lal of the Punjab and the third by Mr. Kamlapat. The last mentioned two offers are printed at pp. 17 and 16 respectively of the paper book. In the result, on .22nd November 1926 the Court by an order, decided that in view of the offers since received, it could not sell the property out and out to the Jhusi gentlemen, Girdhari Lal and Hazari Lal.

They were therefore practically sent out of the case. The case was adjourned to 24th November 1926 for ascertaining certain terms proposed on behalf of Lala Harkishen Lal and it was directed that Messrs. Girdhari Lal, Hazari Lal and Kamlapat should also be represented in Court on that day. The proceedings of 24th November 1926 are printed at p. 1. They show that the three parties anxious to obtain the mills were represented in Court by learned counsel. After its reconsideration at the request of a learned counsel the offer of Messrs Girdhari Lal and Hazari Lal was rejected. The several offers then before the Court were considered and it was ordered that they should be placed before the shareholders. These offers are detailed at the bottom of p. 19. They were a scheme for carrying on the company as proposed by Lala Harkishen Lal. Then there was the scheme of Lala Kamlapat about his being the usufructuary mortgagee and Managing Agent. The third offer was of Lala Harkishen Lal to purchase the entire concern for 11½ lakhs of rupees and lastly came the offer of Lala Kamlapat to purchase the entire concern for 12 lakhs of rupees. The Court described the offers of management and mortgage as "schemes" and fixed 16th December for the shareholders to consider the four offers already described. The Court then intimated to the public by a clear order that it was not prepared thereafter, to receive any further offers unless and until the offers then before it had been accepted or rejected by the shareholders. In spite of the rejection the offer of 11 lakhs of rupees made by Lalas Girdhari Lal and Hazari Lal to purchase the concern their counsel agreed to keep the offers open.

A meeting of the shareholders was held. A report of the proceedings is to be found printed at p. 22 to 25. Ultimately the shareholders accepted the scheme of mortgage in favour of Lala Kamlapat (see O. 24). The result was that all other competitors had to leave the field and Mr. Kamlapat was in sole possession of it. The scheme which is printed at p. 16 was partly to the effect that Mr. Kamlapat was depositing 1½ lakhs of rupees on 22nd November 1926 and would deposit 8½ lakhs within a month. He was accordingly called upon to deposit the balance of 8½ lakhs of rupees in two days by an order dated 20th December 1926. The next day the Official Liquidators reported that they had ascertained the amount of debt payable by the concern and had discovered that the total amount of debt payable would be somewhere near 10 lakhs and 62 thousand rupees. The matter accordingly came up before the Court on 21st December 1926. The proceedings and the order are printed at p. 29 of the book.

It was found that some more money was required and it was stated that if Mr. Kamlapat advanced the required sum of money, it would not be necessary to sell the property out and out to Mr. Kamlapat for 12 lakhs of rupees. For it was discovered that the scheme of mortgage would not meet the situation as it did not raise more than 10 lakhs of rupees. The only other alternative left was to sell the property to Lala Kamlapat who had made the highest offer as the price. On behalf of some of the shareholders, Mr. Indu Bhusan Banerji, a learned counsel, stated that he had reasons to believe that Lala Kamlapat had the interests of the shareholders at heart and he requested the Court to defer passing final orders till the Courts reopened after the Christmas holidays. He suggested that Lala Kamlapat might be given immediate possession over the Mills on the understanding that either an out and out sale or a mortgage would be effected in his favour in the near future. Mr. Kamlapat was not present in person, but was represented by his counsel Mr. Ramakant Malaviya. He also agreed to the postponement of the final order. It was ordered that Mr. Kamlapat might be put in immediate possession of the

mills and accessories on the understanding that he would be either a mortgagee as proposed by him or a purchaser, in either capacity he being entitled to possession. The money paid by Lala Harkishen Lal into Court was ordered to be returned. The Court fixed 7th January 1927 for further orders in the case. In pursuance of this order Mr. Kamlapat was put in possession on 24th December 1926. The report to that effect of the Official Liquidators is printed at pp. 30 and 31 of the paper-book.

On 7th January 1927, Mr. Kamlapat made an application which is printed at p. 32. In it he stated that he had seen most of the creditors of the company and fully believed that the liabilities of the company would be discharged in full with a sum of Rs. ten lakhs and thirty-seven thousand. Taking another twenty-five thousand as the expenses of liquidation, Mr. Kamlapat agreed to pay sixty-two thousand more and to take a mortgage on the terms proposed for advancing Rs. ten lakhs. He also intimated that he would keep his offer for purchasing the Mills for twelve lakhs of rupees open for another six months. On that day, the Official Liquidators made another report, that the total claims received up to that day amounted to ten lakhs and sixty three thousand rupees. The Court then passed an order (dated 7th January 1927) which is very important.

The Court noted the fact that the Official Liquidators had reported that the total amount of the claims received came to well nigh ten lakhs and sixty four thousand rupees ; that Lala Kamlapat had made an application estimating the total liabilities of the company at ten lakhs and thirty-seven thousand rupees, that he had expressed his willingness to advance a further sum of rupees sixty-two thousand on the same terms as he had formulated, for advance of Rs. ten lakhs and that he had agreed to purchase the entire concern for twelve lakhs of rupees if it was found that the total debts payable by the concern exceeded the sum of Rs. ten lakhs and sixty-two thousand. The Court also noted that Mr. Kamlapat had agreed that his offer to purchase at twelve lakhs would remain open for a period of six months from 7th January 1927. Then the Court passed the following order. We shall only quote the more important passages. The entire order is printed at p. 35 :

"It appears to us that as far as can be foreseen at present, the sum of Rs. ten lakhs and sixty-two thousand should be sufficient to meet all valid claims of the creditors including the costs of liquidation, and the information accorded to us at present is sufficient to justify our thinking that the creditors will run no ris if the offer of Lala Kamlapat which has been made today is accepted . . . We accordingly fix 28th February. The Official Liquidators shall submit their report on 28th January . . . and it will be only for some cogent and some unforeseen reason that we shall refrain from passing a final order on 25th February. That order will either be acceptance of the scheme of mortgage or acceptance of Rs twelve lakhs from Lala Kamlapat. We are not prepared to entertain any alternative scheme of any description at this stage of the proceedings."

It was found that the sum of Rs. ten lakhs and sixty-two thousand proved sufficient to pay all the creditors, some of whom agreed, by way of compromise to receive less than their full claim. On 25th February the Court directed that mortgage deed be executed in favour of Mr. Kamlapat for the sum of Rs. ten lakhs and sixty-two thousand: see p. 37. The situation at present is that the creditors have been paid and a sum of money is in the hands of the Official Liquidators, sufficient to meet the liquidation expenses and expenses of Court unless further litigation is to follow.

The question now is whether in the circumstances detailed above Mr. Kamlapat is to be permitted to withdraw his offer. The withdrawal of the other involves the return of his money to Mr. Kamlapat. It is impossible now for the Official Liquidators to find the money and, on the information furnished by Mr. Kamlapat's counsel, the value of the machinery has considerably gone down and it is not to be hoped for that any sale of the property would bring anything like twelve lakhs of rupees offered by Mr. Kamlapat.

In the teeth of the history of the case, as narrated above, the learned counsel for Mr. Kamlapat has argued that there can be no case of estoppel against his client. His argument was that S. 115, Evidence Act, did not apply, that his client did not assert the truth of "a thing" and he was not making an assertion to the contrary of any of his assertions made before and that S. 115 con-

tained only a rule of evidence and nothing more. Acceding, without deciding, that S. 115 does not apply, it is clear to us that the entire rule of estoppel is not contained in S. 115, Evidence Act. For example, Ss. 41 and 43, T. P. Act, contain rules of estoppel. It is, therefore, not right to say that if the present case do not fall within the language of S. 115, Evidence Act, Mr. Kamlapat is entitled to withdraw his offer quietly and, thereafter, to ask for repayment of his money.

Authorities have laid down from time to time that people, who have induced others to act on the assertion that they were going to act in a particular manner, have not been allowed to act otherwise than in the way promised, if the other party have acted in the manner suggested, and have thereby changed their position. This was held, without any reference to S. 115, Evidence Act. The case of *Sarat Chandra Deb* v. *Gopal Chandra Laha* (1), decided by their Lordships of the Privy Council may be described as one of the leading cases on the law of estoppel. In that particular case, the party who was held to have been estopped by his conduct held out that the mortgagor was entitled to mortgage the property and the case fell within the language of S. 115, Evidence Act. But their Lordships quoted at p. 311, the following passage from a decision of the House of Lords, with approval:

"The doctrine will apply, which is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he, therefore, induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. . . ."

The quotation is from *Cairncross* v. *Lorimer* (2).

In the case of *Amir Ali* v. *Inderjit Singh* (3), the appellant's counsel asked the High Court of Calcutta to confine their decision to one particular point, the counsel having given an undertaking that no appeal could be filed to Her Majesty in Council. The High Court acceded to the request and decided that point alone. By asking the High Court to confine their decision to one point only, the appellant obtained an advantage, as described in the judgment. Notwithstanding this undertaking given to the Court, the appellant filed an appeal before Her Majesty in Council. It was held that the appeal was not maintainable. Their Lordships held (at p. 207 of the report) that the appeal had been brought in violation of good faith and it could not be maintained. This case is a sufficient answer to the argument of Sir Tej Bahadur Sapru, advanced on behalf of Mr. Kamlapat, that whatever his client agreed to do was in the nature of an offer to the Court, that a Court could not be a party to a contract and that, therefore, his client was entitled to resile from his offer. In the case before their Lordships of the Privy Council it might very well have been argued that the High Court of Calcutta accepted the offer of counsel and the Court, as such, could not be a party to a contract.

There are numerous cases decided in India where parties to proceedings in Court have been held bound to respect the undertakings given by themselves.: *Uttam Chandra* v. *Khetra Nath* (4) was a case in which, in execution of a decree, a certain property was sold and the judgment-debtor applied for the setting aside of the sale on the ground of irregularity and fraud. It was agreed between the decree-holder and the judgment-debtor that the latter should have given him a certain amount of time to pay up the decretal amount and that if he failed to pay up, the sale should stand good. The judgment-debtor did not pay in full and asked for his application to be tried. The High Court held that the judgment-debtor was bound by his agreement and he was estopped from contesting the legality of the sale. This case again, is an answer to Mr. Kamlapat's counsel's argument, that whatever advantage his client received, he received it at the hands of the Court and that, therefore, he was in a position to lawfully withdraw from his offer.

In the case of *Pratap Chandra Das* v.

(1) [1893] 20 Cal. 296=19 I. A. 203=6 Sar. 224 (P.C.).
(2) [1861] 3 H. L. C. 829=3 L.T. 1 0=7 Jur. (n.s.) 149.
(3) [1870-72] 14 M. I. A. 203=9 B. L. R. 460 (P.C.).
(4) [1902] 29 Cal. 577.

Arathoon (5), the judgment-debtor was arrested in execution of a decree before the time for filing an appeal against the decree had expired. He put in a petition to the Court agreeing not to prefer an appeal against the judgment and the decree-holder agreed that the judgment-debtor might be released from the arrest and might be allowed to pay the decretal amount by instalments. The judgment-debtor, notwithstanding this agreement, filed an appeal. It was held that the appeal could not be maintained by him. A similar decision was arrived at by a Full Bench of our own High Court in the case of *Ananta Das* v. *Ashburner & Co.* (6).

It is not necessary to quote more cases. Let us now consider the facts of the present case in the light of the law as settled by the authorities quoted above. We have mentioned that, to start with, Messrs. Girdhari Lal and Hazari Lal offered to purchase the entire assets of the company for Rs. 11,00,000. Then appeared on the scene, besides others, Messrs. Har Kishen Lal and Kamlapat. Lala Harkishen Lal's terms are noted at p. 14 of the paper-book, in the order of the Court. Lal Har Kishen Lal agreed to be an usufructuary mortgagee for a period of ten years, at the end of which he offered to return the premises free from all encumbrances. He also offered to purchase the entire property for Rs. 11½ lakhs. As already stated, the terms of Kamlapat's offers are to be found at p. 16 of the paper-book. Initially, he offered, besides his offer to be a mortgagee, to purchase the property for Rs. 11½ lakhs. When he found that Lala Har Kishen was agreeable to pay that sum, he increased his offer of purchase for Rs. 12½ lakhs. Mr. Kamlapat, by offering more acceptable terms, ousted all competitors from the the scene and induced the Official Liquidators and the Court to accept his offers. If he now withdraws his offer, on his own showing, it would be impossible to get Rs. 12 lakhs for the property and it would be impossible to get a man who would take a usufructuary mortgage for Rs. 10 lakhs and sixty-two thousands. Sir Tej Bahadur Sapru, on behalf of Mr. Kamlapat, stated to us that the machinery with which the factory was fitted was meant to manufacture sugar out of raw sugar or gur, that the machinery now in vogue and yielding more profits was a machinery which used, instead of raw sugar, sugarcanes directly. and that unless and until a further large sum of money was invested, it was not likely that the concern would ever pay. It is, therefore, in view of the change in the method of manufacture that Mr. Kamlapat is anxious to withdraw from his bargain. It may be pure ill-luck that induced him to enter in to the bargain, but he cannot dump his own misfortune on other people and back out of his undertaking. We need hardly point out that Mr. Kamlapat has been in possession of the entire belongings of the company from 24th December 1926. If he has been unable to make any profits, that is neither here nor there.

The proceedings before the Court which considered the several offers made by several persons for taking mortgage of the property or purchasing the same may be looked upon as negotiations between those parties and the Official Liquidators, under the supervision of the Court. In so far as the Court intervened, it intervened for the benefit of the Official Liquidators and through them for the benefit of the creditors and ultimately of the shareholders. The offers that were accepted by the Court, when accepted on behalf of the Official Liquidators and the offer and acceptance may be regarded as a valid and binding contract between Mr. Kamlapat and the Official Liquidators, although the Judges themselves took a great interest and an active part in the settlement of the terms. In the Privy Council case of *Amir Ali* v. *Maharani Inderjit Singh* (3), the offer of the counsel through the Court was accepted as a valid agreement by their Lordships of the Privy Council. Whether, therefore, we look upon the final conclusions as an agreement enforceable in law and, therefore, a contract, between Mr. Kamlapat on the one hand and the Official Liquidators on the other, or whether we say that Mr. Kamlapat is estopped from withdrawing his offer, the result is the same. The result is that Mr. Kamlapat's ofier to take a mortgage for Rs. ten lakhs and sixty-two thousands and in the alternative, to purchase the

(5) [1882] 8 Cal. 455=10 C. L. R. 443.
(6) [1875] 1 All. 267 (F.B.).

entire concern for Rs. 12 lakhs must go before the shareholders of the company for their approval.

It seems to us to be abundantly clear that the offer to take a mortgage of the property of the company for Rs. ten lakhs sixty-two thousand alone cannot go before the shareholders. The parties must be restored to the same position in which they were before the Court accepted Mr. Kamlapat's offer to increase the mortgage money by Rs. sixty-two thousand It may be,as pointed out by their Lordships of the Privy Council themselves, that the addition of Rs. sixty-two thousand to mortgage money might have influenced the judgment of the shareholders. They might have preferred an out and out sale of the premises and machinery instead of allowing a mortgage for the increased amount. It was only when one of the offers, viz., that of mortgage, described as " the scheme " was accepted that the offer of purchase fell through. Mr. Kamlapat stated, in so many words, that he left his offer or purchase open for a period of six months. He had to keep that offer open, for it was not yet known whether the sum of Rs. ten lakhs sixty-two thousand would be enough to meet all the claims against the company: see p. 32, application of Mr. Kamlapat and the Court's order at p. 35, both dated 7th January 1927.

Their Lordships of the Privy Council have directed that the terms for the consideration of the shareholders should be in greater detail and there should be reserved a power for the Court to modify the terms. It is, therefore, necessary to hear the parties further, in order to enable the Court to formulate the terms of the offers that should go before the shareholders and to formulate the language in which the Court's power to interfere is to be reserved. This judgment only determines the procedure which the Court has decided to adopt, in pursuance of the orders of His Majesty in Council, and in spite of the formal withdrawal of the offer byMessrs. Kamlapat and Moti Lal. The case should now be put up on 20th November 1929, for the purpose indicated above.

V.S./R.K. *Order acoordingly.*

1930 A/43 & 44

A. I. R. 1930 Allahabad 337

SULAIMAN AND KENDALL, JJ.

Sarju Tewari—Plaintiff—Appellant.

v.

Shah Mohammad Amin and *others*—Defendants—Respondents.

Second Appeal No. 2091 of 1927, Decided on 19th December 1929, against decree of First Addl. Sub-Judge, Gorakhpur, D/- 25th July 1927.

(a) Agra Pre-emption Act, S. 8 (c)—Omission of recital in sale deed as to purpose for which property is acquired is not fatal—This can be proved by extrinsic evidence.

The omission of any recitals as to the purpose for which the property is acquired in the sale deed is not a fatal defect. It is open to the vendee to show by other evidence, even though there may not be any such recital, what the real purpose of the purchase is though of course an omission of such a purpose from the sale deed may be a strong piece of evidence against him. [P 338 C 1]

(b) Agra Pre-emption Act, S. 8 (c)—Cultivation of sugar cane crop is agricultural pursuit distinct from industry of manufacturing sugar.

Sugar plantation or the cultivation of sugarcane crop is an agricultural pursuit quite different and distinct from the industry of manufacturing sugar. The setting up of even a model farm, the main object of which may be to experiment on the quality of the sugarcane produced or to serve as an object lesson to the neighbouring cultivating classes would be to bring about an improvement in the cultivation of sugarcane, i. e., a promotion of agriculture. That object cannot be treated as the purpose of a manufacturing industry itself : *A. I. R.* 1930 *All.* 77, *Foll.* [P 338 C 1]

(c) Agra Pre-emption Act, S. 8 (c)—Primary and main object of purchase of entire land should be manufacturing—Burden of proof lies on vendee.

A vendee who takes up surplus land, intending to hold it in reserve for future use when he can afford to extend his factory will not be protected under S. 8. The primary and main object of the purchase of the entire land should be the manufacturing purpose and the land so purchased should in good faith be substantially utilized for that purpose within one year. The burden of showing that the case falls within the exception contained in S. 8 undoubtedly lies on the vendee. [P 338 C 2]

S. K. Dar and *Baleshwari Prasad*—for Appellant.

K. N. Katju—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for pre-emption. The principal defence raised by the vendee was that the purchase had been for the purpose of a manufacturing industry. The Court below held against the defendant and decreed the claim. On appeal the lower appellate Court has dismissed the suit in its entirety.

There was an express recital in the sale deed as to the purpose for which the property was being acquired. The lower appellate Court differing from the Court of first instance held that the omission of any recitals in the sale deed was not a fatal defect. In our opinion this view was correct. It is open to the vendee to show by other evidence, even though there may not be any such recital, what the real purpose of the purchase was, though of course an omission of such a purpose from the sale deed may be a strong piece of evidence against him.

The learned Judge does appear to have found that the purpose of the purchase was "to start the sugar industry." He has held:

"the land in all is about seven bighas, on one bigha stand the plant, shed &c. and on the remaining six bighas, a model farm is set up—all go to work the industry."

There can be no doubt that he found that the purpose of the purchase of at least some land was to set up a manufacturing industry and that one bigha of land out of the area purchased was actually utilized for that purpose within one year of the purchase. His finding, however, does not make it clear whether the remaining six bighas of land on which, according to him, a model farm exists was required for the same manufacturing purpose.

It has been laid down by this Court in the case of the *Punjab Sugar Mills Co. Ltd.* v. *Lachhman Prasad* (1) that sugar plantation or the cultivation of of sugarcane crop is an agricultural pursuit quite different and distinct from the industry of manufacturing sugar. The setting up of even a model farm, the main object of which may be to experiment on the quality of the sugarcane produced or to serve as an object lesson to the neighbouring cultivating classes would be to bring about an improvement in the cultivation of sugarcane, i. e., a promotion of agriculture. That object cannot be treated as the purpose of a manufacturing industry itself. Improvement in the quality of sugarcane, which would ultimately serve as raw material for consumption of the factory is for the purpose of improving cultivation and agriculture, and not manufacture. On the other hand it is possible that although only one bigha of land is actually occupied by the plant, shed &c. more space is required for the purpose of the manufacturing factory itself.

It has been contended on behalf of the respondent that the land might have been actually acquired with the intention of utilizing it at the time when extensions are to be made for the factory which has been set up. We do not think that a vendee who takes up surplus land intending to hold it in reserve for future use when he can afford to extend his factory, would be protected under this section. The primary and main object of the purchase of the entire land should be the manufacturing purpose and the land so purchased should in good faith be substantially utilized for that purpose within one year. The burden of showing that the case falls within the exception contained in S. 8 undoubtedly lies on the vendee.

In our opinion the findings of the lower appellate Court are insufficient in themselves for a complete disposal of this appeal. We accordingly send down the following issue for determination:

Whether the whole or any part of the remaining six bighas, on which it is stated that a model farm exists, can be inferred to have been reasonably required for the purposes of the manufacturing industry?

As the case has not been approached in the Courts from this standpoint, we direct that the parties should be at liberty to produce fresh evidence if they consider necessary. The finding should be returned within three months, if practicable, and on return of the finding the usual ten days will be allowed for objections.

V.S./R.K. *Case remanded.*

(1) A. I. R. 1930 All. 77.

A. I. R. 1930 Allahabad 338

NIAMATULLAH, J.

Mohammad Yusuf — Plaintiff — Appellant.

v.

Suraj Bali Singh and *another* — Defendants—Respondents.

Second Appeal No. 957 of 1928, Decided on 20th January 1930, against decree of Sub-Judge, Jaunpur, D/- 2nd March 1928.

(a) Easements Act, S. 4 — Question whether party has indefeasible right to do something on another's land is mixed question of law and fact.

The question whether a party has an indefeasible right to do something on the land

found to belong to another is a mixed question of law and fact. The witnesses are to prove facts or acts done, and it is for the Court to affirm or negative the existence of an alleged right on such facts being considered in relation to the rule of law applicable to the question. [P 339 C 2]

(b) Easements Act, S. 18— Villagers taking wood from landlord's jungle without his knowledge cannot acquire right to cut and appropriate wood — If such acts are with permission or acquiescence that amounts to license —Easements Act, S. 52.

One or more inhabitants of a village taking wood from the landlord's jungle without the latter's knowledge cannot by so doing for any length of time acquire a right to cut and appropriate wood contrary to the wishes of the latter. Similar acts done with the permission or acquiescence of the owner being referable to a license express or implied cannot likewise confer a right as against him. [P 340 C 1, 2]

(c) Easements Act, S 18 — Court before recognizing custom should be satisfied of its reasonableness and certainty and continuous and open enjoyment—Custom.

A Court should not decide that a local custom, such as cutting wood from a jungle exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned: 17 *All.* 87, *Rel. on.* [P 340 C 2]

Mushtaq Ahmad—for Appellant.

Kedar Nath Sinha—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiff for a declaration that he is the owner of plot 410, which is jungle, situated in village Saraiya in the Jaunpur district, and that the defendants have no interest in it. The defence was that the village originally belonged to the ancestor of the defendants who sold it to the plaintiff's ancestor excepting jungle and waste land. The plot in dispute is the remnant of a jungle, part of which has since become cultivated land. It is pleaded that the plaintiff was not in possession of the plot in dispute at any time within 12 years before the suit and that the defendants have been in proprietary and adverse possession thereof for a considerable length of time. Lastly, it is claimed that the defendants and their ancestors have been grazing their cattle in this jungle and other jungles in the village and taking wood therefrom, that it is not open to the plaintiff to convert the plot into cultivated land and that the plaintiff is bound to leave the jungle intact for the benefit of the defendants. The Courts below have overruled the defence as regards the defendants' alleged proprietary right acquired by adverse possession or independently of it. The defendants have been found to be no heirs of the original proprietor who sold the village to the plaintiff's ancestor. The Court of first instance declared their right to graze their cattle in any part of the land in suit which is still jungle. The plaintiff's right of ownership, subject to the above reservation, was declared. The plaintiff-appellant acquiesced in the decree of the trial Court but the defendants appealed. The lower appellate Court modified the decree of the trial Court declaring the defendants':

"right to graze cattle and collect "dhak" wood in the portion of the plot which still retains the character of a jungle."

The plaintiff has appealed to this Court.

The defendants attempted to establish their long and continued possession of the plot in dispute as heirs of one Matai, who is noted in settlement papers as the person in possession of it (qabiz). The lower appellate Court has found that Matai was a "sadhu" occupying a hut (*kuti*) in the jungle and that the plaintiff "out of regard for him allowed him the use of the jungle." It has concluded that Matai's "rights in the jungle were merely personal." The respondents' case based on their proprietary right and adverse possession failed and has not been pressed before me. The judgment of the lower appellate Court recognising the defendants' right to take "dhak" wood is cryptic and the ground on which it is based is not intelligible. The whole question has been disposed of in the following sentence:

"But the appellants are on stronger ground when they allege that they have a right to graze cattle and collect "dhak" wood in the jungle."

The question whether a party has an indefeasible right to do something on the land found to belong to another is a mixed question of law and fact. The witnesses are to prove facts or acts done and it is for the Court to affirm or negative the existence of an alleged right, on such facts being considered

in relation to the rule of law applicable to the question. I am unable to ascertain from the judgment of the learned Judge what facts or acts done by the defendants and for what length of time are, in his opinion, established by evidence nor has he referred to the rule of law under which the defendants can be said to have acquired the right to take "dhak" wood from the portion of the land which is still jungle. The judgment is equally vague as to whether the defendants can insist on the jungle being maintained for their benefit as they claim. Under these circumstances I called upon the learned counsel for the defendants to refer to the rule of law and to the evidence he relies on. In formulating his case he based it on a customary right of easement which he contends, is established by the evidence of one of the defendants Ram Narain Singh, and the defendants' witnesses, Ram Niranjan Singh and Beni Singh. Ram Narain Singh, defendant, states that his family have always cut wood without the permission of the plaintiff and that the plaintiff never had any wood cut in the jungle. Ram Niranjan only states generally that the defendants have always been in possession of the jungle and that the plaintiff never had any sort of possession. Beni Singh states that the defendants have been in possession of the jungle, they graze their cattle and take wood from it, that the village people also graze their cattle in the jungle but with the defendants' permission. This is the whole of the evidence on which a case of customary right of easement can be based. No such right was pleaded in the written statement, the defendants claiming only proprietary right by adverse possession. The evidence noted above is directed to proving a case of that kind which has, however, been negatived by the lower Courts. The lower appellate Court has nevertheless found that the defendants have a right to take "dhak" wood from the jungle as they have hitherto done.

Apart from adverse possession or prescriptive easement which is not relied on before me and which has to be established in term of S. 15, Easements Act, one or more inhabitants of a village taking wood from the landlord's jungle without the latter's knowledge cannot, by so doing for any length of time acquire a right to cut and appropriate wood contrary to the wishes of the latter. Similar acts done with the permission or acquiescence of the owner being referable to a license express or implied cannot likewise confer a right as against him. Customary easements are provided for by S. 18, Easements Act, which enacts that "an easement may be acquired in virtue of a local custom" and that "such easements are called customary easements." Illus. (a) and (b), appended to that section explain what is the character of this class of easements. Both are cases where any one residing in a village or town is entitled to do something with reference to another's property which in the absence of a local custom to the contrary would be unlawful. Such custom has the force of law in that village or town empowering on the one hand the inhabitants thereof to do what they have apart from the custom no right to do it, and on the other hand restraining the owner of a property affected by such custom to refrain from objecting to what he would but for the custom be entitled to object to.

As observed in *Kuar Sen* v. *Mamman* (1) at p. 192:

"A Court should not decide that a local custom such as that set up in this case, exists unless the Court is satisfied of its reasonableness and its certainty as to extent and application and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned."

The defendants repudiate the suggestion that they took "dhak" wood with the plaintiff's consent. Therefore they took it by force or by stealth. They claim the right to take it to the exclusion of everybody else. Other inhabitants of the village graze their cattle in the jungle with the permission of the defendants, according to a witness of theirs and not because they have a right to do so under a local custom. We are, however, concerned only with the defendants' right to take wood from the jungle. As regards reason-

(1) [1895] 17 All. 87=(1895) A. W. N. 10.

ableness of the defendants' claim it should be observed, there is no limit to the quantity of wood they can take from the jungle. The evidence refers to the defendants having a right to "cut" wood from the jungle. If they be assumed to have the right to do so they can cut the whole jungle. The learned District Judge has declared the defendants' right to "collect" wood from the jungle. This may mean that the defendants have merely the right to take dry wood lying in the jungle. In any case the evidence does not if believed establish any right of customary easement which the defendants can enforce against the plaintiff.

In the view of the case taken by me, this appeal is allowed, the decree of the lower appellate Court is set aside and that of the Court of first instance is restored. The defendants-respondents shall pay the plaintiff's costs of this Court and of the lower appellate Court.

V.S./R.K. *Appeal allowed.*

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SULAIMAN AND KENDALL, JJ.

Mt. Bhagwan Dei—Defendant—Appellant.

v.

Shib Singh—Plaintiff—Respondent.

First Appeal No. 406 of 1926, Decided on 28th November 1929.

(a) Hindu Law—Joint family—Effect of conversion.

Where a member of a joint Hindu family becomes a convert to another religion, there is a break in the joint status of the family: 29 *All.* 487 and 33 *All.* 356 (*P.C.*), *Rel. on.* [P 342 C 1]

(b) Hindu Law—Joint family—Presumption is of jointness.

Every Hindu family is presumed to be joint unless division is proved and burden of proving it is on party alleging it [P 342 C 2]

(c) Hindu Law—Widow—Status of widow in joint Hindu family and in separated Hindu family—Extent of her rights enunciated.

In a joint Hindu family a widow is not entitled to any property as a Hindu widow. She has only a right to be maintained out of the income of the family property. If the family is separated, she only acquires a Hindu widow's estate in the property left by her husband and by no agreement with the reversioner or adverse possession can she enhance her right and ripen it into full proprietorship: *A.I.R.* 1924 *P. C.* 121, *Foll.* [P 342 C 1]

(d) Registration Act, S. 17—Document evidencing family arrangement requires registration—Evidence Act, S. 92.

Documents evidencing family arrangement affecting immovable property require to be registered and if such documents are not registered, they are wholly inadmissible in evidence (*Case Law Discussed*). [P 344 C 2]

(e) Record-of-Rights—Entry in—Presumption arises as to possession of the person recorded.

Entry in the Record-of-Rights raises a prima facie presumption of possession in favour of party in whose name such entry is made. [P 346 C 1]

B. Malik and *P. L. Banerji*—for Appellant.

Bhagwati Shankar, *Durga Prasad*, *K. C. Mital* and *S. N. Varma*—for Respondents.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for a declaration of the plaintiff's right in the property detailed in the plaint. The pedigree is printed at p. 22, and shows that Laoti Ram had two sons, Nahar Singh and Saheb Singh. The plaintiff Shib Singh is the son of Saheb Singh. Nahar Singh's widow was Mt. Chaoni, and he left a son Chait Ram. Chait Ram died leaving Babu Lal as his son. He left a widow Mt. Bhagwan Dei, the defendant appellant.

The plaintiff's case briefly stated was that Babu Lal and Shib Singh were members of a joint Hindu family when Babu Lal died, and that the names of Mt. Chaoni and Mt. Bhagwan Dei were entered in the revenue papers against the share of Babu Lal for their consolation and to secure payment of their maintenance allowance, but that the plaintiff himself remained in actual possession of the property. The plaintiff complained against the action of the widow in granting a lease, but he did not claim any specific relief with regard to that lease. The actual relief claimed in the suit was one in the following words:

"It may be declared that the plaintiff is the owner of the property mentioned below and the defendant has no right therein except that of maintenance."

The contesting defendant took up the position that the family was separate, and that therefore she had entered into the estate of Babu Lal as his widow. She further pleaded that under a family arrangement she was made the owner of the property in her possession, and Shib Singh became the owner of the property allotted to him on the understanding that neither party would have any right of interference or connexion with the property given to the other. An attempt was made to offer an elaborate

explanation of the various transactions which had taken place since the death of Babu Lal and might prima facie throw some doubt on the title of the defendant.

The learned Subordinate Judge has come to the conclusion that the family was not separate and that the plaintiff Shib Singh is entitled to the estate. He has overruled the defendant's contention that there was any arrangement under which she was made the owner of any part of the property, and has also repelled her contention that she has been in possession of this property adversely against the plaintiff. The actual form in which the decree has been passed is:

"It is declared that the plaintiff is the owner of the property in suit and the defendant is entitled to get maintenance from him."

It is obvious that the form of the decree given is not exactly what the plaintiff had asked for in the plaint.

The defendant has appealed from this decree and on her behalf the findings of the learned Subordinate Judge have been challenged.

A new point has been urged before us which does not appear to have been seriously pressed before the Court below but which, if accepted, would certainly strengthen the appellant's case, that the family was separate. It is said that Nahar Singh by conversion became a Mussalman and therefore there was a break up in the joint status of the family. That such a result would follow as a matter of law is obvious from the case of *Gobind Krishna Narain* v. *Khunni Lal* (1), and the pronouncement of their Lordships of the Privy Council in the case of *Khunni Lal* v. *Gobind Krishna Narain* (2). But in our opinion that fact is not at all proved.

In the first place, this was not the position taken up clearly in the written statement. We think that if the defendant intended to urge before the Court that Nahar Singh had become a convert and that there was a disruption in the family ipso facto, the point would have been put forward expressly in the grounds of appeal. No such question was put either to the plaintiff or to any of the witnesses who supported the jointness of Nahar Singh and Sahib Singh. The plaintiff's oral evidence was closed on 20th April 1926, and on that very date an application was made for the examination on commission of a witness, Mt. Amatul Mannan, who was described as the daughter of Khalil-ur-Rahman and the interrogatories for whom suggested that her father had been Nahar Singh. This witness was examined on 21st April 1926, and stated that she was the daughter of Khalil-ur-Rahman, whose former name had been Nahar Singh, that her father lived separately from Sahib Singh and that they were separate in mess though their property was joint. According to her, this Khalil-ur-Rahman died 15 or 16 years after the death of Saheb Singh, and Saheb Singh must have died about 30 years ago. Another witness Chaman Lal somewhat corroborated the story told by Mt. Amat-ul-Mannan, and stated that Nahar Singh had become a Mahomedan, that he actually saw him for the last time 18 or 19 years ago, and that he was separate from Saheb Singh. In cross-examination this witness admitted that the first time he saw Nahar Singh was 18 or 19 years ago and before that he did not know him, nor did he see his possession over any property. His information as to this alleged conversion was apparently based on what he had been told by Balak Ram. There is no other evidence in support of this theory. We are unable to accept this story. It seems to us that this story was put forward at a late stage in the case and was apparently an afterthought. It has been made to look plausible because Nahar Singh died or disappeared a long time ago. It is also clear that Nahar Singh did not take away with him his son Chait Ram, nor did he get his share in the family property separated. On the other hand a khewat for 1867 (p. 149) shows that Nahar Singh's minor son Chait Ram was entered as owner of a share under the guardianship of his grandfather Laoti Ram under an order dated 20th July 1867. We therefore totally reject this story of conversion.

There being a presumption of jointness under the Hindu Law, the burden undoubtedly lay on the defendant to establish the actual separation in the family. Before the hearing commenced

(1) [1907] 29 All. 487=4 A. L. J. 365=(1907) A.W.N. 151.
(2) [1911] 33 All. 356=10 I. C. 477=38 I. A. 87 (P.C.).

the learned Subordinate Judge took down the statements of the pleaders for the defendant as to the time when this separation was alleged to have taken place, and the proceedings (pp. 6 and 7) then recorded show that the pleaders for the defendant stated that Laoti Ram, the common ancestor of the plaintiff and Babu Lal, deceased, died after 1867. Their families have been separate from the time of Sahib Singh and Nahar Singh. It cannot be stated when the partition took place. Nahar Singh so far as the defendant can say died before 1867. Loati Ram died about the year 1867. It cannot be said whether Nahar Singh died first or Laoti Ram died first. From this statement it is clear that the case of the defendant originally was that there was a separation in the family from the time of Saheb Sing and Nahar Singh and that the latter died about 1867.

We have already referred to the khewat for 1867, which shows that the name of Chait Ram the minor son of Nahar Singh was entered in respect of a share under the guardianship of his grandfather Laoti Ram. That strengthens the case of the plaintiff that Nahar Singh might have died in the year 1867 or before that year. It is clear from a sale-deed dated 2nd May 1869 (p. 61) that Laoti Ram remained alive till that date. There is no documentary evidence subsequent to 1869 which would go to show that Nahar Singh owned or was in possession of any separate property. A hypothecation bond (p. 65) dated 10th September 1869 in favour of Saheb Singh might merely show that Laoti Ram and Nahar Singh were dead, and that Chait Ram was then a minor. We have about five documents from September 1869 to December 1879 standing in the name of Saheb Singh alone. They also do not show anything more than that.

On pp. 151, 153 and 155, the khewats for 1297 Fasli again show that the name of Chait Ram son of Nahar Singh and that of Saheb Singh were entered jointly. There are other khewats for 1297 Fasli and 1298 Fasli in which either the name of Saheb Singh or Chait Ram alone is entered. On p. 81 there is a decree dated 14th May 1896 in a suit brought against Saheb Singh and Chait Ram jointly. It is an admitted fact that in 1899 Saheb Singh died, and on p. 83 we have a decree obtained by Chait Ram in his own right and as guardian of Shib Singh the minor son of Saheb Singh. After this Chait Ram died in 1901. On 26th November 1902 Shib Singh executed a deed of gift of the share entered against his name in favour of his stepmother. Apart from the facts that this was a gift of the share entered against his name, made at a time when Babu Lal was alive, and that it related to a half share in the estate, there is no other recital in the document which would indicate that the family was separate. This is the entire documentary evidence up to the time of the death of Babu Lal. In our opinion it is not sufficient to rebut the presumption of jointness which arises under the Hindu Law.

As regards the oral evidence the position is as follows: On behalf of the plaintiff there are the statements of Shib Singh, the plaintiff himself, and of Kalyan Singh, Ram Prasad, Bul Chand, Kallu and Jawahar Singh who, generally speaking, said that Nahar Singh had died long ago and that there was no separation in the family. On the other hand the defendant herself has not gone into the witness-box, but the statements of Mt. Amatulmannan, Murari Lal and Chaman Lal are to the effect that there was a separation in residence, mess and business. We have already rejected the testimonies of Amatulmannan and Chaman Lal, and we do not think that the defendant's evidence in any way outweighs the plaintiff's evidence.

There are a few circumstances which make the alleged separation highly improbable. The evidence in the case shows that Nahar Singh predeceased his father Laoti Ram, and there is no ground for supposing (barring the alleged conversion which we have not believed) that Nahar Singh had separated from his father in the latter's lifetime. The khewats show that Nahar Singh's minor son Chait Ram was under the guardianship of his grandfather Laoti Ram. It further appears from the decree of 1896 that Shib Singh and Chait Ram were impleaded jointly. It also appears from the decree of 1901 that after the death of Shib Singh,

Chait Ram was acting for himself and as guardian of Shib Singh, who was then a minor. Chait Ram died soon after in 1901, and his death was followed by that of Babu Lal in 1903. The death register (p. 93) shows that Babu Lal at the time of his death was about 22 years old. All these circumstances in our opinion do not make it at all probable that there was a disruption in the family. The learned Subordinate Judge who heard the oral evidence and considered the documentary evidence has come to the conclusion that the defendant has failed to prove this alleged separation. We see no reason to interfere with that finding, which we accept.

The family being joint, the defendant Mt. Bhagwan Dei was not entitled to any property as a Hindu widow. She of course, had a right to be maintained out of the income of the family property. The case of absolute ownership put forward by her in para. 3 of the written statement is inconsistent with the case of her being a Hindu widow on the death of Babu Lal, a separated member as suggested in para. 1. If the family had been separate she only acquired a Hindu widow's estate in the property left by her husband, and by no agreement with the reversioner could she enhance her rights and ripen it into full proprietorship. From the position taken up by her that her husband was a separated member of the family the utmost that she could claim would be an acquisition of a Hindu widow's estate by adverse possession over 12 years: *Rajwanti* v. *Safa Chand* (3). Her case rests on an alleged compromise of the year 1909 after the death of Mr. Chaoni. In support of her case she produced two documents Exs. D and C, said to be copies of two deeds of compromise filed in the mutation Court, which copies were signed by Shib Singh himself and handed over to Mt. Bhagwan Dei. These are printed at pp. 97 and 99 of the paper-book. On reading them there can be no doubt that they both are non-testamentary documents purporting to declare, if not also create, rights in immovable property, and that they certainly affect the properties mentioned therein. The recitals further go to show that those documents were intended to be prepared and signed in order to serve as evidence of title, and that they themselves were the deed of compromise intended to operate as title deeds (in the translation the word "sulehnama," which means a "deed of compromise," has been wrongly translated as "compromise"). Even if they evidenced a family arrangement, when such arrangement was reduced to the form of a document registration was necessary. These papars are not mere recitals of something which had happened previously, but they themselves purport to embody the alleged compromise. The documents therefore require registration: *Ram Gopal* v. *Tulsi Ram* (4). Not being registered they are wholly inadmissible in evidence : *James R. R. Skinner* v. *R. H. Skinner* (5).

The learned advocate for the appellant has contended before us that even if these documents are inadmissible in evidence to show the rights given to Mt. Bhagwan Dei, they can be admitted for a collateral purpose, viz: to show the nature and character of the possession of Mt. Bhagwan Dei.

No doubt it has been consistently held by this High Court that even an unregistered document might be taken in evidence for a collateral purpose in order to show the character of possession: *Jhamphu* v. *Kutramani* (6). This view also found favour in Calcutta and Bombay : *Jagannath Marwari* v. *Sm. Chandni Bibi* (7) and *Thakore Fatesingji* v. *Bamanji A. Dalal* (8). The same view was re-affirmed in the Full Bench case of *Sohan Lal* v. *Mohan Lal* (9) This view finds support from the pronouncements of their Lordships of the Privy Council in the case of *Varada Pillai* v. *Jeevarathnammal* (10) and *Vyravan Chetti* v. *Subramanian Chetti* (11). In *Varada Pillai's* case (10) at

(3) A. I. R. 1924 P. C. 121=5 Lah. 192=59 I. A. 171 (P.C.).

(4) A. I. R. 1929 All. 641 (F.B.).
(5) A. I. R. 1929 P. C. 269=56 I. A. 363 (P.C.).
(6) [1917] 39 All. 696=42 I. C. 713=15 A. L. J. 761.
(7) A. I. R. 1921 Cal. 647.
(8) [1903] 27 Bom. 515=5 Bom. L. R. 274.
(9) A. I. R. 1928 All. 726=50 All. 986 (F.B.).
(10) A. I. R. 1123 P. C. 44=43 Mad. 244=46 I. A. 295 (P.C.).
(11) A. I. R. 1920 P. C. 33=43 Mad. 660=47 I. A. 188 (P.C.).

(p. 251 *of* 43 *Mad.*), their Lordships remarked:

"Although the petitions of 1895 and the change of names made in the registration in consequence of those petitions are not admissible to prove a gift, they may nevertheless be referred to as explaining the nature and character of possession thenceforth held by Duraisani"

and in *Vyravan Chetti's* case (11) at p. 664 their Lordships observed:

"If, on the other hand, there are two distinct provisions, the one relating to rights of property and the other with regard to the division of the realisation moneys then, as these proceedings relate merely to the question of the realized money, it need not be registered for the purpose of being given in evidence in this suit although it may be that it would require to be registered for the purpose of being given in evidence in a suit relating to the regulation of the rights against the estate itself."

We do not think that the recent pronouncement of their Lordships in *James Skinner's* case (5) in any way throws doubt on the previous pronouncements. In that case the deed in question itself clearly purported to transfer George Skinner's interest in the immovable property inherited from Richard Skinner. Their Lordships accordingly held that if the instrument purporting to create by transfer an interest in immovable property is not registered it cannot be used in any legal proceeding to bring about indirectly the effect which it would have had if registered. Their Lordships declined to admit this deed of transfer as proof of a mere agreement to sell; but it was made quite clear that, under S. 17 (2) (v), a document which does not itself create an interest in immovable property but merely creates a right to obtain another document which will do so was not compulsorily registrable. Thus *James Skinner's* (5) case was not intended to be an authority for the proposition that an unregistered document can in no circumstances be used in evidence for a collateral purpose. It may in this connexion be pointed out that whereas the Registration Act of 1864 had provided that no instrument (required to be registered) shall be received in evidence in any civil proceeding in any Court or shall be acted upon by any public official and the Act of 1866 provided that no such instrument shall be received in evidence in any civil proceeding in any Court or shall be acted on or shall affect any property comprised therein, the languages of the corresponding sections of the Acts of 1897 and 1908 are different. Now no such document required to be registered can affect any immovable property comprised therein or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered. We, however, think that it would be unsafe to rely upon Exs. B and C filed by the defendant. The defendant herself did not go into the witness-box to substantiate her case of a compromise in 1909, nor did she explain how these papers have remained in her custody.

The learned Subordinate Judge has pointed out that there were three previous occasions on which these documents might have been produced in Court. These are the mutation proceedings following on the grant of a lease by Mt. Bhagwan Dei to her lessees, the criminal proceedings following thereupon, and the civil suit brought by the plaintiff against the defendant and her thekadars. There is also the fact that these papers were not put to the plaintiff when he was in the witness-box, although his pleader had denied their genuineness. The learned Judge has also pointed out that the writing on one of the two papers shows that the lines were crowded in the beginning and were spread out towards the end, which fact raises a suspicion that it might have been written on some paper bearing the signature of Shib Singh. We have only the statement of one witness Muhammad Ali, the scribe, who deposes to this document having been executed by Shib Singh. There is no other evidence in support of his testimony. No doubt the entries in the khewat correspond with the recitals in these deeds, but that fact by itself is not of any significance inasmuch as these documents might well have been prepared in view of the entries in the khewat. In the written statement no specific mention was made of these important documents said to have been signed by Shib Singh himself. And although the written statement was filed on 27th September 1925, these papers were not produced till 24th March of the following year, just before the dates fixed for the hearing. The learned Subordinate Judge who con-

sidered the evidence in support of these papers felt very suspicious, and remarked that in his opinion they had been prepared for this suit only. Having considered the evidence we are of opinion that it would be unsafe to rely upon these two decuments, and to accept them as genuine by overruling the finding of the Court below. We accordingly exclude Exs. B and C entirely from our consideration.

We, however, do not agree with the view of the learned Subordinate Judge that the defendant has never been in possession of these properties, and that her name appears to have been recorded in the revenue papers merely fictitiously. As a matter of fact even in the plaint the plaintiff had admitted that the names of the ladies were entered for their consolation and to secure payment of their maintenance allowance, and in the relief claimed he had stated that she had a right of maintenance in the property detailed in the plaint. It also appears that in the mutation proceedings of 1922 (p. 135) the position taken up by Shib Singh was that :

"Mt. Bhagwan Dei's name was entered in the khewat on the death of her husband in lieu of her maintenance supply with a view to console her."

It is also difficult to imagine what consolation it would have brought to Mt. Bhagwan Dei if she had been merely told that her name was fictitiously entered in the revenue papers, when she could not in case of any dispute or quarrel fall back on the property standing in her name.

The entry of her name in the khewats which had stood from 1899 up to the present day raised a prima facie presumption in her favour that she had been in possession of the property. These khewats are printed from p. 173 to 201.

On 14th June 1909 a sale deed was jointly executed by Shib Singh and Mt. Bhagwan Dei under which a share in mauza Akbarpur which had stood in the names of both was sold for Rs. 1,500. The registration endorsement showed that Rs. 1,200 were paid to Shib Singh and Rs. 300 were paid to Mt. Bhagwan Dei separately, that is to say the consideration was paid in the ratio of 4 to 1. The shares standing in their respective names were 1 to 3. It seems to us that this document indicates that her right in the property was to some extent recognized, otherwise the whole consideration would have been taken exclusively by Shib Singh himself. We also have a number of counterparts of leases executed by tenants jointly in the name of Shib Singh and Mt. Bhagwan Dei in which it was clearly admitted that the property leased belonged to Shib Singh and Mt. Bhagwan Dei. The only explanation which Shib Singh in his re-examination offered as regards these rent deeds was that they were obtained in his absence by a mukhtariam Ismail. It is admitted (p. 8) that this Ismail was the mukhtariam both of Mt. Chaoni and Bhagwan Dei and also of the plaintiff Shib Singh. He was dismissed by Shib Singh in 1921. These counter leases are on pp. 105, 113, 117 and 121, and range from 1917 to January 1921. On 10th February 1921 a lease was executed by Mt. Bhagwan Dei alone in favour of two persons relating to a share which stood in her name exclusively. It is since then that the dispute has arisen between Shib Singh and the defendant. First of all an objection was raised by Shib Singh in the mutation Court against the lessees to the effect that the lease was null and void and was in no way binding upon him. The judgment of the revenue Court is printed at p. 135, and shows that the lady's mukhtariam Mnhammad Ismail who was the brother of one of the lessees ultimately made an admission before the Court that Mt. Bhagwan Dei was not in possession of the property, and the estate was really managed and possessed by the objector Shib Singh who only realized rent. In view of such an admission the case was decided against the lessees. It does not appear that Mt. Bhagwan Dei herself appeared in these proceedings. In the criminal case against the lessees who were acquitted on appeal by the Sessions Judge it was remarked by the Judge that probably Muhammad Ismail saw his profit in changing sides. The opinion of the criminal Court cannot be considered as any evidence in the case, but the fact remains that the learned Judge's view was decidedly in favour of Mt. Bhagwan Dei's titile and possession.

Then followed the suit brought by Shib Singh on 4th November 1901.

against the lessees and Mt. Bhagwan Dei (p. 129). A written statement purporting to have been filed on behalf of Ismail as well as Mt. Bhagwan Dei (p. 133) was only signed by Muhammad Ismail and not by the lady. This case was decreed against the lessees on the basis of a compromise and also against Mt. Bhagwan Dei on 29th April 1902 (p. 139). It is noteworthy that this compromise decree was one day after the mutation order which was based on an admission of Muhammad Ismail. There was another suit brought by the plaintiff Shib Singh against Muhammad Ismail for accounts which was also allowed to be dismissed on 29th April 1922. This was one day after the mutation order based on the statement of Muhammad Ismail. The plaintiff in his deposition has admitted that he got the suit dismissed after Ismail had stated in his favour in the mutation proceedings (p. 9). Mt. Bhagwan Dei succeeded in getting this ex parte decree set aside, but after this Shib Singh instead of proceeding to fight out the suit against her entered into a compromise on 9th October 1922 and agreed that the decree should not be operative against or binding on Mt. Bhagwan Dei, and it was declared that the plaintiff and Mt. Bhag wan Dei shall continue to have the same rights as against each other as they had prior to the suit (p. 147). In addition to these circumstances there is this admitted fact that previous to 1921 Muhammad Ismail was the karinda who was making collections of rent, and that he held a general power-of-atterney on behalf of Mt. Bhagwan Dei also. The patwari produced by the plaintiff admits that Muhammad Ismail used to make collections although since 1921 the plaintiff alone has been getting entries made in the siaha aud has been making collections. In view of all the circumstances and the evidence we are unable to agree with the Court below that the defendant has not been in possession of the property standing in her name although it may be that during recent years the plaintiff alone has been realising and appropriating profits.

On the death of Babu Lal his grandmother Mt. Chaoni had no right to get her name recorded in any part of the property except in lieu of maintenance. Similarly when the family was joint Mt. Bhagwan Dei had no other right. The fact that the names of the ladies were recorded and that Mt. Bhagwan Dei was treated as being in possession cannot be seriously disputed. The plaintiff in his plaint himself made a partial admission that it was to secure payment of her maintenance allowance that her name was recorded, and in the relief which he claimed did not deny her right of maintenance in the property in suit. We have also noted that not only her possession was acknowledged by the various lessees, but she was actually given a share in the sale consideration when a part of the property entered in her name was transferred.

We have therefore come to the conclusion that Mt. Bhagwan Dei under a family arrangement was put in possession of the property standing in her name in lieu of her maintenance allowance. She is entitled to retain possession of the same during her lifetime, but not having acquired the estate of a Hindu widow she has no power of transfer even for legal necessity. The proprietary interest in the property remained vested in the joint family of which Shib Singh was the manager. We have already remarked that when Mt. Bhagwan Dei was claiming that her husband was a separated member she could only have acquired a Hindu widow's estate by adverse possession and not absolute ownership. Her case that she acquired an absolute proprietary interest was based on Exs. B and C which we have rejected. It has been suggested on her behalf that the mere fact that she has remained in possession raises a presumption that she must have been in adverse possession as the family was joint. We do not think that this necessarily follows, because her possession might be either adverse or that of a Hindu widow or in lieu of maintenance. Had she taken possession of the estate as the widow of Babu Lal one would expect to find that she would have secured possession over the whole share which had stood recorded in the name of Babu Lal. On the other hand we find from the khewat that the names of Mt. Chaoni and Bhagwan Dei were recorded in equal shares over that property, and on the death of Mt. Chaoni half of the share standing in her name went to Shib Singh and the other hal

went to Mt. Bhagwan Dei. Thus she did not acquire the whole of her husband's estate.

During the pendency of this appeal Shib Singh has become an insolvent and his estate has vested in an official receiver. It is unnecessary for us to enquire into the question of whether it is only the interest of Shib Singh in the family property which has vested in the receiver or the entire family estate. That will depend on the nature of the debts which are outstanding.

We accordingly allow this appeal in part, and modifying the decree of the Court below grant the plaintiff a declaration that the proprietary interest in the property in suit vests in the family represented by Shib Singh, and that the defendant has not acquired an absolute title either by adverse possession or even the limited estate as a Hindu widow, but that her possession is in lieu of maintenance and that she is entitled to remain in possession during her lifetime without any power of transfer. We direct that the order of the Court below as regards costs in that Court should stand, but the parties should bear their own costs of this appeal.

V.B./R.K. *Decree modified.*

A. I. R. 1930 Allahabad 348

BANERJI AND NIAMATULLAH, JJ.

Mt. Moti Bala Debi—Plaintiff—Appellant.

v.

Satyanand Tirtha Swami—Defendant—Respondent.

Second Appeal No. 859 of 1927, Decided on 11th January 1930, from decree of Dist. Judge, Benares, D/- 3rd February 1927.

(a) Hindu Law — Religious endowment—Successor in management is legal representative of previous manager—Civil P. C., O. 22, R. 4.

With regard to an endowed property, successor in management of the endowed property may be considered as a legal representative of the prior manager of the same endowed property. [P 349 C 1]

(b) Civil P. C., O. 34, R. 5—O. 34, R. 5, though imperative, legal representative of deceased defendant can raise appropriate defence—Civil P. C., O. 22, R. 4 (2).

While under ordinary circumstances the provisions of O. 34, R. 5, being imperative in their character should be followed, but taking them with the provisions of O. 22, R. 4 (2), a legal representative is at liberty to take any defence which may be appropriate to his character as the legal representative of the deceased defendant. [P 349 C 2]

P. L. Banerji—for Appellant.

B. Malik and *Gadadhar Prasad*—for Respondent.

Niamatullah, J.—This is an appeal from the judgment and decree passed by the learned District Judge of Benares in a suit brought by the plaintiff-appellant for enforcement of a mortgage deed dated 8th January 1921, executed by one Kalkanand Swami who was the Mahant of a shrine situate in Benares. A preliminary decree was passed against the aforesaid Kalkanand Swami on 24th February 1924. He died shortly afterwards. The period of grace fixed in the preliminary decree was three months. By an application dated 13th May 1924, the plaintiff-appellant prayed that Mahant Satyanand, the present respondent, be brought on the record as the legal representative of the deceased Kalkanand Swami. The former objected to the proceeding, taken by the plaintiff-appellant, on the ground that the property which had been mortgaged by Mahant Kalkanand Swami and to which the preliminary decree related was endowed property appertaining to the mutt of which Kalkanand Swami was the presiding Mahant and of which the respondent is now the Mahant in succession to Kalkanand Swami. It was pleaded that the mortgage not being for any legal necessity was not binding on the mutt and on the respondent. Mahant Satyanand Swami also denied being the legal representative of Kalkanand Swami. The learned Subordinate Judge, before whom the case came up in the first instance, held that the property mortgaged by Kalkanand Swami was endowed property appertaining to the mutt of which he was the Mahant and that there was no legal necessity for the loan evidenced by the mortgage deed in suit. The application for final decree under O. 34, R. 5, Civil P. C., was disallowed. An appeal to the learned District Judge was unsuccessful. The present second appeal has been filed by the plaintiff impugning the view taken by the Courts below.

The learned advocate for the plaintiff-appellant has contended before us that the provisions of O. 34, R. 5, Civil P. C., are imperative and that if within the time limited by the preliminary decree the mortgage money has not been paid the Court has no option but to refuse to

pass a final decree. We are unable to accede to this argument. The provisions referred to should be read with other provisions of the Civil Procedure Code. It is clear that a final decree cannot be passed unless some legal representative of the deceased defendant against whom a preliminary decree was passed is brought on the record. If the attempt to treat Satyanand Swami as the legal representative of the deceased fails, it is obvious that no final decree can be passed. Satyanand Swami can be treated as the legal representative of Kalkanand Swami if the mortgaged property is part of the endowed property which was in the management of Kalkanand Swami, who has been succeeded in that management by Satyanand Swami. Under O. 22, R. 4 (2), Civil P. C., a person against whom an application is made for substitution can, if brought on the record, make any defence appropriate to his character as the legal representative of the deceased defendant. If therefore Satyanand Swami be treated as the legal representative of the deceased it is open to him to contest the plaintiff's claim to obtain a final decree on the ground that the mortgage deed executed by Kalkanand Swami was invalid and that a final decree should now be refused. If Satyanand Swami be not treated as the legal representative of the deceased the application made by the plaintiff-appellant for the representative of Kalkanand Swami being brought on the record should stand dismissed, in which case the Court cannot proceed to pass a final decree under O. 34, R. 5, Civil P. C.

We have not been able to discover any definite order of the trial Court directing the name of the respondent being substituted as the legal representative of the deceased Mahant but the trend of the judgment of the learned Subordinate Judge shows that he was inclined to the view that Satyanand Swami having intermeddled with the estate of Kalkanand Swami is his legal representative. He, however, held that the property mortgaged by Kalkanand Swami is part of the property appertaining to the mutt and the mortgage not being warranted by any legal necessity was void. These were the grounds urged by Satyanand Swami in his character as the legal representative of the deceased. Having arrived at that finding he refused to pass the final decree. The learned District Judge has not specifically referred in his judgment to the question as to whether the plaintiff-appellant's application for substitution of Satyanand Swami in place of Kalkanand as the latter's legal representative should be allowed. He has agreed with the view taken by the learned Subordinate Judge as regards the character of the property and the validity of the mortgage. Accordingly he upheld the order refusing to pass the final decree.

We are of opinion that the view taken by the Courts below is correct. While under ordinary circumstances the provisions of O. 34, R. 5, Civil P. C., being imperative in their character should be followed, but taking them with the provisions of O. 22, R. 4 (2), Civil P. C., it is clear to us that the legal representative is at liberty to take any defence which may be appropriate to his character as the legal representative of the deceased defendant. Satyanand Swami having been found to be the Mahant of the mutt to which the mortgaged property appertains is bound to protect the interest of the mutt and is entitled to oppose further proceedings being taken for the enforcement of the invalid mortgage deed executed by his predecessor-in-office. It is obvious that if he does not put forward an appropriate defence for the protection of the interests of the mutt of which he is the present Mahant and allows a final decree to be passed, complications of a serious character will be introduced. It may be too late for him to prevent the sale which must in the ordinary course follow the final decree. The learned advocate for the plaintiff-respondent has suggested a course which does not appeal to us. He contends that Mahant Satyanand Swami should submit to a final decree being passed and the sale held thereunder and should vindicate the right of the mutt by instituting a regular suit. We are of opinion that this circuitous course is not only undesirable but legally objectionable. The policy of the law is always to avoid multiplicity of proceedings, and to take a course of this kind will be to multiply litigation, if nothing worse. Proceedings following an application for preparation of a final decree are proceed-

ings in the suit. It is therefore not too late for the respondent to show that the mortgage sought to be enforced is not valid and binding on him against whom the final decree is applied for. For these reasons we are clearly of opinion that the orders passed by the Courts below are correct. This appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 350

MUKERJI AND BENNET, JJ.

Mt. Rasulan—Plaintiff—Appellant.

v.

Babu—Defendant—Respondent.

Letters Patent Appeal No. 113 of 1927, Decided on 3rd January 1930,

(a) Cosharer—Partition—Proof.

Mere specification of shares does not amount to any division or partition. [P 350 C 2]

(b) Agra Ten. Act (2 of 1901), S. 22—S. 22 does not prohibit survivorship of co-tenant.

Section 22 lays down the succession for a deceased occupancy tenant but it does not lay down that there should be no right of survivorship of one occupancy tenant to a deceased occupancy co-tenant. [P 351 C 1]

(c) Agra Tenancy Act (2 of 1901), S. 22—Cosharers—Rule as to survivorship is modified by Contract Act, Ss. 42 and 45.

The rule of survivorship among joint tenants is modified in India by Ss. 42 and 45, Contract Act, which puts the representative of the deceased joint tenant in his place, so long as there is such a representative. On failure of such a representative the rule of survivorship among joint tenants applies. [P 352 C 2]

Mushtaq Ahmad—for Appellant.

K. Verma—for Respondent.

Bennet, J.—This is a Letters Patent appeal brought by the plaintiff whose suit was decreed in full by both the lower Courts, but on appeal by a defendant, the learned Judge of this Court dismissed the suit of the plaintiff in regard to half an occupancy holding. The pedigree in this case is as follows;

Imam

Mt. Rasulan (Pltff.) daughter — Abdul Rahman = Mt. Mirian (widow)

Abdul Aziz, Mt. Nasira, Mt. Khalila

Imam was the owner of an occupancy holding and he died before Act 2 of 1901. He was succeeded by his daughter Mt. Rasulan the present plaintiff and his son Abdul Rahman. Although according to Mahomedan Law Abdul Rahman would have been entitled to a two-thirds share, the entry of the occupancy holding was made for Mt. Rasulan and Abdnl Rahman in equal shares. Abdul Rahman died about nine or ten years before the suit and he was succeeded by his son Abdul Aziz who died without issue in 1916. On the death of Abdul Aziz, the name of his mother Mt. Mirian, the widow of Abdul Rahman was entered and on her death in 1918, the name of one Babu, a defendant, who was the brother of Mt. Mirian was entered as in occupation of half her holding. Now, on 2nd January 1904, the plaintiff Mt. Rasulan had mortgaged her half share of the occupancy holding to her brother Abdul Rahman for Rs. 99. One part of the plaintiff's case was a suit for redemption of this half of the holding which was mortgaged and the plaintiff has received from all Courts a decree for redemption of this half for Rs. 99 and that matter is not now before us. The question before us is whether the plaintiff is entitled to succeed by survivorship to the remaining half of the occupancy holding. It was argued that this claim was a new case for the plaintiff, but we find it clearly stated in para. 9 of the plaint that after the death of Abdul Rahman the plaintiff was a tenant along with Abdul Aziz his son and after the death of Abdul Aziz, she became the tenant of of the entire holding.

For the respondent it was contended that under S. 22, Act 2 of 1901, which was in force at the time of the death of Mt. Mirian in 1918, and at the time of the death of Abdul Aziz in 1916, the plaintiff is not a person entitled to succeed to the interest of either of those persons. This is undoubtedly so. The question which we have to consider is whether the plaintiff is entitled to succeed as a joint tenant or whether S. 22 prevents one of two joint tenants succeeding on the extinction of the line of the other joint tenant. It was argued in the first place that the specification of shares prevented the plaintiff from having any right of succession in the share of one-half entered for her brother Abdul Rahman. But there was no division of the holding or partition and the mere specification of shares does not amount to any division or partition. This matter of joint tenants has been once before this Court in Second Appeal No. 764 of 1905. In that case, an occupancy te-

nant died leaving a widow and two daughters who were recorded as joint tenants. The widow and the daughters applied to be entered for her share. It was held that the daughters succeeded by survivorship to the whole of the joint holding and the zamindars could not claim any right of reversion of a portion of a joint holding to themselves. Although the judgment of this Court is given somewhat briefly, still it refers with approval to the reasons given by the District Judge, where the proposition is discussed at length. With those reasons we are in agreement. We may also refer to the provisions of law now made in the new Act, Act 3 of 1926, S. 26 where it is laid down:

"And except in the case of widows or of a co-tenant who dies leaving no heir entitled to succeed under S. 24, no interest in any exproprietary, occupancy, statutory, or non-occupancy tenancy shall pass by survivorship."

That is to say, under this provision, the interest of a co-tenant who dies leaving no heir will pass by survivorship to his co-tenant.

It was argued by the learned counsel for the defendant that the right of occupancy was extinguished within the meaning of S. 18, Act 2 of 1901, because the tenant had died leaving no heir. But we consider that if that section had meant to refer to one of two joint tenants, the section would have stated so definitely. We may also refer to the wording of S. 22 which refers to an occupancy tenant, and to his interest in the holding. Therefore, in our opinion, S. 22 lays down the succession for a deceased occupaucy tenant but it does not lay down that there should be no right of survivorship of one occupancy tenant to a deceased occupancy co-tenant. It was argued by the learned counsel for the defendant that there was no provision in Act 2 of 1901, under which a joint tenant could take by survivorship from a deceased joint tenant whose line had become extinguished. That is so, but neither is there any provision for the reversion to the landholder of a share in such circumstances. The fact is that Act 2 of 1901 does not make any special provision for such a case. Accordingly we must go to more general provisions of law for guidance. An occupancy tenancy originates in a non-occupancy tenancy which is held for 12 years, and a non-occupancy tenancy originates in a contract between the landholder and the tenant that the landholder will let the holding from year to year and that the tenant will pay the yearly rent. When the period of 12 years is complete the tenant receives the statutory protection against ejectment on the mere ground that he holds from year to year, but the contract to let and to pay rent remains in force. Where there are joint tenants the devolution of joint rights is governed by S. 45, Contract Act which states:

"Where a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them, during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly".

This section gives the general principle which governs the devolution of the rights of joint tenants. The scope of S. 22, Act 2 of 1901 is limited to defining who is the representative of the deceased joint occupancy tenant. When there is no person who is a representative of the deceased joint occupancy tenant within the meaning of S. 22, Act 2 of 1901, then there is no such representative to claim along with the remaining joint occupancy tenant or tenants that the land-holder should fulfill his part of the contract. Consequently under S. 45, Contract Act, the remaining joint occupancy tenant or tenants have the right to claim fulfilment alone from the landholder. We may refer for comparision to the principles of the English Law of Tenancy as stated in Foa, Landlord and tenant, 5th Edn. p. 65:

"If a lease be granted to two or more persons they hold as joint tenants, and upon the death of one of them the other or others will become entitled by survivorship to the whole at law."

Further at p. 36 in Foa it is stated:

"Joint tenants have but a single free-hold, and they may, therefore, always join in making a demise of it, they then forming together but one lessor. Such a joint demise operates both as a demise by each joint tenant of his own share and by all of the whole, and is consequently not determined by the death of any of them, the lessee thereupon simply becoming tenant to the survivors or survivor, who will become entitled to the whole rent. But though there is but one freehold, and each joint tenant is seised of the whole ("per tout" as well as "per my"), yet for leasing purposes each of them has an exclusive right only to his own share, consequently, if one of them pur-

port singly to demise the whole, nothing more than his own share will pass."

These passages illustrate the nature of joint tenancy. The rule of survivorship among joint tenants is, however, modified in India by Ss. 42 and 45, Contract Act, which put the representative of the deceased joint tenant in his place, so long as there is such a representative. On failure of such a representative the rule of survivorship among joint tenants applies.

Applying these principles to the present case we hold that the plaintiff Mt. Rasulan did take the half share of the joint occupancy holding belonging to Abdul Aziz on his death, as he left no successor capable of taking under S. 22, Act 2 of 1901. Mr. Rasulan being the sole surviving joint occupancy tenant took this share by survivorship. Accordingly we set aside the decree of the learned single Judge of this Court, and we restore the decrees of the lower appellate Court and the Court of first instance with costs throughout.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 352

MUKERJI AND BENNET JJ.

Shahzad Singh—Appellants.

v.

Bachoo Singh—Respondents.

Letters Patent Appeal No. 97 of 1929, Decided on 13th December 1929.

Agra Tenancy Act (2 of 1901), Ss. 28 and 57 (a)—Interest of usufructuary mortgagee or sub-lessee of occupancy holding determines on termination of right of occupancy.

The interest in an occupancy holding of any person, to whom an occupancy tenant sublets or to whom he grants a usufructuary mortgage of land comprised in his occupancy holding, will determine if it has not already determined on the determination of the right of occupancy and can subsist no longer than the right of occupancy: 15 *All.* 219, *Rel.on.* 1925 *All.* 580, *Dist.*

A. P. Dube—for Appellants.

Bennet, J.—This is a Letters Patent Appeal brought by the defendants. The facts as found are that an occupancy tenant has made a usufructuary mortgage of a single plot 906 of his occupancy holding in the year 1889 when such a mortgage was held to be legal by this Court in the Full Bench case of *Khiali Ram* v. *Nathu Lal* (1). The zamindar sued the tenant Faqir for arrears of rent and obtained a decree for Rs 4-2-0 arrears, under S. 57 (a) Act 2 of 1901, in the year 1924. To this suit the present appellants were not parties, and under Act 2 of 1901 it is not necessary for the landholder to make the present appellants parties, and the present appellants were subtenants under that Act. An application was made under S. 59 of that Act by the landholder to eject the tenant and under S. 71 (1) of that Act a sublessee is no longer entitled to remain in possession. The defendants, however, resisted the landholder in obtaining possession and the landholder brought this suit in the civil Court to obtain possession. The trial Court and the lower appellate Court dismissed the suit of the plaintiff zamindar on the ground that the defendant mortgagees were entitled to remain in possession as their interests under their mortgage were not extinguished by the ejectment of the mortgagor. The learned Judge of this Court having considered the rulings at length has come to the contrary opinion, and he has decreed the plaintiff's suit for possession. For the appellants reference was made to the case of *Bahadur* v. *Motichand* (2). But that ruling dealt with the position of a mortgagee of a tenant under a perpetual lease who was entitled to mortgage his holding by the conditions of his lease. Accordingly the case of a mortgagee from a tenant entitled to mortgage is entirely different from the case of the defendants who are merely in a position of subtenants under Act 2 of 1901. Reference was further made to S. 28 of that Act, but the proviso to that section states that the interest of the subtenant shall be extinguished if the tenant is ejected on any of the grounds specified in S. 57, and the ejectment in question was under S. 57 (a). In *Khiali Ram* v. *Nathu Lal* (1) at p. 230 it was laid down;

"In order that the effect of our opinion may not be misunderstood and our decision be not misapplied, it is necessary to say that it is obvious to us that the interest in an occupancy holding of any person to whom an occupancy tenant sublets, or to whom he grants a usufructuary mortgage of land comprised in his occupancy holding will determine, if it has not previously determined, on the termination of the right of occupancy and can subsist no longer than the right of occupancy subsists."

Accordingly we consider that the decision of the learned Judge of this Court was correct, and we dismiss this Letters Patent Appeal.

V.B./R.K. *Appeal dismissed.*

(1) [1893] 15 All. 219=(1 893) A. W. N. 12 (F. B.).

(2) A. I. R. 1925 All. 580=47 All. 589.

A. I. R. 1930 Allahabad 353

MUKERJI AND BENNET, JJ.

Sri Ram Chandra Naik Kalya—Plaintiff—Appellant.

v.

Satya Narain and *others*—Defendants—Respondents.

Letters Patent Appeals Nos. 71 to 75 of 1928, Decided on 17th January 1930, from judgment of Walsh, J., D/- 21st February 1928.

(a Agra Tenancy Act (2 of 1901), S 158—No revenue can be assessed on "muafi lekhiraj."

Section 158 enables a Court to assess revenue if there is revenue payable on the land. Where, therefore, there is no revenue payable on plots described as "muafi lekhiraj" no revenue can be assessed on the plots under S. 158.

[P 353 C 2 ; P 354 C 1]

(b) Agra Tenancy Act (2 of 1901), S. 150 — Mahal owned by proprietor entirely separate from "muafi" lands –No relief under Chap. 10 can be claimed by proprietor.

Where the full share in the mahal owned by the proprietor is entirely separate from the areas of "muafi" land owned by the "muafidars," the proprietor cannot get relief under Chap. 10, because S. 150 only refers to suits by the proprietor of a mahal or part of a mahal for assessment of rent on "any land situated in such mahal or part of a mahal." Moreover, the mere fact that the "muafidars" are entered themselves in the khewat shows that no suit under Chap. 10 can lie against them. It is only in the case of persons who are not entered in the khewat that suits will lie under this Chapter.

[P 354 C 1]

P. L. Banerji and *K. Varma*—for Appellant.

Damodar Das—for Respondents.

Bennet, J.—These are five connected appeals brought by a plaintiff against the judgment of a learned single Judge of this Court dismissing the suit of the plaintiff which was for assessment of rent and in the alternative for assessment of the share of Government revenue on the plots held by the defendants who were entered as muafidars. The lower Courts have also dismissed the suit of the plaintiff. It was claimed by the learned counsel on behalf of the appellant-plaintiff, that his case came under S. 156, Act 2 of 1901. S. 150 lays down that the proprietor of a mahal or part of a mahal may sue to resume possession of or have rent assessed on any lands situated in such mahal or part of a mahal purporting to be held rent free or to have the holder thereof declared to be liable to pay revenue on it. S. 154 lays down the cases in which land held rent free is liable to resumption. S. 158 lays down the case of land which is not liable to resumption under S. 154 and which has been held rent free for fifty years and by two successors to the original grantee ..... S. 156 lays down that land not liable to resumption under S. 154 and to which the provisions of S. 158 do not apply, shall be liable to assessment of rent.

It is claimed by the learned counsel that Ss. 154 and 158 do not apply and therefore that rent should be assessed under S. 156. The finding of the lower appellate Court is that S. 158 does apply because the land has been held rent-free for more than fifty years and by two successors to the original grantee Accordingly, under that section the land shall be deemed to be held in proprietary right. That section continues: "and the Court shall declare the holder o such land to be the proprietor thereof, and to be liable to pay the revenue thereon, and shal determine the revenue payable by him."

This section enables a Court to assess revenue if there is revenue payable on the land in question. The learned counsel for the appellant referred to the provisions of S. 58, Land Revenue Act, to the effect that revenue might be assessed on this land, but the question before us is not whether revenue might be assessed at some future date on this land but whether there is in fact revenue assessed on the land at present The finding of the lower appellate Court is that there is no revenue at present assessed on this land.

A reference to the khewats of 1289 F shows that this fact is undoubtedly correct. There are two khewats, one for mouza Chaksari Kalan and the other for mouza Chaksari Khuld. But the khewats are similar and are briefly as follows: In each mahal the khewat has a number of khatas, 6 in one case and 7 in the other Khewat 1 is entered for the plaintiff-appellant as the sole owner and is stated to be 16 annas of khalsa land Below this khewat 1 (and in the case of one mahal below) an entry of a small area as public roads come the remaining khatas under the heading "muafi lekhiraj" i. e. free from payment of revenue. These following khatas contain the names of the defendants' predecessors with their small areas o muafi land. Now, the first point that is apparent from this khata .is that the

revenue of the village is .assessed solely on khata 1. No revenue is assessed on any of the khatas in suit and accordingly as there is no revenue payable on these plots so no revenue can be assessed on the plots under S. 158.

The next point which is apparent is that the land of the defendants does not lie within the land owned by the plaintiff. The 16 annas of the mahal owned by the plaintiff is entirely separate from the areas of muafi land owned by the defendants. Accordingly therefore the plaintiff cannot come under Chap. 10, because S. 150 only refers to suits by the proprietor of a mahal or part of a mahal for assessment of rent on "any land situated in such mahal or part of a mahal." The land of the defendants not being situated in the mahal or part of the mahal owned by the plaintiff, the plaintiff cannot get relief under the chapter.

In fact, the suit of the plaintiff has been entirely misconceived. Such a suit as the present will only lie by a proprietor of a khewat for land which is entered in the khatauni as appertaining to the khewat khatas of the plaintiff. The mere fact that the defendants are entered themselves in the khewat shows that no suit under Chap. 10 could lie against them. It is only in the case of persons who are not entered in the khewat that suits will lie under this chapter. Accordingly we dismiss these five appeals brought by the plaintiff, with costs

V.S./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 354

SEN AND NIAMATULLAH, JJ.

Bhagirathi Dubey—Plaintiff—Appellant.

v.

Rajkishore Dubey and *others*—Defendants—Respondents.

Second Appeal No. 223 of 1927, Decided on 20th December 1929, against decree of the Sub-Judge, Azamgarh, D/- 27th October 1926.

(a) Transfer of Property Act, S. 52—"Contentious suit"—Meaning.

The words "contentious suit" in S. 52 have been used in contradistinction to a friendly suit or a collusive suit [P 355 C 1]

(b) Transfer of Property Act, S. 52—Transfer in contentious suit — Transferee takes subject to result of suit.

Where in a contentious suit a party transfers the immovable property in favour of a person who is no party to the action, the latter can only take the property subject to the result of the suit. [P 355 C 1]

(c) Transfer of Property Act, S. 52—Contentious suit—Suit contentious in inception—Fact of one party entering into compromise and another allowing ex parte decree to go against him does not make it non-contentious.

The suit, which is a contentious one in its inception, does not cease to be a contentious suit, either by reason of the fact that one of the parties to the suit has entered into a compromise with the plaintiff or that another party has allowed an ex parte decree to be passed against it. [P 355 C 2]

P. L. Banerji and *S. D. Sinha*—for Appellant.

G. Agarwala—for Respondents.

Sen, J.—One Raj Kishore Dubey owned certain zemindari property in mauzas Rampur and Aranwan Gulzar, pargana Kauna in the district of Azamgarh. On 1st July 1925, he transferred the property in suit with possession to one Katwaru who figures in this action as defendant 8. The document ostensibly amounted to a usufructuary mortgage for Rs. 800. Bhagirathi Dube, plaintiff-appellant instituted a suit for pre-emption on the allegation that the transaction in question was really an out and out sale but it was disguised with the outer trappings of a usufructuary mortgage.

The suit was resisted both by Raj Kishore Dube, the transferrer, and Katwaru, the transferee both of whom pleaded that the transaction was a usufructuary mortgage and the real consideration was Rs. 800 as set out in the document and not Rs. 200 as alleged by the plaintiff.

The 10th December 1925, was the date fixed for the final hearing of the case. Matters, however, took a dramatic turn, on 8th December 1925 when Raj Kishore Dube sold the property in dispute to defendants 2 to 7. On 10th December 1925, Bhagirathi Dube applied to the Court for time to reconsider his position more particularly with reference to the advisability or otherwise of impleading the vendees namely, defendants 2 to 7. On the following day, that is, on 11th December 1925, a compromise was effected between the plaintiff and Katwaru. The result of the compromise was that Katwaru admitted that the transaction in reality was a sale and not a usufructuary mortgage. The parties agreed that the

true consideration for the transfer was Rs. 800 and not Rs. 200 as alleged by the plaintiff. A decree in terms of the compromise was passed in favour of the plaintiff against Katwaru. Raj Kishore Dube, the original transferrer, not having appeared on that date in Court, an ex parte decree was passed against him.

When the plaintiff attempted to execute his decree, he was resisted by defendants 2 to 7 who set up their sale deed, dated 8th December 1925. The present suit was instituted for a declaration that this sale deed dated 8th December 1925, executed by Raj Kishore Dube in favour of Muneshar Dube and others defendants 2 to 7, was null and void and not binding upon the plaintiff. The Court of first instance dismissed the suit. The lower appellate Court has affirmed the decision. The decision of the lower appellate Court proceeds upon the finding that the suit was not a "contentious suit" within the meaning of S. 52, T. P. Act, on 11th December when a compromise was arrived at between Bhagirathi Dube and Katwaru and the transfer by Raj Kishore to defendants 2 to 7 is unaffected by the doctrine of lis pendens. This view is clearly erroneous. The words "contentious suit" in S 52, T. P. Act, have been used in contradistinction to a friendly suit or a collusive suit.

The suit for pre-emption was from its very inception a contentious suit against both the defendants who were parties to the action. It did not cease to be a contentious suit against defendant 2 merely by reason of the litigation coming to an end by means of a compromise decree against one of the defendants. The right to the property in dispute was directly and substantially in question in the pre-emption suit and pending the decision, defendant 1 was not competent to defeat the right of one of the parties by a transfer in favour of persons who were strangers to the action. Defendant 1 was no party to the compromise at all. The Courts below have failed to realize the significance and legal effect of this circumstance. Where in a contentious suit a party transfers the immovable property in favour of a person who is no party to the action, the latter can only take the property subject to the result of the suit. Under the circumstances, defendants 2 to 7 could not, by reason of their obtaining a transfer from defendant 1, defeat the plaintiff of the fruits of his decree. We are clearly of opinion that the transfer in favour of defendants 2 to 7 was obnoxious to the provisions of S. 52, T. P. Act, and that the plaintiff's claim was well founded. We have already stated that defendant 1 was no party to the compromise. The compromise, therefore, whether collusive or not, did not, in any way improve the rights of defendant 1 against whom an ex parte decree was passed. The suit, which was a contentious one in its inception, did not cease to be a contentious suit, either by reason of the fact that one of the parties to the suit had entered into a compromise with the plaintiff or that another party had allowed an ex parte decree to be passed against it. No fraud between the plaintiff and defendant 1 has been alleged or proved. The Courts below appear to have put themselves upon a wrong track by assuming that the compromise entered into between the plaintiff and Katwaru affects the ex parte decree against defendant 1 who was no party to the compromise. We allow the appeal, set aside the decree of the Courts below and decree the plaintiff's claim with costs throughout.

V.B./R.K. *Appeal allowed.*

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* A. I. R. 1930 Allahabad 355

BANERJI AND KING, JJ.

Makhan Lal—Plaintiff—Appellant,

v.

Sohan Lal and *others*—Defendants—Respondents.

Second Appeal No. 338 of 1927, Decided on 5th December 1929, from a decree of Addl. Sub-Judge, Muttra, D/- 27th October 1926.

*** Mortgage—Prior and subsequent—Consecutive suits on respective mortgages by prior and puisne mortgagees without either impleading the other—Decree in favour of both mortgagees in respective suits—Puisne mortgagee bringing suit for possession—Puisne mortgagee held entitled to possession on payment of mortgage money to prior mortgagee—Interest to prior mortgagee allowed—Transfer of Property Act S. 74.**

A prior mortgagee brought a suit in 1919 on his mortgage and obtained a decree for sale without impleading the puisne mortgagee who was in actual possession of the mortgage premises as usufructuary mortgagee. The puisne mortgagee, in 1921, instituted a suit for sale on his mortgage without impleading.

the prior mortgagee and got a decree. But on failure to get an order of mutation in revenue Court, the puisne mortgagee brought the present suit against the prior mortgagee for possession.

Held: that the puisne mortgagee was entitled to possession upon payment of the amount which was decreed as due to prior mortgagee in his suit of 1919.

Held also: that as the puisne mortgagee was in possession as usufructuary mortgagee, the prior mortgagee was entitled to interest at the rate decreed in suit of 1919 up to a date fixed by the High Court: *A. I. R.* 1922 *P. C.* 11, *Rel. on*. [P 357 C 1]

N. P. Asthana—for Appellant.

P. L. Banerji for *Ambika Prasad Dube*—for Respondents.

Banerji, J.—This is a plaintiff's appeal. The plaintiff Makhan Lal was in possession of certain land under a usufructuary mortgage, having acquired by purchase the rights of the original usufructuary mortgagees. The defendants obtained a mortgage on 14th July 1925, of the right, title, and interest of one Tika. Tika on 18th December 1909, mortgaged the property to Makhan Lal. Suits were brought on the two mortgages. On 5th August 1919, the prior mortgagee instituted a suit for sale (No. 480 of 1919) without impleading the puisne mortgagee. A preliminary decree was passed which was followed by a decree absolute and the property was sold by auction and purchased by the prior mortgagees. The plaintiff in the year 1921 instituted a suit (No. 1250 of 1921) for sale on his mortgage of 18th December 1909, and obtained a decree. He did not implead the prior mortgagee. When the plaintiff went to the revenue Court to get his name recorded as owner of the property his application was dismissed on the ground that an order of mutation has already been passed in favour of the defendants prior mortgagees.

The present suit is for the following relief:

"On the establishment of the plaintiff's right and on declaration that no right has accrued to the defendants as against the plaintiff in respect of the right as a mortgagor of 9.20 acres out of 26.18 acres of land entered in the khewat as holding No. 10 and of 3.10 acres out of 10.74 acres entered in the khewat as holding No. 11 situate in mauza Bhura Sani mahal Ghair Khwahisdgan former pargana Mahaban, and recent pargana Mat, district Muttra, the plaintiff may be awarded possession over the said property."

It is not denied that the usufructuary mortgage still subsists and that the plaintiff is in possession as usufructuary mortgagee of the property. Various defences were raised which have been repelled by the Court of first instance, but the plaintiff's claim was decreed subject to his paying Rs. 1850-7-4, the amount of the principal and interest under the mortgage of 14th July 1925. The plaintiff went up in appeal and the appeal was dismissed by the learned Additional Subordinate Judge. There was a cross-appeal by the defendants but that appeal was also dismissed.

The plaintiff has come up in second appeal. The learned advocate for the appellant has contended that, although he cannot assail the condition imposed by the Courts below, the appellant is entitled to recover possession of the property upon payment of the amount which was decreed in suit No. 480 of 1919. Various cases have been referred in the arguments before us. The contention of Mr. Narain Prasad Asthana is that he by reason of a deliberate act of the prior mortgagees cannot be forced to pay more than he would have been directed to pay if he had been made a party to the suit No. 480 of 1929.

On the other hand, Mr. A. P. Dube, holding the brief of Mr. P. L. Banerji, has drawn our attention to the case of *Ganga Prasad Sahu* v. *Land Mortgage Bank* (1), the case of *Jageshwar Mandal* v. *Sridhar Lal Deb A. I. R.* 1928 *Pat.* 589 and also the case of *Raghunath Kunwar* v. *Shankar Singh* (2).

In our opinion the respondent is not entitled when the present suit is instituted to claim to be put into a much better position than he would have been if the present plaintiff had been impleaded in suit No. 480 of 1919. The plaintiff appellant was a usufructuary mortgagee and, as we have stated, it is not denied that he was in possession. The prior mortgagees therefore cannot claim to have any excuse whatsoever for not impleading the present plaintiff. It is contended by Mr. Dube that as his clients were not in possession of the property he is entitled to hold the mortgage as a shield, not the decree. We agree with that contention. In the case of *Sukhi* v. *Ghulam Safdar*

(1) [1894] 21 Cal. 366=21 I. A. 1=6 Sar. 383 (P.C.).
(2) [1914] 36 All. 123=22 I. C. 387=12 A. L. J. 41.

Khan (3) at p. 476 (*of* 34 *All.*) their Lordships of the Privy Council have observed as follows :

"The general principle is stated rightly by the High Court. It is this. The plaintiff is a puisne mortgagee seeking to enforce her mortgage, the prior mortgagee in his suit having failed to make her a party. It is the duty of the Court to give the plaintiff the opportunity of occupying the position which she would have occupied if she had been a party to the former suit."

We have therefore to see what is the proper decree to be passed in this case. In our opinion the proper decree to be passed in this case is to place the prior mortgagee exactly in the same position that he would have been in if he had impleaded the present plaintiff. We therefore vary the decree of the Court below by declaring that the plaintiff is entitled to possession upon payment of the amount which was decreed as due to the prior mortgagees in suit No. 480 of 1919. As the plaintiff was in possession as usufructuary mortgagee the prior mortgagees are entitled to interest at the rate decreed in suit No. 480 of 1919 up to the date we fix for payment of that amount. The amount will be calculated by the office and three months are allowed to the appellant to pay the amount. If such payment is not made the plaintiff's suit will stand dismissed with costs. Appellant will be entitled to the costs of this appeal. We do not interfere in any way with the order as to costs passed by the Courts below.

V.S./R.K. *Order accordingly.*

(3) A. I. R. 1922 P. C. 11=43 All. 469=48 I. A. 465 (P.C.).

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* A. I. R. 1930 Allahabad 357

MUKERJI AND YOUNG, JJ.

Dehra Dun Mussoorie Electric Tramway Co., Ltd.: In re Hansraj Gupta and *others*—Applicants.

v.

Official Liquidators- Opposite Party.

Misc. Appln. No. 96 of 1926, Decided on 20th November 1929.

*** (a) Contract Act, S. 23—Motive of contract is essentially different from consideration or object.**

Motive is essentially different from the consideration or object of the contract and the fact that the contract was entered into in the expectation of some ulterior gain would not affect the contract which is valid in every way. Similarly where there are two collateral contracts, one valid in every respect and other for unlawful consideration, the latter supplying the motive for the former, though not condition precedent, the latter contract is essentially different from both consideration and object of the former and does not vitiate the former. (*Case Law discussed.*) [P 360 C 1; P 362 C 1]

(b) Allahabad High Court Company Rr. 54 to 59—List framed and notice issued under R. 54—Party applies on date fixed for postponement of entry of their name—Application rejected and name entered — No notice under R. 57 necessary to make party liable as contributory.

A list of contributories was framed by liquidators under R. 54 and notices issued to contributories as per R 54. On the date fixed, Court settled the list of contributories, rejecting the application of one of the parties for postponement of the entry of their names in the list, without objection to such entry.

Held : that no further notice under R. 57 is necessary to the party to bind them as contributory. [P 359 C 1]

(c) Companies Act, S. 156—Shareholder obtaining shares with collateral agreement for commission—Breach or unenforceability of agreement does not interfere with his liability as contributory.

Where a person applies for obtaining certain shares in a company in the expectation of obtaining some commission or special gain, and an arrangement is made in accordance thereto by the promoters of the company and application is granted, the application on allotment becomes a shareholder in praesenti, absolutely, and the breach or the unenforceability of the latter arrangement being a collateral agreement does not in any way interfere with the liability of the person as contributory on liquidation of the company. [P 360 C 2]

S. N. Banerji and *Shiva Prasad Sinha*—for Applicants.

K. N. Katju—for Opposite Party.

Mukerji, J.—This is an application on behalf of the legal representatives of one Lala Raghu Mal to have their names removed from the list of contributories.

This application has been made as the result of our judgment delivered on 14th May 1929. It appears that Lala Raghu Mal subscribed for a number of shares. Later on, on 12th August 1922, he was induced to subscribe for a large number of further shares (Rs. 10,000 ordinary shares at Rs. 10 each and 250 preference shares at Rs. 100 each). On the same day, he made applications for shares and the Managing Agent of the company handed over to him a draft letter, which the company was to send, later on, in confirmation of the arrangement, in view of which Lala Raghu Mal subscribed for the additional shares. On 13th September 1923, the company confirmed the arrangement, by three letters, copies of which are to be found in the affidavit

filed with the petition, under paras. 7 and 8. By virtue of the letters written by the company the representatives of Lala Raghu Mal claimed before us a large sum of money on the ground that the company had committed breaches of contracts and the claimants were entitled to a large amount of damages. We held that the agreements were void, being in contravention of S. 105, Companies Act. The applicants, thereupon, now say that if the agreements, on the basis of which they had claimed, are invalid, such must be the case with the purchase of shares. They, therefore, ask that their names should be removed from the list of contributories.

On behalf of the Official Liquidators two points have been raised. One is that the application is barrsd by time and the second is that on the merits, applicants are not entitled to succeed.

A learned counsel appeared from the Calcutta High Court, together with a counsel of this Court on behalf of the applicants, and we have heard him and the learned counsel for the Official Liquidators. The points to be decided are: (1) whether the application is within time and (2) whether the allotment of shares was illegal, being based on a void contract and whether, therefore, the names of the applicants should be removed from the list of contributories.

On the first point of limitation, the learned counsel for the Official Liquidators argued that the applicant's names were ordered to be brought on the list of contributories so early as on 19th July 1927 and that, therefore, they could not come up to the Court, for removal of their names after the expiry of 30 days of that date, under R. 58 of the rules framed by this Court under the Companies Act. Mr. Banerji, who has appeared on behalf of the applicants, argued that no notice was ever issued to or served on his clients as required by R. 57 of the rules framed by the Court and that, therefore, limitation has not even begun to run against his clients. He further argued that it was always open to the Court to rectify errors in the list of contributories and that this is contemplated by R. 54 itself.

We need not decide whether the Court has got or not, power to rectify the list of contributories at any time. We shall assume that it has got that power. But the question is whether a party has a right to move the Court to rectify an alleged error, if that party has allowed the time given to him by the rules, to make the application, pass by.

The Rr. 54 to 58 of the Company rules framed by this Court, bear on the question. Unfortunately, they are not very clear, though they have been taken mainly from the English rules. The modification made in the English rules has created a certain amount of difficulty. Putting, however, the same construction, as the learned counsel for the applicants wants, it would appear that the Official Liquidator is charged by R. 54 to frame a list of contributories. Having done so, he has to obtain from the Court appointment of a date for settlement of the list. A notice is to be given by the Official Liquidator to each and every person whom he has proposed to bring on the list of contributories, of the date so fixed by the Court. On the date fixed, the Court is to settle the list of contributories; see R. 55. Then, R. 57 says that when the list has been settled, the Official Liquidator is to give a new and fresh notice to every person who has been finally placed on the list of contributories, telling them that if they wanted to have their names removed from the list they must apply within 30 days of the delivery of the notice to them. R. 58 says that no application shall be heard if it is beyond 30 days, unless the Court finds reason to extend the time. The contention of Mr. Banerji is that this second notice required by R. 57 was never issued to his clients and that therefore his clients' application is within time. Dr. Katju's objection to the interpretation put by Mr. Banerji is that the rules, if their interpretation were adopted, would allow two opportunities to the same party to contest the action of the Official Liquidator in placing them on the list. The rules are open to this objection. It may be that the idea was that the procedure, obtaining in England, of allowing the Official Liquidator to finally settle the list of contributories should be modified by letting the company Judge do it with the assistance of the Official Liquidator. After the list has been settled, a notice is to go to all those who have been brought on the list, as finally settled. As a notice is also to be issued before the list is finally settled, each proposed con-

tributory, thus, gets two chances to appear before the Court.

What has happened in this particular case is that the applicants appeared at the first chance, viz., on 7th January 1927. They did not object to their name being entered in the list of contributories. They only asked that the entry in the list, of their names, should be postponed. The application contained several other prayers. It was heard and ultimately decided on 19th July 1927 and the prayer for the postponement of the entry of the names of the applicants in the list of contributories was refused. 19th July 1927, then, is the latest date, on which the applicants' names were, it may be said, ordered to be entered in the list of contributories. The question now is whether the applicants should have had a second notice under R. 57. We do not think that they were entitled to any further notice. They appeared by counsel and their case was heard at length. They never objected to the entry of their names. All they wanted was that there should be postponement in the entry, till a certain date. In the circumstances, we are of opinion, that no issue of further notice, of the order of 19th July 1927, was necessary. This is conclusive against the applicants, unless they may apply for a review of judgment. Mr. Banerji for the applicants has clearly told us, that his application is not one for a review of judgment. S. 202, Companies Act, lays down that rehearings of any order or decisions made or given in the matter of the winding up of a company may be had in the same manner and subject to the same conditions in which they may be had from any order or decision in the same Court in cases within its ordinary jurisdiction. That being the rule, we do not think that we shall be justified in exercising, in favour of the applicants any powers that we may possess, in the shape of inherent jurisdiction to rectify the errors in the list of contributories. The result is, the application is incompetent, being too late.

As we have heard the case on the merits as well, we would like to decide it on the merits also.

The learned counsel for the applicants has taken his stand on the Contract Act, and has argued thus : The applications for shares given on 12th August 1922 were given because Lala Raghu Mal expected that the company would give him certain contracts on which Lala Raghu Mal would make some profits. This Court held that the agreement on the part of the company to give Lala Raghu Mal these contracts and some benefits in the matter of contracts already given to others amounted to an illegal agreement, as contravening the spirit of S. 105, Companies Act, and could not be enforced. As the consideration for subscribing for the shares failed, the contract of taking shares also failed. The names of the applicants are, therefore, on the list of contributories, on the basis of an illegal contract. The names should, therefore, be removed.

On the face of it, the argument looks attractive and plausible, but when closely examined, it will be found to be full of fallacies. The contract of purchase of shares was a completed contract when Lala Raghu Mal signed the applications and the applications were accepted by the company and shares were allotted to Lala Raghu Mal. The consideration for Lala Raghu Mal's applications was the allotment of the shares to him and his eligibility to receive dividends if and when the company declared them. The sale by the company of the shares had for its consideration Lala Raghu Mal's money. Thus, the contract to purchase and sell the shares, in itself, was a perfectly valid contract.

But, it is said, Lala Raghu Mal would never have entered into the contract if he had known that the other contract, into which he was to enter, viz., the contract of supply of goods to the company on certain advantageous terms was likely to be a bad contract in law. This may be so, and is perhaps so, but it cannot be said, that this other contract was a consideration "or object" of the contract to purchase and sell shares. Under S. 23, Contract Act, the "consideration" or "object" of an agreement is lawful unless it is of a kind described in the section. We have already pointed out that the "consideration" or "object" of the contract of purchasing shares had nothing illegal in them. The other contract, as to supply of goods was not a consideration or object of the contract of purchase of shares. It may have supplied the

motive for the purchase of shares, but "motive" is essentially different from both consideration and object. We shall come back to the question of "motive" presently. Let us for the present, find out whether the contract for supply of goods was a consideration or object of the agreement to subscribe for shares. Lala Raghu Mal subscribed for the shares because he thought that by doing so, he would be able to induce the company to give him a contract for selling goods to it on advantageous terms. It is certainly not the case that Lala Raghu Mal was to sign the applications for the shares only after he had got the contracts. This had to be conceded clearly by Mr. Banerji, who admitted that he could not argue that the giving of the contract for supply of goods was a "condition precedent"—to borrow an English expression to—the subscription for the shares. The contract for supply of goods was to be given from time to time and this period, during which contracts were to be given, was likely to last for several years. It was agreed that if the tramway was laid from Rajpur to Mussoorie hills, even in that case, Lala Raghu Mal would have a right to supply the necessary goods. From no point of view whatsoever can it be said that Lala Raghu Mal agreed to subscribe for the shares only if he, beforehand, got the contracts and the benefits which he hoped to get from the contracts. Thus the contract for the supply of goods was neither an object nor a consideration for the contract to purchase the shares. The utmost that can be said, therefore, is that the agreement for the supply of goods constituted a "motive" or perhaps "the motive" for Lala Raghu Mal's purchasing the additional shares worth one lakh and 25 thousand rupees.

"Motive" however, can never be enquired into in considering the validity or otherwise of a contract. The word "motive" does not find a place in the Contract Act. In England, it has been held that motive is no consideration for a contract. Anson in his "Law of Contract" (Edn. 16, 1923) at p. 102 deals with the subject. He quotes the case of *Thomas* v. *Thomas* (1), and points out that it was held that the desire on the part of the executors to carry out the wishes of the deceased would not amount to a consideration. Then he quotes the following from a judgment :

> "Motive is not the same thing as consideration. Consideration means something of value in the eye of law moving from the plaintiff."

It seems clear to us that whatever might have been the subject in view (motive) of Lala Raghu Mal in subscribing for the shares, it was a matter entirely for him and had nothing to do with the legal aspects of the otherwise perfectly valid contracts of purchase of shares. In view of the Indian law, therefore, the applicants are not entitled to succeed.

The case has been considered in view of the English law and English precedents and there is an abundant authority to show that in the circumstances of this case the applicants are not entitled to succeed.

In the language of the English Law, the agreement between Lala Raghu Mal and the company that the latter shall place orders for certain goods with the former and would give him certain commissions on orders already placed elsewhere was only a "collateral agraement" and did not constitute a "condition precedent" to Lala Raghu Mal subscribing for the shares. This, we think is perfectly plain. We have already stated that Mr. Banerji, the learned counsel for the applicants had to concede that the agreement for supply of goods was not a condition precedent to the contract for purchasing shares. The two agreements, therefore, were collateral to each other and one did not constitute the consideration or object (to quote again words of the Indian Act) of the other.

Coming to authorities, we shall quote only three, but before we do so, we may mention that the text-book writers all take the same view. Palmer in his Company Law (Edn. 12, 1894) at p. 115 puts the law in the following language :

> "A distinction of a very material kind exists between an application with a condition precedent annexed, and an application with a collateral agreement or condition subsequent. In the latter case, the applicant on allotment becomes a shareholder in praesenti absolutely, with only a right to enforce (if valid) the collateral agreement or condition subsequent against the company."

He quotes several cases, two of which we propose to examine. Buckley in his

(1) [1877] 2 Q. B. 358.

"Company Acts" (Edn. 10, 1924) at p. 60 says :

"If the condition be not precedent, but collateral or subsequent, and the contract be executed by allotment, notice and registration, the allottee is bound."

Out of the cases, on which these statements of law, in the text-books are based, we propose to examine three. One is *In re, Richmond Hill Hotel Co., Elkington's* case (2). In this case, the shares of a certain Hotel were for sale. Messrs Elkington were manufacturers of plates and cutlery. One of the promoters of company agreed and the agreement was subsequently confirmed by the company, that Messrs Elkington were to subscribe for 150 shares of £10 each on payment of only 510 per share, that they were to have a right to supply plates and cutlery to the value of £3,000 and that until all the goods which they agreed to supply had been supplied, and until they had received full payments in cash, they would not be called upon to pay any further calls. Messrs Elkington paid £2 to the share, but received no orders and the company went into liquidation. The question arose whether the Elkingtons could be placed on the list of contributories. Vice-Chancellor Wood V. C. held that they must not be put on the list of contributories The decision was reversed and their liability was held established. The learned Lord Chief Justice who decided the case pointed out that Messrs. Elkington agreed to become members and shareholders in praesenti with a collateral agreement as to what should be the effect of their so becoming shareholders. He pointed out that Messrs. Elkington were already on the list of shareholders, they were in a position to sell the shares, they would have got the dividends, if any had been declared, and were thus for all purposes de facto shareholders of the company. The agreement that certain goods were to be purchased was held to be a collateral agreement. In the case before us, Lala Raghu Mal became a shareholder as early as 12th August 1922, and possessed all the rights and privileges of shareholders. Indeed, till the year 1929 he and after him, his legal representatives professed to enforce all the rights that be acquired by virtue of being shareholders. In the claim made against the company (disallowed by us) they asserted the fact that they had become shareholders in view of the collateral advantages they were to get. It is too late in the day to say that they were never shareholders and their names should not have found a place in the list of members.

In the case of "*In re General Provident Assurance Co., Bridger's* case," the person who objected to be brought on the list of contributories was one of the local agents of the company ordered to be wound up and his business was to convass for shares. In order to be able better to induce persons to take shares in the company, he himself took some shares, it being agreed that he would not pay for the shares except in a particular way, namely, out of the commission to be earned by him. Their Lordships affirming the decision of the Vice-Chancellor, said (at p. 308.):

"Bridger was to become a shareholder in praesenti in order that the world might see him a shareholder and that he might go about saying that he was one. His application for shares was made in the usual form undertaking to accept the shares applied for . . . . . and authorize the directors to enter his name on the register for the number of sharee so allotted . . . . . There may have been an agreement that his calls were to be paid only in a particular way, but he agreed to be a shareholder in praesenti and cannot be heard to say that he was not a shareholder because he had entered into that collateral agreement."

In the case just cited, while the motive of Bridger was that he would be able to induce people all the better, by himself becoming a member of the company, and, incidentally thereby would be able to earn more commission for himself. In the case before us, the motive of Lala Raghu Mal was to be able to earn more profits by the agreement to have the monopoly of supplying goods to the company. The fact that it was agreed that the subscription should be paid either by deductions out of moneys payable to Lala Raghu Mal for goods supplied or in cash was entirely a collateral agreement. If that agreement failed, it did not mean that the factor of Lala Raghu Mal's becoming a shareholder disappeared and his liability to contract ceased.

The third case which we would consider is *In re, Paraguassu Steam Tram*

(2) [1867] 2 Ch. A. 511=36 L. J. Ch. 593=15 W. R. 665=16 L. T. 301.

Road Co., v. *Black & Co's* case (3). The facts as given in the head-note is as follows:

"A contractor agreed with a company to supply them with steam engines at a fixed price and to take shares in the company, payment of the calls on which should not be enforced until at least two engines should have been paid for and the contractor might set off against the calls the money due to him. The contractor took shares accordingly and made two engines for the company, which were not taken by the company or paid for. The company was afterwards ordered to be wound up by the Court and a call was made by the liquidator."

The contractor's liability was upheld. The case mainly turned on the question whether the contractor could set off against his liability the money that he was entitled to claim against the company. The case is only incidentally an authority on the question before us. Lord Shelbourne L. C. said at p. 258:

"I should have thought, until I heard this argument, that it was much too late for any one to suggest that in a question with creditors, a registered shareholder could possibly be taken off the list on the ground of anything contained in such an important agreement as that of 20th October. That is not the contract between himself and the company under which he is constituted a shareholder, but it is the collateral and preliminary contract, though no doubt made in the expectation of his becoming a shareholder in consequence of the arrangement then made."

His Lordship's words are clearly applicable to the facts of the present case. The contract by which Lala Raghu Mal became a shareholder was not the agreement consituted by the three letters of 13th September 1922, but by his applications of 12th August 1922 which were subsequently accepted by the company and on receipt of which shares were allotted to him. That is the contract which is to be now enforced against Lala Rahu Mal's legal representatives. The fact that the contract was entered into "in the expectation of" (to quote Lord Shelbourne's language):

"some ulterior gain, would not affect the contract itself, which is in every way a valid one. Lord Shelbourne further pointed out that it was settled law that although a contract might be avoided before the winding up proceeding started, it could not be avoided after the winding up order." (p. 259 of the report).

We need not multiply authorities, but it seems to us to be settled law that the contract to take shares cannot be vitiated because a collateral contract happens to be unenforceable by law.

(3) [1870] 8 Ch. 254=42 L. J. Ch. 404=28 L. T. 50=21 W. R. 249.

In the result, the applicants' prayer must be rejected and it is hereby rejected. They must pay the Official Liquidator's costs which should be assessed as if the present application were a miscellaneous application under the ordinary jurisdiction of the High Court, the valuation being Rs. 1,25,000 and interest at nine per cent per annum. A week to certify the fee.

V.B./R.K. *Application dismissed.*

A. I. R. 1930 Allahabad 362

MUKERJI AND BENNET, JJ.

Kauleshar Rai—Defendant—Appellant.

v.

Banwari Rai and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 662 of 1928, Decided on 11th January 1930, from judgment of Ashworth, J., D./ 26th January 1928.

Hindu Law—Joint family — Suit for declaration of share and possession of share in alternative from family property treating it as separate—If Court finds that property is joint, Court should give declaration of jointness without specifying shares.

In a joint family no coparcener can say that he has a specific share in the property. His share is liable to fluctuate and consequently if one of the coparceners brings a suit against others for declaration of his share and possession of the same in the alternative, on the allegation that the coparceners in possession treated the property as their separate property and if the Court finds that the property is joint family property, and there is no indication in the plaint that the plaintiff wanted to come out of the family and to separate his status the declaration should be confined to the jointness of the property without specifying shares. [P 363 C 1]

Haribans Sahai—for Appellant.

Ambika Parsad—for Respondents.

Mukerji, J.—The one point seriously pressed before us in this case is that the decree of the Courts below should have been one without specification of the plaintiff's share in the property. The other points have no force.

It appears that the plaintiff Banwari Rai and the defendants Nageshar Rai and Kauleshar Rai come from the same family, being the descendants of one Ramphal Rai. The plaintiff alleged in the plaint that a certain property detailed at the bottom of the plaint was the joint family property of the parties

(among others), but that the defendants treated the same as their separate property. He asked for a declaration that in the aforesaid property his share was one-half. In the alternative he asked for possession over his half-share.

The Courts below, that is to say, the Court of first instance and the lower appellate Court, found that the plaintiff was still joint with the defendants, although the plaintiff was living and having his food separately from the defendants. A learned single Judge of this Court dismissed the appeal by the defendants.

In the Letters Patent appeal it is contended that if the family be joint, the declaration should have been confined to the fact of the jointness of the property and the plaintiff's share in the property should not have been specified.

There can be no doubt that this contention is correct. This point was never taken up by the defendants till the second appeal was filed. If the point had been taken at an earlier stage we are sure the Courts below, namely the trial Court and the lower appellate Court, would have given effect to it.

In a joint family no coparcener can say that he has a specific share in the property. His share is liable to fluctuate from time to time. As there is no indication in the plaint that the plaintiff wanted to come out of the family and to separate his status, his prayer for a declaration that his share is one-half in the property should not have been granted.

In the result, we allow the appeal in part, modify the decrees of the Courts below by confining the declaration in the plaintiff's favour to this that the property in suit is joint family property belonging to the plaintiff and the defendants. As the point was never taken till the matter came up before the High Court, we direct that the parties shall pay their own costs at both the hearings in this Court.

V.B./R.K. *Appeal partly allowed.*

A. I. R 1930 Allahabad 363

SULAIMAN AND KENDALL, JJ.

Dhanukdhari Singh and *another* — Defendants—Appellants.

v.

Suresh Singh and *another* — Plaintiff and Defendant—Respondents.

Second Appeal No. 2061 of 1927, Decided on 14th December 1929, from a decree of Dist. Judge, Azamgarh, D/- 24th August 1927.

(a) Agra Pre-emption Act (11 of 1922)—When Court can decree claim on payment of market value laid down.

Although a pre-emptor may fail to produce direct oral or documentary evidence to establish conclusively that any part of the sale consideration, paid before the Sub-Registrar, was subsequently returned, yet it is open to him to rely on circumstantial evidence; and if he can convince the Court on the basis of such evidence that the consideration shown to have been paid was not, in fact, the true consideration, the Court may proceed to enquire into the market value. The fact that the whole consideration was paid before the Sub-Registrar and no part of it is positively proved to have been returned is a strong circumstance in favour of the vendee and, unless the Court does in spite of that circumstance believe that the whole of it did not represent the true and real consideration, it would not be open to the Court to decree the claim on the payment of the market value. [P 364 C 2, P 365 C 1]

(b) Civil P. C. S. 100 —Question of fact —Market value.

The finding as to the market value is a finding of fact. [P 365 C 1]

Mukhtar Ahmad—for Appellants.

K. Verma—for Respondents.

Sulaiman, J. — This is a defendants' appeal arising out of a suit for pre-emtion. The only point raised relates to the question of consideration.

In spite of the fact that the true interpretation of S. 17, Agra Pre-emption Act, was explained by Lindsay, J., in *Abdul Ghafoor* v. *Kamaluddin* (1) numerous second appeals are being filed only on the question of consideration, challenging the findings of the lower appellate Courts on the sole ground that the question has not been approached in the proper way. It cannot be denied that, in some cases, the language used by the Courts did indicate that the procedure laid down in S. 17 was not followed strictly. We, therefore, think it necessary to restate various stages in the enquiry as to the sale consideration which has been laid down by the legislature.

(1) A. I. R. 1927 All. 441=49 All. 689.

In the first place, it is the duty of the Court to assume in favour of the vendee that the price mentioned in the sale deed and acknowledged by the vendor to have been paid to him was the correct price It is obvious that, there is an initial presumption in favour of the correctness of such a recital or acknowledgment.

But it is open to the plaintiff either to show circumstances antecedent to or surrounding the sale transaction or lead some prima facie evidence that, having regard to the prevailing rates or other circumstances, the price alleged to have been paid was unreasonably high, which might show that the ostensible price entered in the sale deed was probably inflated and not the actual price settled. If this is shown by the pre-emptor, the initial burden, which lay on him, would then be shifted on to the vendee.

After the burden of evidence has been thus shifted, the onus lies on the vendee to prove to the satisfaction of the Court the actual price which was settled and paid. The vendee may give conclusive evidence to prove that the whole of the price entered in the deed was actually paid, or his evidence may be sufficient to prove the passing of consideration to a smaller extent. If, on a consideration of the evidence of both the parties, the Court can come to a definite conclusion as to the actual amount of the sale consideration, whether that amount be more than what the plaintiff admits or less than the ostensible price entered in the deed, it is the duty of the Court to decree the claim for the amount which it finds was in fact the actual consideration.

But if, after the consideration of all the evidence, the Court is unable to make up its mind and come to a definite conclusion as to the exact sale price, but is at the same time on reasonable grounds satisfied that the ostensible price was not the actual price, then the only course open to the Court is to proceed to ascertain the market value of the property and decree the claim on the payment of such amount.

In the present case the plaintiff alleged in the plaint that the price entered in the deed was abnormally high and inflated, and that a portion of the consideration was actually returned by the vendor to the vendees. He asserted that, in spite of Rs. 300 which was mentioned in the sale deed the property was really sold for Rs. 75 only. The defendants pleaded that the sum of Rs. 300 was the real consideration, and the whole of it was paid before the Sub-Registrar. The plaintiff led oral evidence to show that a portion of the amount paid before the Sub-Registrar was returned by the vendor to the vendee after the registration, and he also led evidence to show that Rs. 300 would be an unreasonably high price for the property.

The learned Munsif came to a definite finding:

> "that Rs. 300 was paid by the defendant vendees to the defendant vendor and nothing out of it was paid back to the vendees and as such the real sale consideration is Rs. 300."

In view of this categorical finding, he was perfectly justified in not going into the market value of the property.

The lower appellate Court, presumably in view of the evidence led by the plaintiff, assumed that the burden had shifted on to the defendants to prove the actual consideration. It agreed with the first Court that the return of any portion of the money after the registration of the sale deed was not proved; but it did not suggest any reasons or record any finding that, having regard to all the circumstances of the case, he was satisfied that Rs. 300, although shown before the Sub-Registrar, was not the real price. Without any such expression of opinion, it at once proceeded to enquire into the market value. We think that this procedure was erroneous.

Although a pre-emptor may fail to produce direct oral or documentary evidence to establish conclusively that any part of the sale consideration, paid before the Sub-Registrar, was subsequently returned, yet it is open to him to rely on circumstantial evidence; and if he can convince the Court on the basis of such evidence that the consideration shown to have been paid was not, in fact, the true consideration, the Court may proceed to enquire into the market value. The fact that the whole consideration was paid before the Sub-Registrar and no part of it is positively proved to have been returned is a strong circumstance in favour of the vendee and, unless the Court does in spite of that circumstance believe that the whole of it did not represent the true and real

consideration, it would not be open to the Court to decree the claim on the payment of the market value.

The finding as to the market value is undoubtedly a finding of fact ; but before we can decree the suit on its basis we must have a clear finding by the lower appellate Court on the following issue :

"Whether, although no part of the amount paid before the Sub-Registrar is proved to have been returned, the amount so paid did not, having regard to all the circumstances of this case, represent the actual price settled?"

No further evidence shall be admitted, and the finding should be returned within two months. The usual ten days will be allowed to the parties to file objections to the finding returned.

V.B./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 365 (1)

MUKERJI AND BENNET, JJ.

Basant Lal and *others* — Plaintiffs — Appellants.

v.

Bhagwati Prasad and *others* — Defendants—Respondents.

First Appeal No. 29 of 1929, Decided on 18th December 1929, from an order of Addl. Sub-Judge, Allahabad, D/- 24th November 1928.

(a) Agra Tenancy Act (3 of 1926), S. 37— Suit for partition of grove holding between tenants - Suit lies in revenue Court.

Partition of a grove holding between the tenants of the holding is a matter for revenue Court and no such suit lies to civil Court, nor can a relief to that effect be granted by civil Courts. [P 365 C 2]

(b) Agra Tenancy Act (2 of 1901), S. 99— Damages for dispossession from holding — Suit lies or relief can be claimed in civil Court if cause of action arose before Act 3 of 1926.

A suit for relief for damages for dispossession from a holding lies in the civil Court if the cause of action arose before Act 3 of 1926 came into force but not otherwise: *A. I. R.* 1930 *All.* 158, *Foll.* [P 365 C 2]

Haribans Sahai—for Appellants.

S. D. Sinha—for Respondents.

Bennet, J —This is a first appeal from order brought by the plaintiffs against an order of the lower appellate Court returning their plaint for presentation to the proper Court. The plaintiffs brought a suit for partition of a grove holding between them and the defendant alleging that each party was in possession of a share. Further, the plaintiffs alleged that in April 1926 the defendants did not allow the plaintiffs to remove the fruits and wood of the grove and put the plaintiffs to a loss of Rs. 80 and the plaintiffs claimed Rs. 80 damages which was allowed by the Court of first instance. No objection as to jurisdiction was taken in the trial Court, but the question was raised in the Court of first appeal that the suit should have been brought in a revenue Court. S. 37, Agra Tenancy Act (3 of 1926), provides for a suit for division of tenancies. Accordingly we agree with the lower appellate Court that the relief of partition of this grove is a matter for the revenue Court.

But in regard to the relief for damages, the cause of action is alleged to have arisen in April 1926, i. e. before Act 3 of 1926 came into force, which was on 7th September 1926. It has been held in *Abdul Hakim* v. *Mukarram Ali* (1) that a suit lies in the civil Courts for damages for dispossession if the cause of action arose before Act 3 of 1926 came into force. Sufficient provision is now made under S. 99 of that Act for damages for dispossession and accordingly a suit would not lie in a civil Court in that case. But in the present case the suit does lie in the civil Court.

Accordingly, we allow this appeal to this extent that we return the record to the lower appellate Court with directions to admit it and to dispose of the appeal in regard to the decree granted by the Munsiff for damages to the extent of Rs. 80. We also direct the lower appellate Court to allow the appeal of the defendant in regard to the relief of partition granted by the Court of first instance, as that relief cannot be granted by a civil Court for want of jurisdiction. Costs in this Court will be proportionate to the success and failure of the parties. The costs of the Court below will be in its discretion.

V.B./R.K. *Order accordingly.*

(1) A. I R. 1930 All. 158.

A. I. R. 1930 Allahabad 365 (2)

SEN AND NIAMATULLAH, JJ.

Munir Khan—Plaintiff—Appellant.

v.

Municipal Board, Allahabad—Defendant—Respondent.

Second Appeal No. 256 of 1927, Decided on 18th December 1929.

(a) U. P. Municipalities Act (1916), S. 326 (1)—Words 'cause of action" sufficiently cover cases involving infraction of absolute right or right arising out of contract.

The words "cause of action" are of sufficient ampiitude to cover cases involving the infraction of an absolute right or of a right arising out of a contract and also of a right to compensation flowing from tort. The words "the amount of compensation claimed" do not narrow down the denotation of either "the cause of action', or "the nature of the relief sought" to mere suits for damages founded upon tort and evidently mean no more than this that where the plaintiff sues for damages he must specify the amount of compensation. [P 367 C 2]

(b) U. P. Municipalities Act (1916), S. 326 (3)—Conservancy contractor agreeing to remove rubbish from municipal area—Contract terminating on 31st March 1924—Registered notice for claim of Rs. 446 sent to Municipal Board on 25th July 1925—Suit to recover amount instituted on 15th January 1926—Suit held barred by limitation.

A conservanoy contractor under an agreement with the municipal Board of Allahabad agreed to remove rubbish from certain parts within municipal area on a monthly remuneration of Rs. 325. The contract terminated on 31st March 1924. The contractor alleged that the Municipal Board unlawfully and in violation of the agreement withheld the payment of Rs. 446 A registered notice was sent on 27th July 1925, and the present suit to recover the amount of Rs. 446 was instituted on 15th January 1926 against the Municipal Board.

Held : that the deductions made by the Municipal Board month after month amounted to a refusal to pay the amounts so deducted and that each of these occasions afforded the contractor a separate cause of action. Ex facie the suit was governed by S. 326 and was barred by time. [P 367 C 2]

U. S. Bajpai—for Appellant.

K. N. Katju—for Respondent.

Sen, J.—This is an appeal by the plaintiff from the decree of the Additional Subordinate Judge of Allahabad, dated 8th November 1926, reversing the decree passed by the Munsiff, West, Allahabad, dated 31st May 1926. Plaintiff was a conservancy contractor under a written agreement, dated 9th May 1923, between the plaintiff and the Municipal Board of Allahabad. Under this instrument the plaintiff agreed to remove rubbish from certain parts within the municipal area and deposit the same in the trenching ground. The contract commenced on 1st May 1923, and terminated on 31st March 1924. Para. 3 of the agreement provided as follows :

"The Board hereby covenants to pay the said contractor the sum of Rs. 325 only per month for the supply of thirteen animals and eleven carts and drivers every night for the work of collecting all night soil accumulating within the area of ward Five, West of Railway line, removing the same to such place or places as the Chairman, Public Health of the Board, shall appoint and such payment shall not be liable to any diminution or enhancement by reason of any variation in the number of animals, carts and drivers employed or in the amount of work required to be done by the contractor."

The plaintiff alleged that he performed his part of the contract but that the defendant unlawfully and in violation of the terms of the agreement withheld the payment of Rs. 446. The plaintiff sent a registered notice on 27th July 1925. Reply was received by a letter dated 6th October 1925, that the account was being checked and that a final reply would be given within fifteen days. A post card was received dated 17th August 1925, that the notice sent by the plaintiff had been received and was under consideration.

The suit which has given rise to this appeal was instituted on 15th January 1926, for recovery of Rs. 446 being the total of the amount withheld by the defendant month after month from the stipulated amount of Rs. 325 payable to the plaintiff under the contract. Rs. 93 was claimed as interest by way of compensation at the rate of rupee one per cent per mensem.

The Municipal Board contested the suit on the ground that the notice given by the plaintiff was not in due form, that the plaintiff had not performed the contract by the full number of cattle, that the work itself had not been completely performed, that the Municipal Board was justified in cutting down the amount of remuneration which had been originally agreed upon, that the plaintiff was not entitled to any interest and that the claim was time barred.

The Court of first instance repelled the plea as to the legality of the notice as also the plea as to limitation. It held however that :

"the plaintiff has certainly been wanting in his duty and has been negligent in not seeing that each cart reached the trenching ground."

Curiously enough the Court fined the plaintiff Rs. 100 for shortage of work

and granted a decree for Rs. 327 with proportionate costs.

The lower appellate Court reversed the decree of the trial Court on the ground of limitation and dismissed the plaintiff s suit.

The point which emerges for trial is one of limitation and is founded upon the construction of S. 326, United Provinces Municipalities Act (Act 2 of 1916).

The statute in question is a self-contained Act and provides for a special period of limitation for suits against the Municipal Board or against a a member, officer or servant of the Municipal Roard in respect of an act done or purporting to have been done in its or his official capacity.

Clause (1), S. 326, insists upon the giving of a notice in writing as a condition precedent to the institution of a suit. Where the suit is sought to be directed against the Municipal Board or against its member, officer or servant in respect of an act done or purporting to have been done under the colour of office the rule as to notice is inexorable and is not to be departed from in view of the subject.matter in dispute or the nature of the relief claimed.

Clause (3) which prescribes a special period of limitation runs as follows :

"No action such as is described in sub-Cl. (1) shall unless it is an action for the recovery of immovable property or for a declaration of title thereto be commenced otherwiee than within six months next after the accrual of the cause of action."

A plaintiff agrieved by an act of the Municipal Board or of its member, officer or servant is bound to institute a suit within six months next after the accrual of the cause of action in all suits referred to in Cl. (1) excepting where the claim is for the recovery of immovable property or for a declaration of title thereto.

The plaintiff contends that the scope of Cl. (1) is confined to suits for compensation for wrongful acts on the part of the Municipal Board or of its member, officer or servant and that the words 'act done,' should be construed as wrongful or tortious act sounding in damages. An examination of the language of Cl. 1 does not lend itself to the interpretation which is sought to be put upon it. The clause provides that the notice must explicitly state the cause of action, the nature of the relief sought and the amount of compensation claimed. The scope of the suits has not been confined to suits for damages founded upon tort. No limi ation has been put either as to the nature of the cause of action or as to the nature of the relief claimed. Cl. (4) clearly indicate that the relief claimed under Cl. (1) may be one for an injunction. The only suits which for purposes of limitation have been excepted from the broad scope of suits referred to in Cl. (1) are suits for recovery of immovable property or for a declaration of title thereto. The words "cause of action,' are of sufficient amplitude to cover cases involving the infraction of an absolute right or of a right arising out of a contract and also of a right to compensation flowing from tort. The words "amount of compensation claimed" do not narrow down the denotation of either "the cause of action or "the nature of the relief sought" to mere suits for damages founded upon tort and evidently mean no more than this that where the plaintiff sues for damages he must specify the amount of compensation.

The claim of the plaintiff in substance was based upon a breach of contract on the part of the Municipal Board through its Health Officer. That officer instead of paying the entire remuneration as had been agreed upon under the written contract, dated 9th May 1923, cut down the monthly remuneration by certain sums. The plaintiff's cause of action therefore arose every month when the payment fell due and deductions were wrongfully made out of the sum then due. The contract spent its force on 31st March 1924. The plaint does not say so but presumhbly the last payment was withheld sometime about April 1924. The suit was not instituted till 15th January 1926when more than six months had expired from the date of each deduction. We are of opinion that the deductions made by the Municipal Board month after month amounted to a refusal to pay the amounts so deducted and that each of these occasions afforded the plaintiff a separate cause of action. Ex facie the suit is governed by S. 326, United Provinces Municipalities Act and is barred by time.

Our attention was drawn to a document and it was contended that this amounted to an acknowledgment of

liability in writing and extended the period of limitation. We have examined this document and are of opinion that the Municipal Board has carefully guarded itself against making any acknowledment of claim. The result is that the appeal fails and is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 368

KENDALL AND NIAMATULLAH, JJ.

Jagan Nath and *another* — Defendants—Appellants.

v.

Kunwar Girwar Singh—Plaintiff—Respondent.

Second Appeal No. 546 of 1927, Decided on 3rd January 1930 from a decree of Addl. Sub-Judge, Muttra, D/- 10th February 1927.

Limitation Act, S. 19, Expl. 1—Identification of liability possible by independent evidence—Acknowledgment is good acknowledgment.

If the acknowledgment of the liability is capable of being identified with the liability sought to be enforced in the suit by adducing independent evidence, the acknowledgment should be regarded as a good acknowledgment for the purpose of saving limitation.

[P 369 C 1]

Shiva Prasad Sinha, *S. C. Das* and *K. C. Mital*—for Appellants.

Panna Lal—for Respondent.

Niamatullah, J. — This is a defendant's appeal arising out of a suit brought by the plaintiff-respondent for recovery of Rs. 1,841-12-0 being principal and interest alleged to be due under a promissory note dated 5th August 1925 admittedly executed by the defendant-appellant for Rs. 1,680. The plaintiff's case as set forth in the plaint was that the defendant had borrowed Rs. 1,680 in cash on the date he executed the promissory note in suit. In defence it was pleaded that no cash advance had been made on 5th August 1925, that the defendant had executed a ruqqa on 6th August 1922, and that the promissory note in suit related to what was due under the previous ruqqa after relinquishment of Rs. 29 by the plaintiff. It should be mentioned that the promissory note dated 5th August 1925 on which the suit was founded bore a stamp of one anna only. It should have borne stamp of two annas. It was pleaded by the defendant that the promissory note in suit was not admissible in evidence for want of proper stamp duty. This plea was unanswerable, and its force was recognized both by the trial Court and by the plaintiff in the initial stages of the suit. The plaintiff was, however, allowed to establish his right to recover the sum claimed by him by proving the existence of the debt by other evidence, the promissory note being altogether excluded from consideration. The promissory note in suit was accompanied by a receipt simultaneously executed by the defendant. It recites that

"the executant has executed a ruqqa or promissory note in lieu of Rs. 1680, duly received by him for which this receipt is executed."

The Court of first instance dismissed the plaintiff's suit, holding that the promissory note in suit was not admissible in evidence and that the plaintiff failed to establish his right to recover the sum claimed by other evidence. The lower appellate Court took a contrary view and decreed the plaintiff's suit, holding that on a consideration of all the circumstances of the case, including the defe ant's written statement, the promissory note in suit was really a renewal of the old debt of 1922, and that the suit may well be considered to be one for enforcement of liability under the latter. As regards the question of limitation it held that the receipt dated 5th August 1925 furnished an acknowledgment within the meaning of S. 19, Lim. Act, and made the suit which is within three years, from the date of the receipt within limitation. The plaintiff's suit was accordingly decreed. The defendant has preferred the present second appeal.

The learned advocate for the appellants has contended that there i nothing in the receipt to indicate that the previous debt due under the promissory note of 1922 was acknowledged by the receipt of 5th August 1925 and that therefore it cannot be construed as an acknowledgment within the meaning of S. 19, Lim. Act. We are unable to give effect to this contention. The receipt does not state whether the sum of Rs. 1,680 acknowledged thereunder was advanced in cash on its date or was due under the earlier loan transaction. It is consistent with either of the two alternatives. The defendant insisted in

para. 2 of his written statement on the promissory note and the receipt dated 5th August 1925 evidencing not a cash advance but money due under the earlier loan transaction. The lower appellate Court has found as a fact that the defendant's story is the correct one, and rejected the plaintiff's version that cash had been lent on 5th August 1925. It is not argued before us that the learned Subordinate Judge was not justified in allowing the plaintiff to succeed on foot of the promissory note dated 6th August 1922. The only argument with which we are concerned is whether receipt dated 5th August 1925 is a sufficient acknowledgment to save limitation, assuming that the plaintiff's claim is based on the promissory note dated 6th August 1922, as to which no flaw is suggested. Explanation 1 S. 19, Lim. Act, provides that

" for the purpose of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the. . . . . right "

alleged to have been acknowledged. In other words if the acknowledgment of the liability is capable of being identified with the liability sought to be enforced in the suit by adducing independent evidence, the acknowledgment should be regarded as a good acknowledgment for the purpose of saving limitation. In the case before us the contents of the receipt have been admitted by the defendant appellant himself to refer to the money due under the earlier promissory note dated 6th August 1922. It follows that the liability acknowledged by the receipt to which the defendant was subject on its date was the liability enforceable under the promissory note dated 6th August 1922. For these reasons we think that the lower appellate Court was justified in decreeing the plaintiff's claim on foot of the promissory note dated 6th August 1922. In this view the appeal must fail and is accordingly dismissed with costs.

V B /R.K. *Appeal dismissed.*

1930 A/47 & 48

A. I. R. 1930 Allahabad 369

BOYS AND YOUNG, JJ.

Raghunath Das and *others*—Defendants—Appellants.

v.

Shah Durga Prasad—Plaintiff—Respondent.

Second Appeal No. 168 of 1927, Decided on 12th December 1929, from decree of Sub-Judge, Agra, D/- 21st October 1926.

(a) U. P. Land Revenue Act, S. 44—How much evidence to rebut presumption raised by S. 44 is necessary is question depending upon each particular case.

In every case it must be a question for consideration in that case as to how much and what evidence is necessary before the plaintiff can be considered to have prima facie deprived the revenue record of such value as it may have in raising an inference that the defendants are entitled to the rights which are recorded in their favour. [P 370 C 2]

(b) Civil P. C., O. 22, R. 4—Suit for declaration of title—One of defendants dying—Suit abates against him only.

In a suit for declaration of title where one of the defendants dies and his legal representatives are not brought on record, the suit abates against the deceased defendant and not against all : *A. I. R.* 1928 *All.* 172 (*F.B.*), *Dist.* [P 371 C 2]

P. L. Banerji—for Appellants.

N. P. Asthana—for Respondent.

Boys, J.—This is an appeal by all the defendants in the original suit except the heirs of defendant 4. The plaintiff sued for a declaration that he was the absolute owner of certain property, and further for a declaration that the defendants had no rights at all in the property, though it happened that their names were fictitiously entered in the revenue papers. The case involves one of those difficult questions, which so often arise where there are a number of defendants and plaintiffs and one or other of them has died during the pendency of the suit and the heirs have not been brought on the record.

In the present case defendant 4 died during the pendency of the suit, and for the purpose of facilitating the decision of the cross-objections, which have been taken in the present appeal we may state immediately what occurred after the death of defendant 4. Upon learning of the death of defendant 4, the plaintiff applied to have his heirs brought upon the record, but he did not make his application until a period of

more than three months had elapsed. One of the heirs of defendant 4 was a minor and notice (so we are informed by the respondent here who files the cross-objections) was issued to the heirs of defendant 4 to show cause why one of the heirs should not be appointed guardian of the minor heir. The heirs of defendant 4 did not appear in response to this notice. But it is admitted for the respondent-plaintiff here that no notice was issued to the heirs of defendant 4 to show cause why they should not be brought on the record. There was, therefore, nothing to arouse seriously the attention of the heirs. Subsequently summonses in the suit were issued to these heirs to appear at the settlement of issues. Then they filed a written statement objecting that the application to bring them on the record had been made after the expiry of three months and that no justification was shown for that delay. The trial Court and the lower appellate Court have both accepted this objection, and it forms the basis of the cross-objections filed in the present appeal. We may say at once that the contention of the plaintiff that the heirs of defendant 4 were properly brought on the record, is on the facts that we have stated, untenable, and we, therefore proceed to the consideration of the appeal of the defendants.

The facts are that in the revenue records all the defendants in the present suit including defendant 4 appear as mortgagees in possession. The plaintiff claimed to be the absolute owner, and that the defendants had no right at all and that the entry of their names was "fictitious." In this state of affairs the defendants or some of them on behalf of all of them brought a suit for profits in the revenue Court, on the basis of the entry of their names, and obtained a decree. This fact is stated to us by the counsel for the defendant-appellants and is not controverted by the other side. The situation then was that the defendants could on the basis of the entry of their names on the record proceed to bring a suit every three years for profits, if the plaintiff refused to hand them over. Plaintiff, therefore, came into Court with the present suit. The defendants' answer was that they and their ancestors had been in continuous possession as mortgagees for more than sixty years, and on this basis they asked for the dismissal of the suit.

The trial Court held that the defendants as mortgagees had been receiving profits and on this finding dismissed the whole suit. It further held that in any event the suit abated against the legal representatives of defendant 4 for the reasons we have stated at the outset.

On the plaintiff's appeal the lower appellate Court held that the defendants were not mortgagees and that they had not been receiving profits, and it decreed the suit of the plaintiff against all the defendants, except the heirs of defendant 4. The defendants, with the exception of course of the heirs of defendant 4, appealed and two points have been strongly urged before us by Mr. Ambika Prasad Dube on behalf of the appellants. It is first contended that burden of proof was wrongly thrown upon the defendants by the lower appellate Court. This contention is based on S. 44, Revenue Act. Mr. Ambika Prasad Dube contends that the burden of proof was on the plaintiff in the first place to establish his contention that the defendants were not mortgagees and had not been receiving profits. Whether or no this contention would be sound as a general proposition it is not necessary for us to determine, for in every case it must be a question for consideration in that case as to how much and what evidence is necessary before the plaintiff can be considered to have prima facie deprived the revenue record of such value as it may have in raising an inference that the defendants are entitled to the rights which are recorded in their favour. The present case is not one where the Court has said :

"I do not call upon the plaintiff to prove anything at all. It is for the defendant to establish his rights."

The plaintiff admittedly put three witnesses into the witness-box and denied that the plaintiff was in possession, had any rights or had been receiving any profits at all, other of course than those which he had succeeded in obtaining from the revenue Court, on the basis of the entry of his name which has now been challenged. It is difficult to see what more could be expected of the plaintiff before the defendants were called upon to give proof in support of their own con-

tention. In this respect we agree with the lower appellate Court.

The next contention is that the suit should be held to have abated not only against the heirs of defendant 4 but against all the defendants. In support of this contention we are referred to the Full Bench decision in *Fakira* v. *Hardeva* (1). In our view that case is entirely distinguishable. The whole basis of the decision in that case was that the consequence of holding that the whole suit did not abate or the whole appeal did not abate would be that there would be two contradictory decrees. That owing to the shares of the second party of defendants being joint and in no way whatever separate, the result, if the whole appeal did not abate as regards that whole party of defendants, would be that, to put the matter simply there would be two persons *A* and *B* each having separate rights over the same share. That case is entirely distinguishable from the present. We have invited counsel for the appellants more than once to show us how two contradictory decrees would result from holding in the present case that the suit abated only against defendant 4's heirs. He has been unable to show this. It is not for us to anticipate any decision that may have to be arrived at in subsequent proceedings if unfortunately such proceedings follow. But it is manifest that the only result of our holding in this case, in view of the preceding history of it, that the appeal does not abate against all the defendants, is that all the defendants except the heirs of defendant 4 will be declared to have no rights of any sort in the property. As to the heirs of defendant 4, the result will not be to declare that they have any rights at all. The only result will be that the plaintiff's present suit against them stands dismissed. If in the future the plaintiff refuses to hand over the whole or any share of the profits to the heirs of defendant 4, it will be for them to determine whether it is worthwhile or not to sue for the whole of the profits or a share of the profits in the revenue Court and it may or may not have to be determined in such a suit whether the heirs of defendant 4 are entitled to any share or to the whole of the profits. But as the matter stands as the result of the decree of the lower appellate Court, there is no question of any contradictory decree. We hold, therefore, that the decision of the Full Bench in the case to which we have referred is not applicable to the facts of the present case. The appeal and the cross-objections are, therefore, dismissed with costs.

Mr. Ambika Prasad Dube has argued his case with care and concision and has been of great assistance to us in this case.

V.S./R.K. *Appeal dismissed.*

(1) A. I. R. 1928 All. 172=50 All. 559 (F. B.).

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* A. I. R. 1930 Allahabad 371

MUKERJI AND BENNET, JJ.

Sham Sunder Singh and *another* — Defendants—Appellants.

v.

Jagannath Singh and *others*—Plaintiffs—Respondents.

First Appeal No 426 of 1926, Decided on 8th January 1930, from decree of Sub-Judge, Jaunpur, D - 6th April 1926.

*** Hindu Law — Partition— Brothers inheriting property from father and maternal grandfather—Properties getting mixed up—Properties cannot be consolidated as to give one cause of action for partition — Civil P. C., O. 2, R. 2.**

Where brothers inherit property from their father and also from their maternal grandfather with a right of ownership among themselves, and the properties so inherited become mixed up, the properties do not get consolidated into one whole so as to give one cause of action for partition : 25 *Mad.* 678 (*P. C.*), *Dist.* [P 372 C 2]

P. L. Banerji and *N. Upadhiya*—for Appellants.

K. N. Katju and *Debi Prasad Malaviya*—for Respondents.

Mukerji, J.—The short question that we have to answer in this appeal is whether the present suit, i. e. the suit out of which this appeal has arisen, was barred by the provisions of O. 2, R. 2, Civil P. C.

The facts briefly are as follows: One Dirg Bijai Singh had four sons, Lal Bahadur Singh, Jagannath Singh, Ran Bahadur Singh and Jang Bahadur Singh. Lal Bahadur Singh's son is Sham Sundar Singh, defendant 1, and Sham Sundar Singh's son is Nagendra Bahadur Singh, defendant 2. The other defendants are transferees from defendant 2's. Dirg Bijai Singh was a taluqdar. He died sometime in 1887. Before his death he made a will by which he gave the taluqa

estate to his eldest son Lal Bahadur Singh. By way of provision for his other sons, he bequeathed by his will, certain specified items of immovable property, to them, to be enjoyed by them when they chose to live separate from their eldest brother Lal Bahadur Singh. He also directed by the will that in the case of separation all the four sons would have a one-fourth share in the moveable property. Jang Bahadur Singh, in agreement with Lal Bahadur Singh, obtained separate possession of the property bequeathed to him by his father. Lal Bahadur Singh had died and Ran Bahadur Singh and Jagannath Singh found it difficult to obtain possession of the property bequeathed to them. They had to institute two suits, being Suits Nos. 65 and 66 of 1922 respectively against their nephew Sham Sundar Singh for recovery of the property bequeathed to them, which included a one-fourth share for each of the plaintiffs, in the moveable property. The suits were decreed. The present suit is for partition and separation of three-fourths share out of certain properties which had nothing to do with the property of Dirg Bijai Singh. Ajaib Singh, the maternal grandfather of the four brothers Lal Bahadur Singh and others died in 1876 and was succeeded by several daughters' sons, he having no son at all. The four brothers, as they were living together with their father, enjoyed the property inherited from Ajaib Singh. As the uncles and nephew have now quarrelled, the three plaintiffs being uncles of defendant 1, have claimed three-fourth share out of the property left by Ajaib Singh.

The question now is whether the cause of action for the two suits was one and the same, and whether it was incumbent on the present plaintiffs, at least for the plaintiffs Jagannath Singh and Ran Bahadur Singh, to include the present claim in the previous litigation.

The learned Subordinate Judge has answered the question in the negative, and we are of opinion that he was right.

The earlier suits, the plaint of which will be found printed at pp. 55 and 59 respectively, were strictly confined to a claim on the will. The reliefs and indeed the entire plaints make this clear. The property which was claimed before, was to come out of the paternal estate, to be recovered on foot of a will. Mr. Banerji's contention was that in view of the Privy Council case *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (1) the four brothers inherited the property from Ajaib Singh with a right of survivorship among themselves, and that therefore, property thus inherited from the grandfather and the property received by them from their father Dirg Bijai Singh became mixed up so as to become property of one kind. This argument has no force. Assuming that Lal Bahadur Singh and his brothers took the property of their grandfather with a right of survivorship among themselves, it does not follow that the maternal grandfather's property and the property of Dirg Bijai Singh became consolidated as it were, into one whole. The simple answer to this contention would be this that Brig Bijai Singh was the sole owner of the taluqa property and the property which he bequeathed. He had no interest in his father-in-law's property. Further, even if the property held by Dirg Bijai Singh be treated as joint family property, even then that property and the property of Ajaib Singh could not coalesce as it were into one common whole, because Dirg Bijai Singh had no interest in the property of Ajaib Singh.

In any view of the case, the contention put forward on behalf of the appellants is not sound.

No other point has been pressed. The appeal has no force and is dismissed with costs.

V.B /R.K. *Appeal dismissed.*

(1) [1902] 25 Mad. 678=29 I.A. 156=8 Sar. 286 (P.C.).

A. I. R. 1930 Allahabad 372

SULAIMAN AND KENDALL, JJ.

Mushtaq Ali Beg and *another*—Defendants—Appellants.

v.

Jwala Shankar Sahai—Plaintiff—Respondent.

Second Appeal No. 615 of 1927, Decided on 6th December 1929, from decree of Addl. Dist. Judge, Aligarh, D/- 18th December 1926.

(a) Agra Pre-emption Act (1922), S. 12 (1) —"Coparceners in that interest" means coparceners in interest sold

Under Cl. 1, S. 12, by the phrase "where the interest is petty proprietary interest, co parceners in that interest," obviously coparce

ners in the interest sold are meant and not similar petty proprietors: *A. I. R.* 1929 *All.* 755, *Rel. on.* [P 374 C 1]

(b) Agra Pre-emption Act (1922), S. 12 (1) —Person owning separate plot of land has no right of pre-emption.

Where a person who owns specific plots of lands separate from those owned by the vendor is not coparcener in the interest sold and has therefore no right of pre-emption. [P 374 C 1]

(c) Agra Pre-emption Act (1922), S. 1 (3) —Act has no application to plots within municipal limits—Such plots are governed by local custom—Pre-emption.

The Act does not apply to any area within the limits of any municipality. The case so far as plots situated in municipal limits are concerned is therefore governed by a local custom provided it is proved to exist. [P 373 C 2]

T. A. K. Sherwani—for Appellants.

A. Sanyal—for Respondent.

Sulaiman, J.—Second appeal No. 112 of 1927 and Second appeal No. 615 of 1927 are defendants' appeals arising out of two pre-emption suits in respect of the same sale deed dated 7th July 1925, relating to certain plots of resumed lands in khewat Rai Naterpal Singh, Kasba Jalesar. It is admitted that some of the plots are situated within the municipal limits and others are outside those limits. These plots are in three khewats, and in the revenue papers are shown under the heading haqiat mutafarriqa (miscellaneous property), and are distinct from khewat 1 which represents the entire 20 biswas and is shown as the khalsa share. The learned Additional District Judge has found that

"the said khewats stand by themselves, and the owners thereof are owners of specific plots, and have no concern with the administration of the village. There is no doubt whatever that they must be termed as petty proprietors as defined in the Pre-emption Act."

The position then is that neither the plaintiffs nor the vendors nor the defendant vendees were cosharers in the 20 biswas khalsa land. They all are petty proprietors who own specific plots of lands in the miscellaneous khewats. A reference to khewat 61 shows that the plaintiffs, the vendors and the vendees are all owners of specific plots in this khewat and stand on the same footing. The same can be said as regards khewat 35. No copy of khewat 126 is on the record, but the statement of the defendants' vakil is to the effect that the plaintiffs are cosharers with the vendors in that khewat, whereas the defendants are cosharers in another khewat 20. It is, however, an admitted fact that neither the plaintiffs nor the defendants are coparceners in the same specific plots which have been sold by the vendors.

Taking the case of the plots which are situated within the municipal limits, it is quite clear from S. 1, sub-Cl. (3) of the Act that the new Act does not apply to any area within the limits of any municipality. The case so far as these plots are concerned is therefore governed by a local custom, provided it is proved to exist. The plaintiffs rely upon a wajibularz of the year 1283 Fasli, which does record a custom of pre-emption, and there is no evidence to the contrary. It may therefore be presumed to be a correct record of custom. The language of the wajibularz is as follows:

"If any cosharer (hissadar) or owner of resumed land (malik munzabta) wants to transfer his property by means of sale or mortgage he should sell it first to his real brothers and nephews and then to his cousins who are partners in the property (sharik haqiat) then cosharers of the patti (hissadar digar patti)."

It is clear to us from the language of this entry that a right of pre-emption exists in favour of nearest relations, then near relations who are coparceners in the property, and then to cosharers of the patti and then cosharers of other pattis. The entry makes a clear distinction between a cosharer and a mere owner of resumed lands. No right of pre-emption is given to owners of resumed lands who are not partners in the property. The phrase "hissadar patti" in this entry obviously means cosharers as distinct from petty proprietors. We are therefore of opinion that the evidence is insufficient to prove a custom of pre-emption in favour of petty proprietors who are not coparceners in the property. The plaintiff's claim with regard to the plots situated within the municipal limits ought therefore to have been dismissed.

As regards the plots situated outside the municipal limits, the Act undoubtedly applies. There being a record in the wajibularz. a custom of pre-emption is deemed to exist, aud the right is determined by S. 12 of the Act. The lower appellate Court is of opinion that because these separate miscellaneous plots are grouped together in the revenue papers under one miscellaneous .khewat, therefore any petty

proprietor in that khewat has a right of pre-emption when another petty proprietor in that khewat sells his interest. But when it is borne in mind that these petty proprietors own various plots separately and are not partners in those plots, that view cannot be accepted if Ss. 11 and 12 are read together. Under Cl. 1, S. 12 by the phrase

"where the interest is petty proprietary interest, coparceners in that interest,"

obviously coparceners in the interest sold are meant and not similar petty proprietors. This was the view expressed in *Ganeshi Lal* v. *Chob Singh* (1) by a Bench of this Court in the following words:

"Under S. 12 of the Act a petty proprietor has preference if he is a coparcener in the proprietary interest sold. In such cases he is given preference over even cosharers. But he must be a coparcener in the very interest which has been sold, and not merely a petty proprietor of any other lands."

In our opinion that the present plaintiffs who own specific plots of lands separate from those owned by the vendors are not coparceners in the interest sold and have therefore no right of pre-emption. It is not disputed before us that the plaintiffs are not cosharers in the khalsa khewat, and therefore do not come within the other four classes. The result therefore is that the plaintiffs have no right of pre-emption at all.

We accordingly allow these two appeals, set aside the decrees of the Courts below and dismiss the plaintiffs' suits with regard to all the plots with costs in all Courts including in this court-fees on the higher scale.

V.S./R.K. *Appeals allowed.*

(1) A. I. R. 1929 All. 755.

A. I. R. 1930 Allahabad 374

BANERJI AND KING, JJ.

Pancham Singh and *another*—Plaintiffs—Appellants.

v.

Balak Ram and *others*—Defendants—Respondents.

Second Appeal No. 240 of 1927, Decided on 10th December 1929, from decree of Dist. Judge, Cawnpore, D/- 29th November 1926.

Transfer of Property Act, S. 41—Hindu widow of joint Hindu family in possession of property in lieu of maintenance affecting mutation in favour of her cousin—Cousin transferring property to third person—In suit for possession against transferee by relation of deceased husband of widow, relation is not estopped from questioning transfer under S. 41.

G died leaving behind him a widow *K* who obtained possession of his zamindari and other property in lieu of maintenance as the Hindu widow of a joint Hindu family. As regards some of the property she got mutation effected in favour of her cousin who in his turn transferred the property to one *B* who purchased it bona fide. *P* a relation of *G* brought a suit for possession of the property, claiming title in his own rights and not as under *K*:

Held: that *B* was not protected by S. 41, as *K* was the person estopped from questioning the transfer and as *P* did not claim under *K*, *P* could succeed in his suit: 26 *All*, 490, *Relied on*. [P 375 C 1]

K. N. Katju—for Appellants.

P. L Banerji—for Respondents.

Banerji, J.—This is a plaintiffs' appeal in a suit for possession of certain property.

At p. 14 of the paper book will be found the pedigree of the plaintiffs' family. The present plaintiffs are relations of one Gulab Singh who died in or about the year 1886. Mt. Kenchan Koer, widow of Gulab Singh, obtained possession of zamindari property and the property now in suit, and it is found by the Courts below that she obtained possession in lieu of maintenance. She transferred some of her property, but as regards the property in suit she, by an application to the revenue Courts, got the name of her cousins entered in the revenue papers. The defendants are transferees from the cousins of Mt. Kenchan Koer.

The Court of first instance decreed the plaintiffs' claim. The lower appellate Court dismissed a portion of the claim on the ground that the transferees were protected under S. 41, T. P. Act.

The plaintiffs have come up in appeal before us. The learned Judge found that "the person interested" within the meaning of S, 41, was Mt. Kenchan Koer, and further held that on the date of the transfer by her cousins she had the right of possession and she was the only person entitled to consent or withhold consent to possession by others. The learned Judge held that the conditions of S. 41 were satisfied by the consent which he considered to have been given by Mt. Kenchan Koer and that the defendants were protected under S. 41.

We are unable to accept the view of the law which was accepted by the learned District Judge. In the case of

Khwaja Mohammad Khan v. *Muhammad Ibrahim* (1) a Bench of this Court has stated as follows :

"The Privy Council has laid down the principle upon which S. 41, T. P. Act, is founded in the case of *Ram Coomar Koondoo* v. *John and Maria McQueen* (2). Their Lordships say as follows : It is a principle of natural equity which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it."

Applying the principles so stated the person who is estopped from questioning the transfer made to a bona fide transferee must be deemed to be Mt. Kenchen Koer, as she was the person interested within the meaning of S. 41. The plaintiffs do not claim title under Mt. Kenchan Koer, who had admittedly been in possession of the property in lieu of her maintenance as the Hindu widow of a joint Hindu family.

Under these circumstances we are of opinion that the plaintiffs' appeal must succeed. We allow it and restore the decree of the Court of first instance with costs.

V.B./R.K. *Appeal allowed.*

(1) [1904] 26 All. 490.
(2) [1872] I. A. Sup. Vol. 40=11 B. L. R. 46 =18 W. R. 166=3 Sar. 160 (P.C.).

A. I. R. 1930 Allahabad 375

NIAMATULLAH, J.

Chotey Lal—Plaintiff—Applicant.

v.

Mt. Mohanian and *another*—Defendants—Opposite Parties.

Civil Revn. No. 278 of 1929, Decided on 10th December 1929, from order of Small Cause Court Judge, Bareilly, D/- 4th April 1929.

Agra Tenancy Act (2 of 1901), S. 25—Lease of occupancy holding for five years coupled with arrangement to appropriate rent in lieu of interest for loan advanced—Transactions of loan and lease independent and not referable to each other—Transaction is not usufructuary mortgage.

A transaction by which an occupancy tenant sublets his holding for a period of five years, coupled with an arrangement that the rent was to be appropriated in lieu of interest on a sum due to the subtenant does not by the mere fact of the loan advanced make it a usufructuary mortgage. The subtenant is liable to be ejected on the expiry of the term and cannot insist or retain the land till the money advanced is paid. To constitute such transaction a usufructuary mortgage, the bond acknowledging the loan, though executed simultaneously, should be referable to and dependent on the lease and further the lease should entitle the subtenant to continue in possession till payment of his dues in full: 25 *All.* 115, *Ref.* : 17 *I. C.* 1522 and *A. I. R.* 1922 *All.* 134 and 18 *I. C.* 9, *Dist.* [P 376 C 1, 2]

G. S. Pathak—for Applicant.

S. B. Johari and *Sarup Chandra*—for Opposite Parties.

Judgment.—The plaintiff applicant brought the suit out of which this revision has arisen for recovery of Rs. 182-8-0 on foot of a bond, dated 9th June 1922, executed by the defendant respondents. The principal amount alleged to have been advanced under it was Rs. 127-8-0. Remaining sum represents the interest.

The defence was that the defendants borrowed Rs. 120 from the plaintiff and made over 18 bighas of their occupancy land to the plaintiff for five years for satisfaction of the loan evidenced by the bond in suit, which has been satisfied in full.

The learned Judge of the Court of Small Causes whose decree is sought to be revised, has held that Rs. 127-8-0 was advanced, as alleged by the plaintiff, that 18 bighas tenancy land was made over by the defendants to the plaintiff's father for five years and that the profits derived from the occupancy land were just sufficient to pay the interest. He held accordingly that the entire principal Rs. 127-8-0 was due. In his view the transaction substantially amounted to one of usufructuary mortgage of occupancy land and, therefore, void. The plaintiff was held not entitled to recover the amount due under the bond. The plaintiff has applied in revision.

The learned Judge of the Court below has accepted the evidence of one of the defendants in arriving at his finding of fact. He stated that a lease for five years was executed by the defendants in favour of the plaintiff's father and a bond bearing a date one and a half months after the lease was executed in favour of the plaintiff simultaneously with the lease. The learned Judge has disbelieved him in so far as he stated

that the entire loan, principal and interest, would be deemed satisfied at the end of five years. The conclusion, therefore, arrived at by the learned Judge is this: There was an arrangement between the plaintiff and his father on the one hand and the defendants on the other, under which the latter borrowed Rs. 127-8-0 from the plaintiff and passed a simple money bond in his favour and executed a lease subletting their occupancy land to the plaintiff's father for five years, the understanding being that the interest payable on the sum of Rs. 127-8-0 advanced will be set off against the rent payable under the sublease. The learned Judge of the Court below is of opinion that the transaction, taken as a whole, amounts to a usufructuary mortgage of an occupancy holding. I am unable to endorse that view. Under S. 25, Agra Tenancy Act (2 of 1901), an occupancy tenant is permitted to sublet his holding for a term not exceeding five years. The transaction of sublease to the plaintiff's father not being for more than five years cannot, apart from the loan transaction, be impugned as infringing any rule of law. The fact that the rent was agreed to be set off against the interest on money advanced or that it was associated with the transaction of loan will not make the subletting void, if it is otherwise valid. The mere fact that there was a loan advanced by the plaintiff to the defendants, who transferred to him (plaintiff) possession of his occupancy land for five years at a given rent, will not make the transaction a usufructuary mortgage, as defined in S. 58, T. P. Act. Reading the definition of mortgage with that of usufructuary mortgage, it is clear that, unless there is a transfer of an interest in specific immovable property for the purpose of securing payment of money advanced, there can be no usufructuary mortgage. In *Nidha Sah* v. *Murli Dhar* (1) (at p. 119), their Lordships of the Privy Council construed an

"instrument purporting to be a mortgage of them with possession to one Ishri Sah 'for a period of 14 years from 1284 Fasli to 1297 Fasli' by which it was provided that on the expiration of the term the mortgagor 'shall come in possession of the mortgaged villages without settlement of accounts . . . that on the expiration of the term . . . the mortgagee shall have no power whatever in respect of the said estate . . . and after the expiration of the term this mortgage deed . . . shall be returned to the mortgagor without his accounting for (paying) the mortgage money secured under this document'."

They held that

"this instrument, though it is called a mortgage, and though it will be convenient to follow the nomenclature used in the document itself and in the pleadings and judgments in the Courts below, is not a mortgage in any proper sense of the word. It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption expressed or implied. It was simply a grant of land for a fixed term free of rent in consideration of a sum made up of past and present advances."

That was a much stronger case in so far as the whole transaction was embodied in one deed.

A transaction by which an occupancy tenant sublets his holding, coupled with an arrangement that the rent was to be appropriated in lieu of interest on a sum due to the subtenant, is not per se open to objection. The subtenant is liable to ejectment on the expiry of the term and cannot insist on retaining the land till the money is paid. A usufructuary mortgagee, on the other hand, is entitled to continue in possession till payment of his dues in full. He is not entitled to call in his money. In the case before me the bond and the lease do not refer to each other and, though executed at one and the same time, they were meant to be independent of each other. The bond is payable on demand, and there is nothing to prevent the creditor from recovering the money due under it at any time within the five years of the sublease.

My attention has been drawn by the learned advocate for the respondents to a number of cases in which claim to repayment of loan advanced under a transaction amounting to usufructuary mortgage of occupancy holding was disallowed. In *Pooran Singh* v. *Jai Singh* (2), it was conceded by the plaintiffs that the intention of the parties was to enter into a transaction of usufructuary mortgage of the occupancy holding. In the case before me it is not conceded but repudiated by the plaintiff. The circumstance that the parties kept the two transactions apart from each other as regards the rights and obligations of the parties to them and the fact that the

(1) [1903] 25 All. 115=30 I.A. 54=8 Sar. 435 (P.C.).

(2) [1912] 17 I.C. 522.

plaintiff avoided being also the sub-lessee negative an intention to enter into a transaction of usufructuary mortgage.

Har Prasad Tiwari v. *Sheo Gobind Tiwari* (3), was in form and substance a case of usufructuary mortgage of occupancy holding. The mortgagee sued to recover the money due under the deed on foot of a personal covenant contained in the mortgage deed. It was held that such personal covenant could not be enforced, being part of a deed which evidenced a void transaction. That case can have no application to the circumstances of the one before me.

Ram Partap Rai v. *Ram Phal Teli* (4) was a case in which the bond executed by an occupancy tenant provided that, in case interest from year to year was not paid, it was open to the creditor to take possession of the occupancy holding of the debtor. It was held that the bond could not be enforced.

The essential difference between a case where a creditor has been held not entitled to recover what he advanced and the one like the present is that, in the former the undertaking to repay a certain sum of money advanced by the plaintiff being an integral part of a void transaction, the creditor cannot recover, either on a personal covenant contained in the bond or otherwise; while in the latter, the rights and liabilities arising out of the loan transaction and the sub-lease are separate and distinct and no part of the transaction can be considered to be opposed to any provision of law, though the transaction as a whole may, in some particulars resemble a usufructuary mortgage.

For the foregoing reasons, I allow this revision and decree the principal amount of Rs. 127-8-0, found to be due by the Court below. Parties shall pay and receive costs in proportion to success and failure throughout.

V.B./R.K. *Revision allowed.*

(3) A.I.R. 192 All. 134=44 All. 486.
(4) [1913] 18 I.C. 9.

A. I. R. 1930 Allahabad 377

NIAMATULLAH, J.

Sheo Mangal Shukul—Defendant—Appellant.

v.

Jagan Lohar and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 847 of 1928, Decided on 18th December 1929.

Transfer of Property Act, S. 6—Grove is property of grove-holder—He has right to transfer his grove unless he holds it under condition disentitling him to do so—Landlord and tenant.

A groveholder may not be the owner of the land; but his interest as a groveholder including ownership of the trees and the right of enjoyment thereof must be regarded as property within the meaning of S. 6. His interest as a groveholder is not restricted in its enjoyment to the owner personally nor is there anything in the nature of the tenure of a groveholder which makes the transfer of his interest opposed to such interest. Therefore a groveholder has a right to transfer his grove by sale, mortgage or otherwise unless he holds the grove under a special condition subject to which the grant is made a condition which disentitles him to transfer his grove: *A. I. R.* 1923 *All.* 553 and *A. I. R.* 1921 *All.* 168, *Rel. on.* [P 378 C 1]

K. N. Malaviya—for Appellant.

Shanker Saran—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiff-respondents for recovery of possession of half of grove standing on plots 231 and 233. It is no longer in dispute that the grove was planted by one Paltan about 50 years before the institution of the suit. Paltan died, leaving two sons: Gajadhar (defendant 1) and Sudha. Sudh died childless some time afterwards, leaving his widow, who also died about seven years before the suit. Her husband's share reverted to his brother, Gajadhar (defendant 1). By a deed dated 14th July 1916, Gajadhar, defendant 1, sold half of the grove to the plaintiff, who brought the present suit for possession, which is alleged to be withheld by defendants 2 and 3 the zamindars. Defendant 2, the appellant in this Court, contested the suit on the ground that Gajadhar abandoned the village and for that reason lost title to the grove in question and that he had no right to make a transfer of his interests as a groveholder there being no custom in the village justifying a groveholder to transfer his grove.

The suit has been decreed by both the Courts below, who have held that Gajadhar did not abandon the grove, though

he might have discontinued his residence in the village, and that a groveholder is entitled to transfer the grove, there being no local custom forbidding transfer of the interest of the groveholder. Defendant 2 has preferred the present second appeal.

It is contended, firstly, that a groveholder does not possess such interest in the land granted to him by the zamindar for planting a grove as he can transfer by sale, mortgage or otherwise; and secondly, that a custom recorded in the wajibularz forbids alienation by a groveholder of the whole or part of his grove.

As regards the general right of a groveholder to transfer his grove, I have no hesitation in holding that, apart from any custom to the contrary, he has a right to transfer his grove by sale, mortgage or otherwise. That a grove is the property" of the groveholder cannot be disputed. He may not be the owner of the land; but his interest as a groveholder, including ownership of the trees and the right of enjoyment thereof, must be regarded as "property" within the meaning of S. 6, T. P. Act. As such. it may be transferred, except as provided by that Act or any other law for the time being in force: see S. 6, T. P. Act (4 of 1882.) The interest possessed by a groveholder is not restricted in its enjoyment to the owner personally so as to make Cl. (d) of that section applicable, nor is there anything in the nature of the tenure of a groveholder which makes the transfer of his interest opposed to such interest so as to make Cl. (h) of that section applicable. This being so, unless the landlord can establish a local custom or a condition subject to which the grant was made, which disentitles the groveholder to transfer his grove, the plaintiff's claim is unanswerable and was rightly decreed by the Courts below, whose view is supported by *Baijnath Singh* v. *Chandrapal Singh* (1) and *Jalesar Sahu* v. *Raj Mangal* (2).

The learned advocate for the appellant has relied upon a wajibularz, prepared in 1860, which provides that there were at that time only three groves which, for certain reasons stated, had become the property of the zamindars and that:

"an inhabitant of the village planting a grove has no right of ownership of any kind, nor will he have the right to cut or sell the trees without the consent of the zamindar."

It is argued that this clause merely entitles the groveholder to enjoy the produce of the grove and gives him no right of ownership in the trees themselves which he could convey to another by alienation inter vivos. That this is the meaning of the clause quoted may be conceded. The lower appellate Court has, however, held on a consideration of some circumstances, that the custom sought to be proved with the help of the wajibularz has not been established. It is pointed out that 'an earlier wajibularz prepared in 1833 does not record such a custom. It is emphasized by the lower appellate Court that a self-serving statement of this character, recorded at the instance of the zamindar and behind the back of groveholders is not of very great value in view of the total absence of instances which may illustrate the operation of the custom. In other words, the lower appellate Court has not given such weight to the evidence afforded by the entry in the wajibularz as may be sufficient to establish the custom in question. Having regard to certain circumstances and the nature of the entry itself, it is rightly contended before me by the learned advocate for the respondents that I will not be justified in interfering with the finding of fact arrived at by the lower appellate Court and in greater weight than what was given to the entry in the wajibularz. It is true the lower appellate Court has observed at one place in its judgment that the wajibularz in question is no evidence of any "subsisting custom," because at the time it was recorded there were no groves in possession of groveholders. I do not think this remark vitiates the finding of the lower appellate Court based as it is on a consideration of the wajibularz of 1833, the absence of instances and that self-serving character of the entry in the wajibularz. On the whole, I am not prepared to interfere with the finding of the lower appellate Court. This appeal is accordingly dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1923 All. 553.
(2) A. I. R. 1921 All. 163=43 All. 606.

A. I. R. 1930 Allahabad 379 (1)

MUKERJI AND BENNET, JJ.

Salamat Khan and *another*—Defendants—Appellants.

v.

Bhagwat and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 133 of 1929, Decided on 12th December 1929, from judgment of Dalal, J., D/- 9th January 1929.

Hindu Law—Alienation—Legal necessity—Adult member joining in execution does not supply evidence of necessity.

Although the fact that all the adult members of a family joined in the execution of a deed of transfer is sufficient to supply any lacuna that may exist in the evidence of legal necessity, that fact alone cannot snpply the evidence of legal necessity when there is no evidence of legal necessity on the record : 8 *Bom.* 602 and *A. I. R.* 1924 *All.* 912, *Ref.*

[P 379 C 2]

Iqbal Ahmad and *Mansur Alam*—for Appellants.

Judgment.—This is a Letters Patent Appeal. The plaintiff sued in 1925 to set aside a sale-deed executed on 24th October 1914, by the father and grandfather of the plaintiffs, who were at that period minors. The sale-deed purported to be for Rs. 3,550. The plaintiffs allege that the sale-deed was not for legal necessity. The Court of first instance decreed the suit unconditionally. The lower appellate Court reversed that decree and made the decree in favour of the plaintiffs conditional on the payment by plaintiffs of nearly all the sale consideration. In second appeal, a learned Judge of this Court has restored the decree of the Court of first instance.

The case deals solely with the question of the burden of proof on legal necessity. The sale consideration according to the sale-deed, consisted of Rs. 1,600 cash before the Sub-Registrar, Rs. 200 paid to one Babban Lal and Rs. 1,432 to be paid between the years 1915 and 1918. It was found that the latter amount of Rs. 1,432 was not in fact paid and this is admitted. Babban Lal was produced for the defendants in regard to the payment to him but he did not show that it was for any legal necessity existing at the date of sale and his evidence was not believed by the trial Court. The lower appellate Court did not allude to Babban Lal proving legal necessity and, therefore, that Court did not rely on his evidence for that purpose.

The lower appellate Court based its judgment largely on the fact that the sale-deed was executed by all the members of the family who were then adults and then stated :

"Looking at this fact from the common-sense point of view, I think it raises a strong presumption that the deed in question was executed for consideration and for legal necessity. In view of this fact and the presumption arising from it, I think the onus in the case before us shifted to the plaintiff's respondents and we have, therefore, to see whether the evidence produced on their behalf rebuts the presumption and discharges the onus."

The lower appellate Court then considered that the plaintiffs had failed to discharge that onus and, therefore, legal necessity was proved. The learned Judge of this Court did not agree with this view of the law. Certain rulings have been produced, such as *Balwant* v. *Babaji* (1) and *Dhanraj Rai* v. *Ram Naresh Rai* (2), but we consider that although the fact that all the adult members of a family joined in the execution of a deed of transfer is sufficient to supply any lacuna that may exist in the evidence of legal necessity, that fact alone cannot supply the evidence of legal necessity when there is no evidence of legal necessity on the record. Accordingly, as in the present case, the lower appellate Court relied solely on this presumption and the evidence of Babban Lal has not been believed, we consider that the judgment of the learned Judge of this Court was correct. We, therefore, dismiss this Letters Patent appeal.

V.B./R.K. *Appeal dismissed.*

(1) [1894] 8 Bom. 602.
(2) A. I. R. 1924 All. 912.

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* A. I. R. 1930 Allahabad 379 (2)

DALAL, J.

Tulsi Ram—Plaintiff—Applicant.

v.

Municipal Board, Shahjahanpur —Defendant—Opposite Party.

Misc. Appln. No. 851 of 1929, Decided on 2nd December 1929.

*** Civil P.C., O. 22, Rr. 9 (2) and 6—Within ninety days of death of party if application not made, suit or the appeal automatically abates and no formal order of statement necessary.**

On the expiry of ninety days there is an automatic abatement and the party who wishes

to be substituted should apply under O. 22, R. 9, for setting aside the automatic abatement and for substitution. There is no necessity of a formal order of abatement. But this automatic abatement does not follow where party dies before conclusion of hearing: *A. I. R.* 1922 *All.* 209, *Diss.*; 42 *All.* 540, *Foll.* [P 380 C 1, 2]

K. N. Malaviya—for Applicant.

M. N. Raina—for Opposite Party.

Judgment.—There is a considerable confusion as to the steps which should be taken to bring fresh parties on to the record ninety days after the death of the party in whose place substitution is desired. The ruling of a single Judge of this Court in *Lachmi Narain* v. *Muhammad Yusuf* (1) lays down an excellent workable rule that there would be an automatic abatement and the party who wishes to be substituted should apply under O. 22, R. 9, for setting aside the automatic abatement and for substitution. Unfortunately there was dissent from this ruling by a Bench of this Court in *Mt. Gujrati* v. *Sital Misir*, *A. I. R.* 1922 *All.* 209. It is curious that such a Bench-judgment which overrules a reported case in a volume of the Allahabad Law Journal should not be reported in that journal or in the Indian Law Reports. I am stating this from information given to me at the Bar. Without commenting on the validity of either ruling the Bench ruling greatly complicates procedure because first of all the party desiring action under R. 9 would have to obtain a specific order of abatement or dismissal from the Court before substitution can take place. This is a matter which should be brought to the notice of the Rules Committee, and as there is divergence of opinion it is desirable that the view of the single Judge which could be better put in practice should be adopted in the rules and words added in R. 3 and R. 4 to make it clear that the abatement and dismissal for want of action within the period of limitation shall be automatic. The Registrar shall be requested to put up suitable amendments before the Rules Committee, with a note of mine that the procedure laid down by the Bench-ruling is complicated and involved, while the procedure consequent on automatic abatement or dismissal would be quicker and better understood by litigants.

(1) [1920] 42 All. 540=59 I. C. 903=18 A. L. J. 688.

In the present case a decree was passed by a learned Judge of this Court in favour of the plaintiff-appellant without knowledge that the plaintiff-appellant had died prior to the hearing of the argument. Such a decree is a nullity as may be gathered from the provisions of R. 6. R. 6 lays down specifically that there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but the judgment may in such cases be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place. Obviously, therefore, if the death took place prior to the hearing of the argument the decree would be a nullity. With great respect this rule may be cited in favour of the opinion of the single Judge because there must be a presumption of automatic abatement when in R. 6 it is stated that there will be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment. The meaning appears to be that automatic abatement which follows in other cases does not follow in this particular case.

To shorten procedure I now declare Second Appeal No. 96 of 1928 to have abated.

The next question is whether under R. 9 this abatement should be set aside and substitution made I have read the affidavit. The reasons given therein are not sufficient to give the legal representatives of Tulsi Ram the benefit of the provisions of S. 5, Lim. Act. It was the duty of those representatives to acquaint themselves with the legal dealings of Tulsi Ram when he died. It is not the case of a stranger as in the case of a plaintiff being ignorant of the death of one of the defendants.

I dismiss this application.

V.B./R.K. *Application dismissed.*

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* A. I. R. 1930 Allahabad 380

SULAIMAN AND SEN, JJ.

Banke Behari Lal—Judgment-debtor—Appellant.

v.

Raghubar Dayal — Decree-holder—Respondent.

Execution Second Appeal No. 2093 of 1928, Decided on 2nd January 1930.

*** Civil P. C., O. 22, R. 10 (1)—Assignment of decree pending appeal—Assignment does not prevent decree-holder from prosecuting proceedings to final conclusion.**

After the interest of a decree-holder in a decree which is the subject-matter of an appeal has been assigned to a third party, it is not absolutely necessary for the assignee to have his name brought on the record in place of the decree-holder, if he is satisfied that his rights will be sufficiently protected by the assignor. In the absence of his name proceedings can be continued as before by the decree-holder in spite of the assignment and as the assignment of the decree really amounts to the assignment of the interest of the decree-holder in the decree as may be finally determined the assignment would not prevent the decree-holder from prosecuting the proceedings till its final conclusion. 35 *M. L. J.* 294, *Rel. on.* [P 381 C 2]

Harnandan Prasad—for Appellant.

S. N. Chaube—for Respondent.

Sulaiman, J.—This is an execution second appeal by the judgment-debtor arising out of a suit for sale. After the preliminary decree for sale was passed one of the judgment-debtots Duli Chand died. An objection was raised on behalf of the other judgment-debtors that his heirs not having been brought on the record within three months the suit had abated. This objection was overruled and a final decree was passed on 8th April 1922. The surviving judgment-debtors appealed to the lower appellate Court. While that appeal was pending the decree-holder Babu Ram on 7th October 1922, assigned his rights and interests in the decree to Raghubar Dayal. Raghubar Dayal made no attempt to have his name brought on the record in the appeal. Tne decree-holder alone contested it. The lower appellate Court decreed the appeal against the decree-holder and presumably modified it so far as the deceased judgment-debtor was concerned. The decree-holder preferred a second appeal to the High Court which was ultimately allowed and on 20th February 1925, the final decree in the form in which it had been passed by the trial Court was restored. Raghubar Dayal had not been made a party either in the appeal before the lower appellate Court or in the second appeal in the High Court.

On 13th March 1926, Raghubar Dayal applied to execute the decree and was met with the objection that his application was barred by time. Both the Courts below have held in favour of the decree-holder and have allowed the application.

It seems to me that the application cannot be held to be barred by time. No doubt when the decree was assigned to Raghubar Dayal in October 1922, he might have applied to have his name brought on the record in the appeal or even ignoring the appeal he might have applied for execution of the original decree. But after the decree was modified by the lower appellate Court it would have been difficult for him to apply to execute the decree in its original form.

After the interest of the decree-holder in a decree which is the subject-matter of an appeal has been assigned to a third party it is not absolutely necessary for the assignee to have his name brought on the record in place of the decree-holder, if he is satisfied that his rights will be sufficiently protected by assignor. The language of O. 22 (1) R. 10, Civil P. C., itself indicates that it is only by the leave of the Court that the proceedings can be continued by or against the person to or upon whom the interest has devolved. Similarly O. 21, R. 16, Civil P. C, would also indicate that it is open to the transferee to apply for the execution of the decree. The Limitation Act prescribes no special period for an application by a transferee of the decree to be brought on the record (27 *C. W. N.* 710). In the absence of his name, the proceedings can be continued as before by the decree-holder in spite of the assignment. If the decree which has been transferred is ultimately upheld the assignee is entitled to claim the benefit of it. It is quite clear that it is the decree which is ultimately passed in the suit which is the final decree in the case and in which the original Court's decree comes to be merged. An assignee of the decree-holder cannot be treated as a perfect stranger but must be deemed to be fully represented through the decree-holder. It is also clear fhat while an appeal is pending the rights of the judgment-debtor appellant cannot be prejudiced by the mere fact that the respondent to the decree has chosen to transfer his rights and interests in the decree during the pendency of the appeal. Even though S. 52 T. P. Act, would not apply to the case of the transfer of a decree which is not an immovable property, the principle underlying that section would, in my opinion,

be applicable and the mere fact that an assignment has been made would not prevent the decree-holder from prosecuting the proceedings till its final conclusion.

This view finds support from the case of *Ponnusami Pillai* v. *Chidambaram Chettiar* (1) where it was pointed out that an assignment of a decree is really an assignment of the interest of the decree-holder in the decree as may be finally determined. The only feature which distinguishes the present case from that case is that there the assignee of the decree had actually been brought upon the record in the appeal.

I would therefore dismiss this appeal.

Sen, J.—I concur. In view of the fact that the point raised in this appeal is not covered by any clear authority I should like to add a few words.

On 4th August 1917, a preliminary decree was obtained against a number of persons including one Duli Chand. Duli Chand died and no application was made for the substitution of his heirs on the record within the statutory period. Sometime before April 1922, an application was made for the preparation of a final decree. This application was resisted on the ground that the decree-holder had lost his right to a final decree by reason of Duli Chand's legal representatives not having been brought on the record within three months of the date of Duli Chand's death. This plea was overruled by the final Court and a final decree for sale was passed on 8th April 1922. The judgment-debtor appealed. During the pendency of the appeal, the decree-holder on or about 7th October 1922, assigned the decree to Raghubar Dayal, the respondent. On 8th November 1922 the appeal was decreed. We have not got the copy of the order passed by the lower appellate Court but presumably the order was to the effect that the suit had abated in part qua the legal representative of the deceased judgment-debtor Duli Chand. The decree-holder appealed to this Court. On 20th February 1925, the appeal was allowed and the decree of the trial Court was restored.

Raghubar Dayal, the assignee of the decree was not a party to any of the proceedings which have been referred to above.

On 13th March 1926, Raghubar Dayal applied for the execution of the decree and was met with the plea that the application was barred by time. This plea has been overruled by both the Courts below.

In order to appreciate the point of limitation raised in this appeal, we have got to consider the scope and legal effect of the assignment of the decree in favour of Raghubar Dayal of 7th October 1922. What was transferred was not the decree itself but the interest of the decree-holder. This interest had not become statute-barred. Under O. 22, R. 10, Civil P. C., the assignee was not bound to apply for the substitution of his name in the decree and the language of O. 22, R. 10, Cl. (1) Civil P. C., is indicative of the fact that the original decree-holder might continue the proceedings for the benefit of himself or any other person on whom the interest has devolved by substitution or by assignment. No special or fixed period of limitation has been prescribed in the Limitation Act for the substitution of names in favour of the assignee. This fact also would suggest that the original decree-holder was entitled to continue the proceedings for the benefit of himself and his assignee. Between 8th November 1922, and 20th February 1925, there was no decree capable of execution. It was not till by the order of this Court that the original decree dated 8th April 1922, was restored and revived. It is an elementary principle of law that time cannot run against the person who is incapable of acting. It is unnecessary to invoke the aid of S. 52 T. P. Act, but I am in agreement with my learned collegue that the principle underlying the said section would suggest that the assignee is under the circumstances protected and is entitled to claim the benefit of the decree which was eventually restored by the order of this Court dated 20th February 1925. I would therefore dismiss the appeal.

V.B./R.K. *Appeal dismissed.*

(1) [1918] 35 M. L. J. 294=7 M. L. W. 566=44 I. C. 849=(1918) M. W. N. 194.

A. I. R. 1930 Allahabad 383

MUKERJI AND BENNET, JJ.

Goswami Sadanand—Defendant—Appellant.

v.

Goswami Indra Nand and *others*—Plantiffs and Defendants—Respondents.

First Appeals Nos. 88 and 67 of 1926, Decided on 16th January 1930, from decree of Addl. Sub-Judge, Muttra, D/- 2nd November 1925.

(a) Hindu Law—Joint family — Manager —Dayabhaga Law—Property acquired in name of manager will be presumed to be family property.

In the case of a family governed by the Dayabhaga Law, the father is the owner of the entire property and on his death his sons take the property as co-owners and not as joint owners. But where the property is held jointly and where there is a nucleus of family property and where one of the members of the family has been left in the management of the property, properties acquired in the name of the manager will be presumed to be the property of the family, unless the manager shows that he had a separate income apart from the yields of the joint family property out of which he may have acquired the property: 31 *Cal.* 448, *Dist.*; 31 *All.* 477, *Expl.*

[P 384 C 2]

(b) Hindu Law — Religious Endowment—Temple—Court may assign certain days for facility of worship.

Where a family has a right of worship with some emoluments attached to it, the Court may assign certain days for facility of worship and for the purpose of enabling sach party to receive offerings offered: *A. I. R.* 1925 *P. C.* 139 and *A. I. R.* 1923 *All.* 425, *Rel. on.*

[P 386 C 2]

Iqbal Ahmad and *B. Malik*—for Appellant.

U. S. Bajpai—for Rospondents.

Mukerji, J.—This appeal and appeal No. 67 of 1926 arise out of the same suit and will be decided by the same judgment.

The pedigree at p. 67 of the paper book of appeal No. 88 of 1926 will show how the parties are related to one another. It appears that either in the lifetime of Goklanandji, the remote ancester or from before, there was established a temple in the holy city of Brindaban. The presiding deity of the temple is known as Mahaprabhuji and the temple itself is known as Singar Bat. The management of the temple, which is open to the public is in the hands of the descendants of Goklanandji. In course of time, the management came to be divided among the three descendants of Goklanandji, who had it appears, three sons, Nimanandji, Sundarnandji and Keshavanandji. The branch of Nimanandji, came to be known as the "Bari Taraf" or the eldest branch, The descendants of Sundaranandji came to be described as the middle branch and Keshavanandji's descendants came to be described as "Chhoti Taraf" or the youngest branch. In course of time the middle branch disappeared and the temple was left in the management of the remaining two branches. The original mode of management was that each branch managed the temple for a month. When the middle branch died away, the remaining two branches managed the temple for one and half months each. We are concerned, in this litigation with the elder branch alone. The last male ancestor of this branch was Jadavanandji. He had four sons, two by each of his two wives. The plaintiffs are the two sons of his second wife, who married Jadavanandji after the death of his first wife. The first two defendants were the sons of the elder wife. Defendant 2 Rajendranandan died during the pendency of the suit. He is represented by his sons. The sons of defendant 1 Sadanand are also parties.

The plaintiffs' case was that defendant 1 was in the management of the temple and its properties and was also the manager of the private properties of the parties. Sadanand had become dishonest in his intentions and the plaintiffs did not like that he should continue to manage the property. On these allegations the plaintiff sought the partition of the property. He mentioned that the plaintiffs' aunt Mt. Thakomani (originally defendant 3) was not entitled to any share because she had become a recluse. The lady denied this statement and claimed a third share in the property. She, however, died pending the suit and we are no longer concerned with what would have been her share in case of partition. The main defence in the case has been put forward by defendant 1. His case was that certain of the immovable properties in suit were temple properties, that certain others were the joint properties of the parties, that as regards items 1 to 7 and 11 and 13 at p. 8 of the printed record and items 1, 3, 9 13, 17 and 18 at p. 12 of the printed record were his

separate property, having been acquired by him out of his separate funds. Defendant 1 denied that he was in possession of any moveable property belonging to the parties. Defendant 1 also urged that he alone was entitled to the worship of the idol and the right to worship could not be delegated to the plaintiffs.

The learned Subordinate Judge, who tried the case, held that the entire house property was the property of the idol and could not be divided. As regards the zamindari property which were claimed by defendant 1 as his own, the learned Judge held that in the absence of clear evidence of separate acquisition on the part of the defendant, they must be treated as joint properties of the parties. The parties' rights only were declared because the actual partition could nct be carried out by the civil Court. He dismissed the suit with respect to most of the moveable properties. It appears that a commissioner was appointed to make an inventory of the moveable properties found in a portion of the house of the parties. As regards these properties the learned Subordinate Judge directed that they should be divided in equal shares. As regards the turn of worship, the learned Judge said that it would be divided between the parties, but the "veth" (offerings) should not be divided, but should go to the common storeroom.

Appeal No. 88 of 1926 is the appeal of defendant 1 and the apeal No. 67 of 1926 is the appeal by the plaintiffs.

We shall take up the appeal of defendant 1 first. It was argued on behalf of defendant 1 that the parties being governed (admittedly) by the Dayabhaga school of the Hindu law, it was for the plaintiff to prove that the properties which stood recorded in the name of defendant 1 were not his separate property but were joint family property. The learned counsel relied on the case of *Sarada Prasad Ray* v. *Mahanand Ray* (1) and that of *Govind Chandra Das* v. *Radha Krishto Das* (2). There can be no doubt that in its constitution a family governed by the Mitakshara Law is different from a family governed by the Dayabhaga Law. But where only a question of presumption is concerned, it has to be determined on the facts of each case. In a family governed by tha Mitakshara law, everybody forming the family is entitled to a share in the family property. In the case of a family governed by the Dayabhaga Law, the father is the owner of the entire property and on his death his sons take the property as co-owers and not as joint owners. These and other differences do exist in the constitution of the families. But where the property is held jointly and where there is a nucleus of family property and where one of the members of the family has been left in the management of the property, properties acquired in the name of the manager will be presumed to be the property of the family, unless the manager shows that he had a separate income, income apart from the yields of the joint family property out of which he may have acquired the property. The case in *Sarada Prasad Ray* v. *Mahananda Ray* (1) was this. The defendant had acquired a certain property in the lifetime of the father. In a suit for partition instituted after the death of the father, the question arose, whether the property held in the name of the defendant should be treated as a partible property. The learned Judges of the Calcutta High Court held that there was no presumption that this property was joint family property. The reason was clear. In the lifetime of the father, the entire property belonged to him alone. In the circumstances, the acquisition by the defendant could have been made only with his separate income. There was, therefore, in that particular case no source of income, out of which property might be acquired for and on behalf of the plaintiff.

In the Allahabad case *Govind Chandra Das* v. *Radha Krishto Das* (2), the family was not shown to have possessed any nucleus, out of which further property could be acquired. It was accordingly held that it was for the plaintiff to prove that the property in the hands of the defendant was a joint family property acquired out of the joint funds and, therefore, was divisible. The learned counsel for the appellant has selected and relied on a particular passage out of the report of this case

(1) [1904] 31 Cal. 448.
(2) [1909] 31 All. 477=3 I. C. 563=6 A. L. J. 591.

to be found at p. 480. It runs as follows:

"If a person subject to the Dayabhaga Law desires to prove that a property acquired during the time that the family was living as a joint Hindu family, is joint property, it is incumbent on him to prove that there was an original nucleus of joint property, with the aid of which the property sought to be partitioned *has been* increased and amplified."

Stress has been laid on the words, "has been." What their Lordships meant was that it had to be proved that there was a nucleus of joint property out of the income of which additional property could have been acquired. The remarks in the judgment must be read with the facts of the case, because the remarks must be taken to have been influenced by the facts alone. Their Lordships were not considering a case like the present one before us. In the particular case before us, we have got the fact that there was a substantial nucleus of joint family property. It has not been shown that defendant 1 had any independent and separate income of his own. He was in charge of the temple property and he was in charge of the entire joint immovable property. In the circumstances, if there was a substantial nucleus, it would be enough for the plaintiff to show that the defendant had no separate income. Then it would be presumed that what was acquired by the defendant was acquired with the income of the joint family property. Where, therefore, there is a nucleus of joint family property and there is no separate means of acquisition by the defendant, it cannot be said that further evidence must be laid, on behalf of the plaintiffs, to prove that, as a matter of fact, the acquisition was made with the income of the joint family property. It would be impossible for any plaintiff to prove a thing like that. The family income being in the hands of defendant 1, he alone will be able to prove how he has spent it. On the other hand, if the defendant has a substantial income of his own and if he is prepared to explain how he spent the income from the joint family property, the plaintiff will have to prove that the account was wrong and the money, being the profits from the joint family property, was actually applied to acquire property standing in the name of the defendant.

We are of opinion that having regard to the circumstances of this case, the learned Subordinate Judge was right in holding that the zamindari property is not the separate property of the defendant and is divisible among the parties.

Coming to the house property, it appears that the appeal ought to succeed in the case of only one house and no more. It is in respect of three houses that defendant 1 claims that the plaintiffs' suit should fail. These are, item 5 at p. 6, item 12 at p. 7 and item 14 at p. 7. As regards item 5 at p. 6 (which is described as "House No. 1, comprising seven shops. . . . . ", it appears that plaintiff 1 admitted before the Court below (see p 46) that it was the property of an idol known as Thakur Radha Damodar. It was an idol with which the parties had no concern to start with. Somebody by the name of Sukhomaya Rai established an idol and endowed the property. The idol was installed in this very house. Plaintiff 1 stated that the idol had been removed to the building in which the idol of Mahaprabhuji is situated. We have no evidence to corroborate him, but if this was so, the removal must have been to facilitate the carrying on of the worship. The fact remains that this house did not belong to the family. The management of the house and the management of the worship of Thakur Radha Damodar has been in the hands of defendant 1 for the last 22 to 26 years (see p. 57). In the circumstances the property cannot be claimed by the plaintiffs either as the property of Mahaprabhuji or property of the parties. The appeal, therefore, will have to be allowed with respect to this house and the suit should be dismissed with respect to it.

As regards item 12 at p. 7, this is the property which once belonged to one Subharam Bhagat. The plaintiffs' case is that it was given to the idol many years ago. The defendant has not been able to prove that the gift was made to him personally or to his ancestors personally. The property has been treated as the property of the Thakurji and the decision of the Court below with respect to it must be taken as correct. As regards item 14 at p. 7, the house is described as a dharamsala. A part of it was built by the family and a portion of it was added to by some pious gentleman by the name of Ganga Ram. It has been

used for the purpose of lodging pilgrims who come to visit the temple. It has been treated as a part of the idol's property and it must be left as such.

Defendant 1's appeal also included among it the moveable properties which were recovered from the apartments once occupied by Mt. Madhumati. There is no admission on the part of the plaintiffs that the properties belonged to Madhumati alone. It was argued by the learned counsel for the appellant, that the properties, being Mt. Madhumati's exclusive property, could not be claimed by the plaintiffs till they had shown that all the possible line of heirship has become extinct. But, as we have already mentioned, there is no admission on the part of the plaintiffs, that these moveable properties belonged to Madhumati. They were only recovered from what were once the apartments of that lady. She died about three years prior to the institution of the suit. It is therefore difficult to believe that her goods were not appropriated by the parties and had been kept separate. The plaintiffs claim the partition of these goods as a part of the joint property and, therefore, asked the Court to depute somebody to make an inventory of these goods. In the written statement, defendant 1 did not claim that these goods were not to be partitioned as they belonged to a third party. We may mention the very important fact that the commissioner's report had been received much earlier than the filing of the written statement by defendant 1. In view of these circumstances we do not think that we need treat these properties as the separate properties of Mt. Madhumati. These properties therefore have rightly been declared to be divisible between the parties.

Lastly comes the question of "turns" or days fixed for worship by the elder branches of the family. It has been held more than once in this Court that where a family has a right of worship with some emoluments attached to it, the Court may assign certain days for facility of worship and for the purpose of enabling each party to receive offerings offered. The latest case on the point comes from their Lordships of the Privy Council in *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (3). One of the cases decided by this Court will be found reported in *A. I. R.* 1923 *All.* p. 425. It is, therefore, open to the Court in this case to divide the turns of worship. We may point out that in this particular family (as stated in the beginning of this judgment) three branches managed the worship, each branch for a month, when the middle or second branch disappeared, its turn of worship of one month was divided between the surviving members of the family. In the circumstances, there can be no bar to the division of the turn of worship.

Coming to the appeal filed by the plaintiffs, it appears that the learned Subordinate Judge, in directing the division of the turn of worship made the following reservation :

"The bhet at the temple during their turns will continue to go to the Thakurji's bhandar of the bari taraf walas as usual." (see p. 73).

The learned counsel for the plaintiffs argued that if all the offerings to the priest who may be officiating or presiding at a particular time were to go for the worship of the idol, it was no use dividing the turns at all. The counsel for the parties are agreed that the income of the temple may be divided into two classes, one as the income of the presiding priest and the other as the "charao" or offering made to the idol itself. The learned counsel are agreed that according to the evidence given in this case, the actual offerings that were made to the idol are the idol's property, while the remuneration or presents made to the priest is his private property. We agree with his view and, therefore, we make it clear that any presents or remuneration paid to the pujari or the person whose turn it may be to act or officiate, will be his personal property, while the offerings made to the idol would be the idol's exclusive property.

The plaintiffs also complain that the learned Subordinate Judge has not given any direction to enable the plaintiffs to control the management of the endowed property. The management of endowed property cannot be very well divided. We are of opinion that the learned Subordinate Judge will have to frame a scheme, with the approval, as far as possible, of the parties, by which two persons at least should be constituted the management, who would be liable to keep accurate accounts of the income not

(3) A. I. R. 1925 P. C. 139=52 Cal. 809=52 I. A. 245 (P.C.).

only from the immovable property, but also from the offerings to the idol. The properties that we are mentioning are, of course, the property which belongs only to the parties and properties which are under the control of the parties and our remarks have nothing to do with properties that may be under the control of the youngest branch. Subject to these modifications, the judgment of the Court below is affirmed.

To sum up, the claim of the plaintiffs with respect to item 5 at p. 6 is dismissed. The claim otherwise stands decreed subject to the modifications stated above. In appeal No. 83 of 1926 the parties will pay and receive their costs in proportion to their respective failure and success. In appeal No. 67, the parties will pay their own costs.

V.S./R.K. *Decree modified.*

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* A. I. R. 1930 Allahabad 387(1)

DALAL, J.

Sukhdeo Rai and *others*—Plaintiffs—Appellants.

v.

Ram Narain Rai and *another* — Defendants—Respondents.

Second Appeal No. 212 of 1928, Decided on 26th November 1929, from decree of Sub-Judge, Ghazipur, D/- 28th November 1927.

Evidence Act, S. 92—Suit for recovery of possession on basis of document, property in suit being left out as result of clerical mistake — Suit for rectification barred — Mistake can be proved — Practice—Plea—Limitation.

In a suit for recovery of possession based on a document which contains a mistake, the property in suit being left out through clerical mistake, although a suit for rectification may be barred by limitation, the plaintiff is entitled to succeed and mistake can be proved under S. 92: *A. I. R.* 1927 *All.* 355, *Ref.* [P 387 C 2]

Haribans Sahai – for Appellants.

U. S. Bajpai—for Respondents.

Judgment.—In my opinion the lower appellate Court ought to have gone further and made inquiry whether the plaintiffs were entitled to succeed in a suit for possession. The plaintiffs sued for the rectification of a sale deed alleging that by mistake instead of a certain area a lesser area was entered in the sale deed. The lower appellate Court held that the suit for rectification was time barred under Art. 96, Lim. Act. I agree with that finding. There was, however, a prayer (c) for possession of the property which was left out from being entered in the sale deed through a clerical mistake. As pointed out by Iqbal Ahmad, J. in *Kesho Singh* v. *Roopan* *A. I. R.* 1927, *All.* 355 a mistake may be proved under S. 92, Prov. (1), Evidence Act. The plaintiffs have come to recover possession within twelve years of the transfer, so their suit for possession is not time barred. What they mean in effect is that for instance, "1" is a mistake for "2", and that in consequence they should be given possession over "2" and not over "1" only.

Only on behalf of the respondents Mr Gaur argued that there could be no possession until there was rectification of the document. Their contention for the dismissal of the suit for possession would be correct if the proposition put forward by him were accepted. I do not think that the proposition is sound. What the plaintiffs want is to be put in possession of what they actually purchased and they can prove the mistake made in the document of sale. It is not necessary that the mistake should be corrected in the document within the period of limitation allowed for such correction before they could be permitted to take possession of the property actually sold to them.

I set aside the decree of the lower appellate Court, which dismissed the plaintiffs' suit completely. I confirm the decree dismissing the suit for the rectification of the document, and whatever the result of the remand may be, the plaintiffs shall pay to the defendants costs of that portion of the claim. The rest of the appeal is remanded under O. 41, R. 23, to arrive at further decisions whether there was a mistake as alleged by the plaintiffs and whether in case of such a mistake the plaintiffs could obtain possession of property left out of the sale-deed through a mistake. As regards that portion of the claim, the lower appellate Court shall pass orders as to costs.

V.B./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 387(2)

DALAL, J.

Balbhaddar—Plaintiff—Appellant.

v.

Balla and *others* –Defendants — Respondents.

Second Appeal No. 439 of 1928, Decided on 29th November 1929.

(a) Civil P. C., O. 39, R. 1 — Injunction granted pendente lite ends with suit.

An injunction granted pendente lite until the disposal of the suit or further orders will end in any case on the disposal of the suit or any earlier date on which further orders may be passed. The words "until further orders" do not extend its duration beyond the date of decree : *A. I. R.* 1924 *Mad.* 178, *Rel. on.* [P 388 C 2]

(b) Civil P. C., O. 39, Rr. 1 and 2 (3)— Provisions of R. 2 (3) may be applied to breach of injunction under R. 1—(*Obiter*).

Provisions of R. 2 (3), O. 39 were intended to be applied to breach of injunction under R. (1) also but as Cl. (3) is included under R 2, it would follow that the provisions of that clause will not apply to R. 1. It is suggested that the clause may be split into separate rules (*obiter*). [P 388 C 2]

(c) Civil P. C., O. 39 R. 1 — Existence of injunction does not render void alienation —Transfer of Property.

The existence of a temporary injunction does not render void an alienation made in contravention of the injunction : 9 *All.* 497, 25 *All* 431 and 35 *M. L. J.* 96, *Rel. on.* [P 388 C 2]

R. C. Ghatak—for Appellant.

Iqbal Ahmad—for Respondents.

Judgment.—Mr. Ghatak has argued this appeal with considerable skill, but I am afraid that the authority is against him. The plaintiff sued for a declaration that a certain mortgage executed by his judgment-debtor Balla in favour of Ram Ghulam was fictitious, ostensible, invalid and ineffectual according to law; that Balla had no right to transfer the property, and that Ram Ghulam had no right to accept the transfer. The plaintiff Balbhaddar sued Balla in the Court of Small Causes at Cawnpore on a simple money bond and at the same time applied under O. 39, R. 1, Civil P. C., for an injunction to prevent him from transferring his house. Notices were issued and both the application for injunction and the suit came up for hearing on the same date. The injunction was granted and the suit decreed. Both happened on the same day, 18th August 1926, and next day on 19th August Balla made the transfer to Ram Ghulam which is brought into question in this suit. It was argued in the suit that the injunction having been issued the transfer was null and void. This argument is against authority. It was held by this Court as far back as 1887 in *Chunni Kuar* v. *Dwarka Prasad* (1), that a temporary injunction came to an end with the passing of the decree. In that case the argument was advanced that a temporary injunction may be issued by Court until further orders, so it may extend beyond the date of the decree. This Court explained that until further orders provided for an alteration in the order prior to the passing of the decree that is, the injunction may extend either up to the passing of the decree or to a time short of that until further orders of the Court. The injunction, therefore, became inoperative on the passing of the decree. I find from a note in one of the annotated editions that the same view was taken by the Madras High Court in 1924. The case is said to to have been reported in *Ayisa Umma* v. *K. Abdulla* (2), of which a copy is not in this Court.

Going a little further the existence of an injunction does not render void an alienation made in contravention of the injunction. It was held by this Court in 1887 in *Delhi and London Bank, Limited* v. *Ram Narain* (3), that the principles of S. 23, Contract Act, do not apply to such an alienation. This view was affirmed by a Bench of this Court in 1903 in *Manohar Das* v. *Ram Autar Pande* (4). The same view was taken by the Madras High Court in 1918 in *Pnzhakkal Edom* v. *Mahadeva Pattar* (5) on the authority of this Court.

Through some inadvertence no penalty appears to be provided in O. 39 for the breach of an injunction. It seems likely that the provisions of R. 2 (3) O. 39 were intended to be applied to a breach of an injunction under R. 1 also, but as Cl. (3) is included under R. 2 it would follow that the provisions of that clause will not apply to R. 1. The Registrar shall be requested to bring this matter to the notice of the Rules Committee so that Cl. (3), R. 2, may be turned into a separate rule applicable both to breaches of injunctions issued under R. 1 and under R. 2.

The learned counsel referred to the provisions of S. 52, T. P. Act. Those provisions do not apply because the

(1) [1887] A. W. N. 297.

(2) A. I. R. 1924 Mad. 178.
(3) [1887] 9 All. 497=(1887) A.W.N. 107.
(4) [1903] 25 All. 431=(1903) A.W.N. 92.
(5) [1918] 35 M. L. J. 96=47 I. C. 778.

suit was a simple money suit and the house was not the subject of litigation in the suit, He further argued that the transfer would be invalid under S. 53 as he suggested that it was made in fraud of creditors. The lower appellate Court has held that the transaction was a genuine transaction. The argument under S. 53 will, therefore, not prevail.

His final argument was that even if the mortgage be held to be valid for the sum of Rs. 195 in respect of the mortgagee's prior debt it was invalid as regards Rs. 105 received in cash by Balla. The lower appellate Court, however, has disagreed with the opinion of the trial Court and has not held that Ram Ghulam was aware of the injunction and entered into a fraudulent transaction with Balla. There was a further prayer that the sale held in execution of plaintiff's decree be held to be invalid. That is a matter in execution and the plaintiff was not serious about that relief as it appears to me that the purchaser of the house in execution of his decree is a man of his own choosing.

I dismiss this appeal, but having regard to the circumstance of the case I make no order as to costs here.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 389

MUKERJI AND NIAMATULLAH, JJ.

Ram Prasad, In the matter of.

Misc Case No. 671 of 1929, Decided on 21st November 1929, Reference made by Commissioner of Income-tax, U. P.

(a) Government Trading Taxation Act (3 of 1926), S. 2 (3)—Act appiles to Tehri State.

Tehri State is included in the territory which is under "His Majesty's protection" and so the Government Trading Taxation Act is applicable to it. [P 390 C 2]

(b) Government of India Act, S. 65—"Person" includes body of persons corporate or incorporate.

The expression "person" as used in S. 65, includes any body of persons, corporate or incorporate. [P 391 C 1]

(c) Income-tax Act (11 of 1922), S. 3—Tax cannot be claimed in respect of something done in territory of Government having sovereign rights.

The object of the Income-tax Act is to charge income acquired in British India, and it is not in the contemplation of the Act to claim anything in respect of something done in the territory of a Government which may have sovereign rights within its own territories. [P 391 C 1]

(d) Government Trading Taxation Act, S. 3 — Act comingforce in 1926 — Still Governments are liable to assessment for transactions taking place in year 1925-1926 —Income-Tax Act, S. 3.

Although Government Trading Taxation Act only came into force on 1st April 1926, a State or Goverement liable to income-tax under the provisions of the Act is liable to assessment with reference to transactions which took place during the year 1925-1926 by virtue of Income-Tax Act S. 3. [P 391 C 1, 2]

(e) Income-tax Act (11 of 1922), S. 10—Whether money received is capital or profits is question of fact.

Whether money received in a transaction is really the value of the capital, which has changed its shape, or whether there are profits is a question of fact. The presumption generally is that money sunk in business brought back not only itself but something more by way of profits. [P 392 C 1]

(f) Government Trading Taxation Act (3 of 1926), S. 2 (3)—What constitutes trading in British India.

Act of a State in arranging for the sale of a commodity and in receiving proceeds of the contract in British India, constitutes trading in British India. [P 392 C 1]

U. S. Bajpai—for the Crown.

Tej Bahadur Sapru and *P. N. Sapru*—for Opposite Party.

Mukerji, J.—This is a reference by the Commissioner of Income-tax under S. 66 (2), Income-tax Act of 1922.

The assessee is the Tehri State. It appears that the State has grown timber within its territory, and annually, it arranges to sell the timber at two places in British India, namely, Hardwar in the United Provinces and Abdullahpur in the Punjab. The method of business is this : Annual auctions are held at Dehra Dun and certain prices are offered. These offers are communicated to the State capital, and there, on their acceptance, money is deposited by the purchasers, in the Imperial Bank of India, in its Dehra Dun branch. It also appears that, later on, the State appointed a certain gentleman, by the name of Pandit Ghananand, to carry on the sale of timber. He having died shortly after, a State official was appointed to carry on the business. This was Pandit Sadanand.

The year on the basis of the income of which, income-tax is to be calculated is 1925-26. The tax is to be paid in the year 1926-27. An assessment having been proposed, the State opposed it on several grounds. There was an appeal to the Commissioner of Income-tax, and he considerably reduced the proposed tax. Being, however, dissatisfied with the ultimate assessment, the Tehri State asked for a reference, and four

points have been put before us for our opinion. These are :

(1) Whether the Government Trading Taxation Act and the Income-tax Act are applicable to the Tehri State ?

(2) Whether, since the Government Trading Taxation Act only came into force on 1st April 1926, there is any liability for assessment with reference to transactions which took place before that date ?

(3) Whether the royalty is nothing but the price of the forest produce as it stands on the ground and, therefore, not assessable ?

(4) Whether the acts of the State in arranging for the sale of timber and in receiving the proceeds of the contracts in British India constitute trading in British India ?

The case for the assessee has been very ably and at some length argued by Sir Tej Bahadur Sapru, and we are greatly indebted to him for his illuminative arguments.

The first point is that the Tehri State is not amenable to the jurisdiction of the Indian legislature, and neither the Income-tax Act nor the Government Trading Taxation Act can apply to the State. To start with, we have to see whether the Government Trading Taxation Act (3 of 1926) is applicable, for that Act has, to some extent, amended and explained certain provisions of the Income-tax Act of 1892. By the preamble of the Government Trading Taxation Act we are told that this Act was meant :

"to determine the liability of certain Governments to taxation in British India in respect of trading operations."

The object, therefore, of the Act is to tax Governments who may be trading in British India. The legislature, deliberately, has set out on taxing Governments. S. 2 of the Act reads as follows :

"(1) Whether a trade or business of any kind is carried on by or on be half of the Government of any part of His Majesty's Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all income arising in connexion therewith, be liable :

"(a) to taxation under the Income-tax Act, 1922, . . ."

By sub-S. 3 of the same S. 2, we are furnished with the meanning of the expression "His Majesty's Dominions" The expression is defined to include "any territory which is under His Majesty's protection . . ." Now, the question is whether the Tehri State is part of His Majesty's Dominions. If it is, the Government Trading Taxation Act of 1926 would be applicable, by virtue of sub-S. 1, S. 2. The treaty between the Tehri State and the British Government has been read out to us. It will be found at p. 34, Vol. 1, "Treaties, Engagements and Sanads" by Aitchison. The sanad granted to the Rajah of Garhwal concludes with the following sentence :

"While these conditions shall be faithfully observed, the British Government will guarantee the Rajah and his posterity in the secure possession of the country now conferred upon him and will defend him against his enemies."

The sentence quoted above, in our opintion, furnishes to us an answer as to what is meant by the phrase: "His Majesty's protection," to be found in S. 2 (3), Government Trading Taxation Act. In our opinion the Tehri State is included in a territory which is under His Majesty's protection. It would follow, as we have already mentioned, that the Government Trading Taxation Act of 1926 is applicable to the Tehri State.

Now, let us see what is the significance of the passing of the Act 3 of 1926. By sub-S. 2, S. 2 :

"For the purposes of the levy and collection of income-tax under the Income tax Act, 1922, ... any Government to which that subsectiou applies shall be deemed to be a "company" within the meaning of that Act, and the provisions of that Act shall apply accordingly."

The result is that within the meaning of S. 3, Income-tax Act of 1922, a Government, which carries on trade in British India, is to be treated as a company. The trading "company" is liable to pay income-tax under S. 3 of the Act of 1922. The relevant portion of that section is as follows :

"Where any Act of the Indian legislature enacts that income-tax shall be charged for any year. . . . . , tax shall be charged . . . . in respect of all income, profits and gains . . . . . of every individual, Hindu undivided family, company, firm and other associations of individuals."

The trading Government as a "company" becomes liable to pay income-tax under S. 3.

The learned counsel for the assessee has argued that under S. 65, Government of India Act, the Indian legislature has power to make laws only for persons within British India and that the Tehri State being not a person within British India is not subject to the Indian legislature. In this view, the learned counsel went on to argue, the whole Act 3 of 1926 was ultra vires of the Indian legislature. We do not think that this argument is quite sound. The English Interpretation Act of 1889, by S. 19, defines the word "person." S. 19 runs as follows :

"In this Act, and in every Act passed after the commencement of this Act, the expression "person" shall, unless contrary intention appears, include any body of persons, corporate or incorporate."

It may be that the person who governs the State is a single individual or a body of persons. In either case, the governing authority, single or several in number, will come within the definition of the "person" in S. 65, the Government of India Act and those persons, carrying on business within British India would be subject to any law that the Indian legislature should frame and promulgate. The object of the Income-tax Act is to charge income acquired in British India and it is not in the contemplation of the Act to claim anything in respect of something done in the territory of a Government which may have sovereign rights within its own tarritories. In our opinion Act 3 of 1926 was intra vires of the Indian legislature.

Now we come to question 2. The argument is that the income that is being taken into consideration for taxation accrued to the State in 1925 26, that the Government Trading Taxation Act came into force on 1st April 1926 and that therefore, it could have no application to the income which was earned in the previous year (1925 26). On the face of it this argument is very attractive but in view of the language employed in S. 3, Taxation Act, we do not think that it has much force. The Tehri State we have been told has continued this business in years subsequent to 1925 26 and the Income-tax Department has sought to assess it for the year 1926-27. The tax is to be paid in and for that year. The Income-tax Department is armed with powers to tax the Tehri State any time after 1st April 1926. That being so, let us read S. 3, Act 3 of 1926. We have already read it once before. Now substituting the years with which we have to deal the section would read as follows :

" Where any Act of the Indian legislature enacts that income-tax shall be charged for the year 1926-27 . . . tax . . . shall be charged for the year 1926-27 . . . in respect of all the income profits and gains of the previous year (1925-26.) . . . "

This is the natural reading of S. 3, in view of the facts before us. It seems to be quite clear to us that the tax which has to be paid by the Tehri State for the year 1926-27 is to be paid on the amount of profits earned by it in the year 1925-26. If the State decided to stop its business say in the year 1930-31, the tax paid by it in 1930-31 on the basis of the income of the year 1930-31 would be liable to be refunded in so far as the income of the year 1930-31 fell short of the income earned in 1929-30.

Now we come to the third point. The argument of the learned counsel for the assessee is that the money received is really the value of the capital which has changed its shape and there are no profits. This really in our view at any rate is a question of fact. How the Income-tax Department has looked upon the matter is this. By sale of timber the State is supposed to have made profits. For growing timber a certain amount of capital expenditure is necessary. The British Indian Government has also extensive forests. It employs officers, spends money, sells timber and makes a profit. The Income-tax Department assumed in the absence of any evidence to the contrary that the Tehri State does the same. The net profits made by the British Indian Government amount to about 44 per cent. The Commissioner of Income-tax reduced the profits which the Tehri State presumably made to 35 per cent. Now, to go back to the argument of royalty as we have already stated it is virtually a question of fact. The question is whether what has been received by the Tehri State is the value of its capital or whether it includes capital and profits. We have already mentioned that the State carries on this business of growing timber

and selling it. This presumably is done for profit. We have already stated that the British Indian Government does the same thing and makes a profit. It is, therefore, reasonable to expect that all the money that was sunk in the business brought back not only itself but something more in the shape of profit. If it were the case that what were the receipts were only tne capital which had changed its shape the argument of the learned counsel would have been very very good. We find that the amount on which the tax has been assessed represents no capital but only the estimated profit. In this view the answer that we should return is that only the income has been taxed and not the capital.

Coming to the fourth point here again is a question of fact although the learned Commissioner was doubtful whether it was purely a question of fact or partly a question of law. The question is whether the acts of the State in arranging for the sale of timber and in receiving the proceeds of the contracts in British India constitute "trading in British India," We are of opinion that the answer must be in the affirmative. The sales were arranged in British India and the money was received in British India. What remained to be done in the capital of the State itself was the acceptance of the offer made by the purchaser. We do not think that the matter requires much discussion. The money was received by the Imperial Bank at Dehra Dun as the agent of the Tehri State. The receipt by the Bank was a receipt on behalf of the State. As already stated we answer the question in the affirmative.

The result is that none of the grounds taken by the Tehri State appear to be tenable.

Let a copy of this judgment be sent to the Commissioner of Income-tax as the answer to his reference to this Court.

The learned Goverment Advocate is entitled to a fee of Rs. 250 if he files a certificate of fee within a month.

V.B./R.K. *Reference answered.*

A. I. R. 1930 Allahabad 392

BOYS AND KING, JJ.

M. B. Singh and *Co.*—Plaintiffs—Appellants.

v.

Sircar and *Co.*—Defendants—Respondents.

Second Appeal No. 140 of 1927, Decided on 29th November 1929, from decree of Addl. Dist. Judge, Cawnpore, D/- 19th October 1926.

Limitation Act, S. 20—Mode of appropriating and proving payment of interest and principal explained.

Section 20 provides for cases in which a payment towards interest or a payment towards principal may be proved to save limitation. If there has been nothing in the handwriting of the debtor, as required by the proviso, the only way in which the creditor can show, that it is open to him to use the payment to save limitation is by proving that at the time it was made it was avowedly made and accepted as a payment towards interest. If it was so made, it does not come within the proviso and no writing is necessary. But if there is no question, of the payment being proved to have been made towards interest at the time it was made, then it must be treated as a payment towards principal, in which case the fact of the payment, and not the fact that the payment is towards the principal, must be recorded in the handwriting of the debtor. This is the meaning of the words "paid as such" in the first paragraph of S. 20 (1) : *A. I. R.* 1921 *All.* 335, *Rel. on* ; 9 *Bom. L.R.* 1329, *Dist.*; 6 *M.L.W.* 790 and 9 *Mad.* 271, *Ref.* [P 394 C 2]

K. N. Katju—for Appellants.

P. L. Banerji and *I. B. Banerji*—for Respondents.

Boys, J.—The plaintiff-appellants are M. B. Singh and Co., colliery proprietors, and it is admitted that they supplied coal to the defendants, Sircar and Co., owing to the fact that the plaintiffs were abolishing their agency in Cawnpore, an arrangement was come to by which the plaintiffs were to supply some of the coal to the Pioneer Sugar Mills Co., at Unao. The Pioneer Sugar Mills went into bankruptcy and a question of accounts and balance due arose between the plaintiffs and the defendants. No mention would have been necessary of the share of the Pioneer Sugar Mills in the transactions at all, but for the fact that the lower appellate Court seems to have misconceived some of the facts relating to three cheques, which were exhibits, a misconception to which we shall refer later.

A finding of fact is that the plaintiff company supplied coal at some date

prior to 15th April 1922. The suit on a balance of account was filed on 6th April 1925. Prima facie, therefore, the claim was barred by limitation. The plaintiffs, however, relied on three payments alleged to have been made to them on 12th April 1922, 1st May 1922 and 22nd June 1922. It is on the basis of the transactions evidenced by three cheques that the plaintiffs claimed that their suit was saved from being barred by limitation. We have seen these three cheques, Exs. 9, 10 and 11, and there appear to be no other cheques in question, or, at any rate, no other are on the record. The trial Court describes these cheques as cheques for Rs. 115, Rs. 1050 and Rs. 300 respectively. The cheque, Ex. 9, is in fact not for Rs. 115, but for Rs. 200. No explanation of this is forthcoming, but the error, though curious, is immaterial. The trial Court's judgment proceeds on the view, and obviously correct view that these cheques were drawn by the defendant company in favour of the plaintiff company. It says while discussing the cheques :

"In the present case the plaintiffs reeeived payments for the three cheques and the cheques being in the handwriting of the defendant himself, the requirements of S. 20, Lim. Act are complied with."

The lower appellate Court refers to these three cheques as follows, at p. 16 of the paper-book :

"But it is urged that the Pioneer Sugar Mills issued three cheques on the National Bank of India, Limited, in favour of defendant and defendant endorsed them in favour of plaintiffs and plaintiffs cashed them and this saves limitation. No dcubt defendant admits these payments. The three cheques are on the recosd . . . . . These cheques were cashed by plaintiffs. It is clear that if the endorsement of the cheques amounted to payment, then limitation is saved by S. 20, Lim. Act."

Counsel for the appellants, who opened the case, told us that there was a mistake in this portion of the learned Judge's judgment, in that the cheques were not endorsed by the defendants in favour of the plaintiffs, but were in fact endorsed in blank. Counsel for the defendant respondents accepted this correction and on it founded an argument. It is not necessary to be more precise. After a considerable amount of the time of the Court had been taken up in considering arguments founded on these descriptions of the cheques, counsel for the appellant announced that neither description was correct. The cheques were not drawn by the Pioneer Sugar Mills at all in favour of the defendants, nor drawn by anybody in favour of the defendants, nor endorsed by the defendants in favour of anybcdy ; but simple straightforward cheques had been drawn, in the first place, by the defendant company in favour of the plaintiff company. It would appear that, though these cheques were to form the basis of the whole of the argument in this appeal, neither counsel for the respondents, nor, more particularly, counsel for the appellants had taken the trouble to look at them before the hearing began. It is most unfortunate that so much of our time in a case already of some difficulty should have been taken up with argument that was wholly unfounded on the facts. On the spur of the moment then neither counsel was able to explain how this mistaken description of the cheques found its place in the lower appellate Court's judgment. But it is to be noted that the lower appellate Court's description of the cheques begins with the words, "but it is urged." A possible explanation clearly then is that the learned District Judge took down in his notes a misdescription of the cheques from the plaintiffs' counsel in the lower Court and defendants' counsel never corrected the error. The trial Court gave the plaintiffs a decree. The lower appellate Court allowed the defendants' appeal and dismissed the suit, holding it to be barred by limitation and relying upon the decisions in *Mackenzie* v. *Tiruvengadathan* (1) and *Ram Chander* v. *Chandi Prasad* (2), declined to decide the case in accordance with the decision in *Kedar Nath* v. *Dina Bandhu* (3).

Two questions have finally emerged for decision. The first question is : Did each or all of the transactions evidenced by these cheques amount to payments within S. 20, Lim. Act, so as to save limitation? It is not suggested that the amounts of the cheques were to go towards interest and were paid as such. It is contended for the plaintiff appellants that the admitted facts amount, in the first place, to a payment of part of the principal due. Those facts are that the cheques were drawn by the

(1) [1886] 9 Mad. 271.
(2) [1897] 19 All. 307=(1897) A. W. N. 49.
(3) [1915] 42 Cal. 1043=31 I. C. 626=19 C. W. N. 724.

defendants in favour of the plaintiffs. The plaintiffs presented the cheques immediately for payment and they were honoured and the plaintiff's account was credited with the amounts of the cheques. It is contended for the defendants that the writing of a cheque and handing it over to the payee does not constitute the embodying of the fact of a payment in the handwriting of the person making the same. It is contended that a cheque only constitutes an order for payment and does not amount to payment. After hearing the arguments of the counsel for the parties and considering the cases to which we have been referred, we are of opinion that it would be laying down a proposition too broadly to say that the mere writing of a cheque and handing it over to and its receipt by the payee will and must always constitute a payment of the amount. It is matter of common knowledge that a creditor sometimes receives a cheque refusing wholly to regard it as a payment, while, on the other hand, sometimes it is accepted by him as payment. This may be illustrated by what is within the common knowledge of all. A creditor will sometimes give a receipt for the cheque stating that his account has been paid by cheque.

On the other hand, he will semetimes acknowledge receipt of the cheque and say that a receipt for the amount will follow when the cheque has been duly honoured and the amount paid to the account of the creditor. In the present case, there is no doubt whatever on the facts that the cheque was received by the creditor plaintiffs in payment of their acccunt so far as the cheques are concerned. We are, therefore of opinion that there was here a payment such as prima facie would save limitation. It is next urged on behalf of the defendant respondents that the writing, i. e., the cheques, did not comply with the requirements of the proviso to S. 20. It is contended that while the fact of the payment, in view of the answer to the first question, must be admitted to appear in the handwriting of the defendants, the document must further show that the payment was towards part of the principal of the debt due. In support of this contention for the defendants we are referred to the case of *Muthiah Chettiar* v. *Kuttian Chetty* (4). That case certainly supports the argument of the defendants. It does not, however, discuss the question, but merely follows the decision in *Mackenzie* v. *Tiruvengadathan* (1). We were further referred to the case of *Ranchor Das* v. *Pestonji* (5). That case has, in our view, no bearing on the question, for in that case, so far as the payment of principal is concerned, there appears to have been no memorandum at all. Other cases referred to for the defendants do not call for mention. On the other hand, there is a decision of two Judges of this Court to which we are referred for the plaintiffs reported in *Curlinder* v. *Abdul Hamid* (6). The view of the learned Judges in that case was that it was not necessary that in the document in the handwriting of the defendants there should be any statement that the payment was made towards the principal of the debt in question. It was sufficient, if it evidenced a payment.

Agreeing with the decision in that case, we would state our reasons as follows. S. 20 provides for cases in which a payment towards interest or a payment towards principal may be proved to save limitation. If there has been nothing in the handwriting of the defendant, as required by the proviso, the only way in which the plaintiff can show, that it is open to him to use the payment to save limitation, is by proving that at the time it was made it was avowedly made and accepted as a payment towards interest. If it was so made, it does not come within the proviso and no writing is necessary. But if there is no question of the payment being proved to have been made towards interest at the time it was made, then it must be treated as a payment towards principal. This, we think, is the meaning of the words "paid as such" in para. 1, S. 20 (1). The effect then of the first two paras. is that unless the creditor can show that, at the time, the amount was paid as interest, it will be treated as having been paid towards the principal. If it is to be treated as having been paid towards the principal, the

(4) [1918] 6 M. L. W. 790=43 I. C. 20=(1918) M. W. N 42.
(5) [1907] 9 Bom. L. R. 1329.
(6) A. I. R. 1921 All. 225=42 All. 216.

fact of the payment must be recorded in the handwriting of the debtor. But to hold that there must further be recorded in the handwriting of the debtor the fact that the payment is towards the principal, is to require that something should be inserted in the handwriting of the debtor which ex hypothesi is already presumed. To accept the contention that it is necessary for the fact that the payment is towards part of the principal to be included in the document in the handwriting of the debtor, would further be to read into the section after the words "the fact of the payment" the words "as such." If the legislature had desired to insert these words, it could very easily have done so. We are, therefore, in accord with the decision of this Court already referred to. Allowing the appeal, we set aside the decree of the lower appellate Court and restore that of the trial Court. The appellants will have their costs of the appeal and in the Court below.

V.S./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 395

DALAL, J.

Mt. Chito—Plaintiff—Appellant.

v.

Jhunni Lal and *others*—Decree-holder—Respondents.

Second Appeal No. 1566 of 1928, Decided on 18th February 1930, from decree of Dist. Judge, Aligarh, D/- 10th August 1928.

(a) Hindu Law—Widow—Relinquishment in favour of second reversioner with consent of first reversioner—Relinquishment is valid.

Under Hindu Law, a Hindu lady in possession can relinquish, and by relinquishing anticipate for the reversioners their period of succession; and if she does this in favour of second reversioners with the consent of the first, then or afterwards expressed, the relinquishment is valid : 42 *Mad.* 25, *Foll.*; *A. I. R.* 1927 *Oudh* 278, *Diss. from.*; *A. I. R.* 1928 *All.* 190, *Ref.*

[P 395 C 2]

(b) Civil P. C., O. 21, R. 63—Suit for declaration — Duty of Court of equity explained.

A suit under O. 21, R. 63, may not be necessarily a suit for possession, but for declaration to set aside an order passed in the execution department, but a Court of equity has to see whether there is an honest suit for declaration or whether the declaration is sought on principles which would be held by a Court to be inequitable. [P 396 C 1]

Panna Lal—for Appellant.

S. N. Seth—for Respondents.

Judgment.—In my opinion the ruling quoted by the two Subordinate Courts of *Chinnaswami* v. *Appaswami* (1) covers the present case. The plaintiff is the mother of certain judgment debtors in whose favour the plaintiff's mother executed a deed of gift on 22nd January 1913. The plaintiff Mt. Chito gave her consent to the deed of gift by signing as an attesting witness. Mt. Chito's mother died in 1914 and ever since that time the judgment-debtors have been in possession. When the decree-holder attached this property of the judgment-debtors, Mt. Chito objected that the property really belonged to her because she was not bound by the gift executed by her mother. The Judges who pronounced the judgment of the Madras case quoted a ruling of 1864 reported in *Pratab Chunder* v. *Joy Monee Dabee* (2). The learned Judges observed in that case :

"We think that it admits of no reasonable doubt that under Hindu Law a Hindu lady in possession can relinquish, and by relinquishing anticipate for the reversioners their period of succession ; and if she does this in favour of second reversioners with the consent of the first, then or afterwards expressed, the relinquishment is valid."

The present is just such a case. The learned counsel for the plaintiff Mt. Chito sought to distinguish the ruling in the Madras case on the ground that in the Madras case both the female holders had actually executed the deed, while in the present case the female holder in possession had executed the deed and the next female holder had merely given her consent. This is a distinction without a difference. It is true that such a distinction has been drawn by King, J., in an Oudh case, *Krishnapal Singh* v. *Sri Raj Kuar A. I. R.* 1927 *Oudh* 278, but the suit was not decided on that point and the learned Judge went on to draw another distinction that such a proposition of law of the Hindu Code will not apply to the Taluqdari Law prevailing in Oudh. As already mentioned, in the case of the *Weekly Reporter* no deed was executed by the next female heir and the proposition of law was laid down in general terms and the surrender was held to be valid merely on the consent of the next female heir expressed either at the time or subsequently. Another case of this Court quoted by the

(1) [1919] 42 Mad. 25=35 M.L.J. 512=8 M.L.W. 512=48 I.C. 147=(1918) M.W.N. 756.

(2) 1 W.R. 98.

learned counsel is that of *Harihar Prasad* v. *Udai Nath Shah* (3). That case supports the view of the two Subordinate Courts because it was held there that at the moment or time when the next reversioner succeeded he being an insolvent the property vested in the receiver in insolvency and not in the reversioner, and, therefore, the consent of the reversioner could not bind the receiver in insolvency.

The next point argued on behalf of the appellant was that the entire estate had not been surrendered. It may be held as a finding of fact that the entire estate was surrendered, otherwise Mt. Chito's mother Mt. Sundar would not have made herself indebted to her grandsons for payment of a sum of Rs. 6 per month for her own maintenance. This reservation shows that no property remained with her afterwards.

On the point of estoppel, the learned counsel argued that the decree-holder of a simple money decree could not be said to have acted on the representation made by Mt. Chito for a term of over 12 years to the effect that not she but her sons were owners of the property. He stated that if the decree-holder had been a mortgagee in possession the principle of estoppel would have applied. It is, however, forgotten by learned counsel that the advance of money would not have been made to the sons of Mt. Chito if the property now in suit had not been standing in the names of the sons with the consent of Mt. Chito. She has remained silent for over 12 years, and, in fact, there can be no doubt that the present suit is brought by her merely to save the property not for herself but for her sons. In my opinion she is equitably estopped from claiming the property even as against the decree-holder of her sons under a simple money decree.

The next point argued by counsel was that in a suit under O. 21, R 63, Civil P. C., there is no necessity to sue for possession, and, therefore, there can be no bar of time. It is correct that the suit is merely for a declaration to set aside an order passed in the execution department, but a Court of equity has to see whether there is an honest suit for declaration or whether the declaration is sought on principles which would be held by a Court to be inequitable. This is just such a case where a declaration should not be granted under the circumstances.

I dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

(3) A.I.R. 1923 All. 190=45 All. 260.

A. I. R. 1930 Allahabad 396

SEN AND NIAMATULLAH, JJ.

Ram Sarup—Defendant—Appellant.

v.

Shambhu Dayal and *another*—Plaintiff—Respondents.

Letters Patent Appeal No. 15 of 1929, Decided on 19th February 1930, from a judgment of Ashworth, J., D/- 10th December 1928.

Cosharer—Party wall—Encroachment by one over other's part such other bringing suit for possession of land encroached—Court bound to grant decree.

Where a cosharer is reouilding his side of a party wall which belonged jointly to the parties encroaching upon the land of the other cosharer to the extent of 2½ inches in width and the suit is not one for mere mandatory injunction but for possession the Court is bound to grant a decree for possession to the extent of the cosharer's land which has been encroached upon. [P 397 C 1]

P. L. Banerji and *S. N. Gupta*—for Appellant.

N. C. Vaish—for Respondents.

Sen, J.—The land of the parties to the suit is continuous. In between, there was a party wall the width of which was 15 inches. The defendant demolished his side of the wall and in rebuilding the same he encroached upon the plaintiff's land to the extent of 2½ inches. The result was that the present width of the defendant's will is 10 inches in place of its original width which was only 7½ inches.

The suit was, instituted for demolition of the wall for a mandatory injunction and for possession of 2½ inches of land belonging to the plaintiffs which had been encroached upon by the defendant.

The suit had a chequered career. The Court of first instance dismissed the plaintiffs' suit presumably upon the ground that the claim was of a trivial nature. The lower appellate Court reversed the decree of the trial Court and gave the plaintiffs a decree for Rs. 50 by way of compensation. This Court on second appeal came to the conclusion that the suit was not one for a mandatory injunction simplicitor but

was also for possession. It held that under these circumstances, the Courts below had no jurisdiction to refuse relief to the plaintiffs for possession over 2½ inches of land which had been encroached upon. We are of opinion that the viewof the learned single Judge of this Court was clearly correct where the defendant in rebuiiding his side of a party well which belonged jointly to the parties encroaches upon the plaintiffs land to the extent of 2½ inches in width, and the suit is not one for mere mandatory injunction but for possession the Court is bound to grant a decree for possession to the extent of the plaintiffs' land which has been encroached upon. This appeal is without force and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 397

SEN AND NIAMATULLAH, JJ.

Jaganji—Defendant—Appellant.

v.

Bandan—Plaintiff—Respondent.

Second Appeal No. 876 of 1927, Decided on 30th January 1930, from decree of Addl. Sub-Judge, Muttra, D/- 20th January 1927.

(a) Limitation Act, Art. 90 — Sums of money entrusted to person with direction to dispose them off in particular manner—Person wrongfully retaining it in his hands —Suit for recovery of such money is covered by Art. 90 and time begins to run from date of knowledge of matter.

Where various sums of money are entrusted from time to time to a person with specific directions that he should dispose off particular sum in particular manner, the position of person so entrusted is that of an agent, intermediary or middleman. If such person abuses his position and retains the money, it being a suit by the principal against an agent for neglect or misconduct, the suit for recovery of such sums as he wrongfully retains in hand is covered by Art. 90, and time begins to run from the date the matter comes to the knowledge of the principal. [P 398 C 1, 2]

(b) Limitation Act, Art. 48 — Suit for recovery of money.

A suit for recovery of money is a suit for specific moveable property : 5 *All.* 341 ; 29 *All.* 579, *Foll.* [P 398 C 1]

N. P. Asthana—for Appellant.

U. S. Bajpai—for Respondent.

Sen, J.—This is an appeal by the defendant in a suit for recovery of Rs. 1,785.

The defendant is the maternal uncle of the plaintiff. There appears to have been some litigation between the plaintiff and his brothers which was referred to the arbitration of the defendant. The latter gave an award under which Rs. 787-8 where payable by the plaintiff to his brothers The plaintiff was indebted to one Moti Chaube under a hundi and the principal amount payable was about Rs. 200. The plaintiff sent Rs. 987-8 to the defendant by several instalments with the direction that the defendant was to pay Rs. 787-8 to his brothers and Rs. 200 to Moti Chaube. There is a concurrent finding of the two Courts that the aforesaid amount was sent by the plaintiff to the defendant and the object of sending this amount was that the defendant should liquidate the liability of the plaintiff to his brothers and Moti Chaube. It transpired, however, that the defendant did not pay either the brothers or Moti Chaube. On the other hand, the defendant obtained an assignment of the hundi from Moti Chaube in his own favour and instituted a suit for recovery of the amount from the plaintiff. This was suit No. 748 of 1924. The defendant pleaded that the amount payable under the hundi had been sent to the defendant for payment to Moti Chaube and the claim by the plaintiff (present defendant) as assignee of the debt was not maintainable. There was no question directly or substantially in issue between the parties to that action as to whether the sum of money alleged by the plaintiff Bandan to have been sent to Jaganji for payment to Moti Chaube had been received by him. The judgment in that suit proceeded upon the ground that the debt of Moti Chaube under the hundi had not been paid up. The plaintiff sought to enforce the claim not in his individual capacity, but in his capacity as assignee of the debt from Moti Chaube. The liability which is sought to be enforced against the defendant in the present case arises from his breach in not carrying out the undertaking to pay the sums of money which he had received from the plaintiff to the persons who should have been the legal and proper recipients of the same.

The Court of first instance decreed the suit. The lower appellate Court affirmed the decree, except as to the interest which the plaintiff had claimed to recover on the amount advanced.

It may be mentioned that the plaintiff's brothers had also instituted a suit against the plaintiff for recovery of Rs. 787-8 which was payable to them under the award which has already been adverted to. This claim was also decreed.

The present action was lodged on 13th February 1926. The defendant denied that he received the sums of money from the plaintiff. He also resisted the claim on the ground of res judicata and limitation. These pleas were repelled by the trial Court and a decree was passed in favour of the plaintiff for the entire amount. The lower appellate Court has affirmed the decree of the trial Court with a small variation as regards interest. The defendant has appealed to this Court and the plaintiff has filed a cross-objection as regards interest.

Upon the facts, which we have already set out above, the plea of res judicata is clearly unsustainable. The point which calls for determination in the present suit was not directly and substantially in issue in the former suit, nor did the parties litigate under the same title.

We are clearly of opinion that the plaintiff's claim is not time-barred. It is immaterial for the purpose of this case whether Art. 48 or Art. 90, Lim. Act is applicable. In similar cases, this Court has on no less than two occasions applied Art 48: (*Rameshwar Chaube* v. *Mata Bhik* (1) and *Ram Lal* v. *Ghulam Husain* (2). In the last mentioned case, the learned Judges were in some doubt as to the applicability of Art. 48, and we may state at once that we share the doubt. It may be open to argument whether a suit for money could properly be considered to be a suit for "specific moveable property," but we are bound by these decisions.

The position of the defendant in the transaction in which various sums of money were from time to time entrusted to him was that of an agent. He was either a middleman or intermediary on behalf of the plaintiff. The sums of money were entrusted to him with the specific direction that they should be paid in one instance to the brothers and in the other to Moti Chaube. If the defendant abused his position and retained the money, the suit for recovery of the sums which he wrongfully retained in his hands was clearly covered by Art. 90, Lim. Act, it being a suit by the principal against an agent for neglect or misconduct. This neglect or misconduct came to the notice of the plaintiff when the suit referred to above, viz., suit No. 748 of 1924 and 161 of 1925 were instituted. The finding of the lower appellate Court is that the present action was commenced within three years of this matter coming to the knowledge of the plaintiff. The claim therefore is clearly within time. These were the only pleas which were argued in this appeal. We dismiss this appeal with costs.

The plaintiff presses his cross-objection as to interest. His right to interest does not flow from the contract, nor is the plaintiff entitled interest to under Act 32 of 1839. At the out set the claim could have been by way of damages sustained by the plaintiff by reason of the defendant wrongfully withholding the money. As such it should have been pleaded. The measure of damages has not been indicated in the plaint, nor has it been stated upon what data the plaintiff claims the amount.

We are therefore of opinion that the lower appellate Court was not in error in refusing the claim as to interest. The cross objection is dismissed with costs.

V.B /R.K. *Appeal dismissed.*

(1) [1893] 5 All. 341 = (1883) A. W. N. 48.
(2) [1907] 29 All. 579 = 4 A. L. J. 671 = (1907) A. W. N. 181.

A. I. R. 1930 Allahabad 398

MUKERJI AND BENNET, JJ.

Adit Narain Singh—Defendant—Appellant.

v.

Mahabir Prasad Singh and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 80 of 1927, (connected with L. P. A. Nos. 81 and 82 of 1927) Decided on 20th December 1929, from a judgment of Iqbal Ahmad, J., reported in *A. I. R.* 1927 *All.* 586.

(a) Pargana of Kaswar Raj Act (6 of 1915) S. 4 (4)—Scope.

The fact that a tenant is recorded as fixed rate tenant in the Record-of-Rights does not merely raise a legal presumption that he is a fixed rate tenant but shows that he is a fixed rate tenant. [P 399 C 1]

(b) Agra Tenancy Act (2 of 1901), Ss. 79, 34 and 58—Suit for ejectment of some cosharers by tenant—Ss. 34 and 58 and not S. 79 apply.

Where the dispossession is not by or on behalf of the whole body of cosharers, a suit for ejectment of the cosharers by a tenant can be brought under Ss 34 and 58 and not under S. 79: *A. I. R.* 1924 *All.* 572; 9 *A. L. J.* 771, and 40 *All.* 300, *Rel. on.* [P 399 C 2]

Haribans Sahai—for Appellant.

M. P. Asthana—for Respondents.

Judgment.—These are three connected Letters Patent appeals each brought by a defendant against decrees of a learned single Judge of this Court confirming the decrees of the lower appellate Court for the ejectment of the defendants. The three suits were brought by the plaintiffs as fixed-rate tenants. It was argued in the first place that the plaintiffs were not fixed-rate tenants. The plaintiffs were persons who were recorded in the 1911 settlement as fixed rate tenants of land in pargana Kaswar Raja, district Benares. Under U. P. Act 4 of 1915, S. 4 (4) there is a definition as follows:

"A fixed-rate tenant means a tenant who has been recorded as a fixed-rate tenant in the Record-of-rights . . ."

The rest of the definition does not concern the plaintiffs, as they have been recorded as fixed-rate tenants in the Record-of-Rights. It was argued by the learned counsel for the appellant that this definition merely raised a legal presumption that the plaintiffs were fixed-rate tenants. We consider that the definition clearly shows that the plaintiffs are fixed-rate tenants and that there is no question of mere legal presumption. It was of course open to the appellant to show that the fixed rate tenancy had terminated in one of the ways by which fixed-rate tenancies are terminated under Act 2 of 1901 which has been applied to this pargana Kaswar Raja by S. 6, Act 6 of 1915. The appellant claims that the tenancy had terminated by dispossession by the landholder and that the period of dispossession had exceeded the six months within which a suit for dispossession must be brought under S. 79, Act 2 of 1901. The finding of fact by the lower appellate Court which is binding on this Court in second appeal was as follows:

"In my opinion plaintiffs have failed to prove that the contending defendants (i.e., the appellants) hold as tenants of Jagdamba Prasad and the only fact which is proved is that these defendants have been in cultivatory possession of the land for periods varying between four and seven years."

It was further found by the lower appellate Court:

"It must be held that Har Shankar, Badri Narain and Adit Narain respectively are each in separate possession of different fields."

It is to be noted that these three persons (who are the appellants) are cosharers in this mahal and along with them there are two other cosharers Jaisri Singh and Ballu Singh. It was claimed for the appellants that all these cosharers were members of a joint Hindu family and that that joint Hindu family through different representatives cultivated all these holdings. The finding of fact of the lower appellate Court is that this was not so, but that these three persons Har Shankar, Badri Narain and Aditya Narain were in separate cultivation of the different holdings. Accordingly following the ruling of *Chedda* v. *Achha Singh* (1), we hold that the possession not being by or on behalf of the whole body of cosharers no suit for ejectment could be brought by the tenants under the provisions of S. 79 of Act 2 of 1901. The sections under which the plaintiffs can sue to eject the appellants are Ss. 34 and 58 as has been held in *Balli* v. *Naubat Singh* (2) and *Jagarden Singh* v. *Ali Hammad* (3). Accordingly we consider that the decree of the learned single Judge of this Court was correct and we dismiss these appeals with costs.

P.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1924 All. 572=46 All. 690.
(2) [1912 9 A. L. J. 771=16 I. C. 120.
(3) [1918] 40 All. 300=44 I. C. 919=16 A.L.J. 249.

A. I. R. 1930 Allahabad 399

DALAL, J.

Ram Prasad Tamoli—Applicant.

v.

Benares Cotton & Silk Mills, Ltd.—Opposite Party.

Civil Revn. No. 331 of 1929, Decided on 9th January 1930, against order of Small Cause Court Judge, Benares, D/- 22nd July 1929.

Agra Tenancy Act (3 of 1926), S. 3 (4)—Rent payable by licensee for cutting grass can be recovered in revenue Court only.

Rent payable by a licensee for the cutting of grass cannot be recovered in a Court of Small Causes and the licensor must go to the revenue Court to recover the same: 12 *A.L.J.* 36, *Appr.*; 31 *All.* 342, *not Foll.* [P 400 C 2]

Mukhtar Ahmad—for Applicant.

Govind Das—for Opposite Party.

Judgment.—Both learned counsel, Mr. Mukhtar Ahmad and Mr. Govind Das, have helped the Court by placing before it all the relevant rulings on the subject. The Cotton Mills of Benares obtained a kabuliyat from Ram Prasad for purchase of grass growing on two groves within their compound for one year. The document was stamped with a stamp of one anna and the proper fee has now been received together with penalty and the document admitted in evidence. The purchase was for a sum of Rs. 600, out of which Rs. 300 had been paid and a suit was brought by the company in the Court of Small Causes for the recovery of a sum of Rs. 300. There is a certain amount of apparent conflict between two rulings of this Court, one in the case of *B. & N. W. Ry.* v. *Bandhu Singh* (1), and the other of *Manohar Lal* v. *Gauri Rautain* (2). I think the conflict, however, has been set at rest in favour of the later ruling of 1913 by the present Tenancy Act (3 of 1926) subsequent to the passing of which the present suit was instituted. In the Act of 1901 'land' was vaguely defined as land which is let or held for agricultural purposes, while in the current Act the definition is further elaborated to include grove land and land let or held for pasturage. It further includes land covered by water used for the purpose of growing 'singhara' or other similar produce. The only kind of land excluded is land for the time being occupied by dwelling-houses or manufactories or land appurtenant thereto. In the former Act 'rent' did include cash or kind to be paid or delivered by a tenant on account of gathering produce. The matter, however, was not so clear as it is now made by including 'sayar' in rent for the purposes of Chap. 9, Tenancy Act, for the payment and recovery of rent. As defined in S. 3 (4) of the Act, 'sayar' includes whatever is to be paid or delivered to a landholder by a lessee or licensee on account of the right of gathering produce. The present definition of rent, therefore, so far as the recovery thereof is concerned, is made much wider and would include the payment to be made even by a licensee. In the present case Ram Prasad is obviously a licensee who was permitted to enter the compound of the company for the purpose of cutting grass when it grew and taking it away. The learned counsel for the respondent pointed out that there was no right conferred by such a license to immovable property as was held in *Mathura Das* v. *Judubir Thapa* (3). Recently this ruling by a single Judge was followed by a Bench of two Judges here in *Raja Devi* v. *Muhammad Yaqub* (4). This matter, however, relates to the registration of a document by reason of growing crops being exempted by the Registration Act from the expression 'land.' In the present case also the kabuliyat is not registered but was rightly admitted into evidence by the trial Court. These two rulings do not solve the question whether 'rent' payable by a licensee for the cutting of grass may be recovered in a Court of Small Causes, or whether the licensor must go to the revenue Court to recover the same. As I have explained above the single Judge ruling in the case of *Manohar Lal* of 1913 is now well supported by statute.

I hold that the suit was triable by a Court of revenue. I set aside the decree of the trial Court dated 22nd July last and direct that Court to return the plaint for presentation to a proper Court.

Costs relating to court-fee would naturally follow the order of the revenue Court. Parties shall bear all their other costs themselves.

V.B./R.K. *Decree set aside.*

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(1) [1909] 31 All. 342=2 I.C. 223=6 A.L.J. 400.

(2) [1914] 12 A.L.J. 36=22 I.C. 16.

(3) [1906] 28 All. 277=3 A.L.J. 138=(1906) A W.N 4.

(4) A.I.R. 1925 All. 411=47 All. 738.

A. I. R. 1930 Allahabad 401
Full Bench

BOYS, BANERJI AND KING, JJ.

R. Saigal—Applicant.

v.

Emperor

Criminal Misc. Appln. No. 167 of 1929, Decided on 5th March 1930, under S. 99-B of Criminal P. C.

(a) Criminal P. C., S. 99-D —Government should begin — But both parties heard—Onus is immaterial.

It is manifestly most convenient that Government Advocate should begin and state the case in support of the Local Government. But where both parties have been heard fully the question of onus is of very little or no practical importance; *A. I. R.* 1925 *All.* 195, *Rel. on.* [P 402 C 1]

(b) Criminal P. C., S. 99-A — Document though advertisement can be forfeited under S. 99-A—However advertisement of forthcoming book unless seditious by itself cannot be forfeited because it is intimately associated with seditious book.

The mere fact that a document is only an advertisement of a forthcoming book is not sufficient to protect it from forfeiture under S. 99-A and in considering whether it is seditious or not the advertisement must be considered on its merits and not in the light of the forthcoming book. The intention of an advertisement of a forthcoming book is clearly primarily merely to further the sale of the book. It is a step in preparation in furtherance of the sale of the book which is to appear in the future and although it may be very intimately connected with the book and though it may be considered desirable to forfeit all the documents connected with and intimately associated with a book that has been found to be seditious there is no provision in the law either under S. 99-A or 124-A Penal Code to forfeit the advertisement for such reason alone. [P 402 C 2, P 403 C 1]

(c) Criminal P. C., S. 99-D— Two reasonable views—Benefit must be given to applicant.

Where a document admits of two reasonably possible views the applicant must have the benefit of that which is most favourable to him. [P 403 C 1]

(d) Penal Code, S. 124-A — "Duty of historian."

It is the duty of a historian to make an endeavour to be impartial and not to make a presentation only of the evil deeds of those with whom he is dealing. [P 403 C 2, P 404 C 1]

(e) Penal Code S. 124-A— Book is to be judged as a whole.

The book must be judged as a whole with its introduction and acknowledgment or dedication. [P 403 C 2]

(f) Criminal P. C., S. 99-F—Practice referred to is practice in miscellaneous civil proceedings.

The proceedings under S. 99-F are sui generis but the particular exclusion by S. 99F of the practice in suits and the very provisions for an order for the payment of costs suggest that regard is intended to be had to the practice in civil miscellaneous proceedings. It is therefore reasonable that the cost of the other side so far as it may be found to have been reasonably incurred should be paid by the person to whose action the incurring of those costs was due. [P 406 C 1, 2]

K. N. Katju, R. S. Pandit, Ajodhya Prasad and *Kanhailal*—for Applicant.

U. S. Bajpai—for the Crown.

Boys, J. — This is an application under S. 99-B, Criminal P. C., by which the applicant takes objection to orders of the Local Government under S. 99A, Criminal P. C., declaring every copy of a book and of the advertisement thereof forfeited to His Majesty.

The book is entitled "Bharat men Angarezi Rajya." The author is one Sriyut Sundar Lal, B. A., ex-editor of the "Karmayogi" and the "Bhavishya." The book is written in Hindi. R. Saigal is the printer and publisher, and it was published at the Fine Art Printing Cottage, 28, Elgin Road, Allahabad. In the advertisement of the book it is described as a :

"compilation from the English books "Rise of Christian Power in India," "The consolidation of the Christian Power in India," and "Ruin of Indian Trade and Industries" of the well-known historian Major Baman Das Basu, I. M. S., and from other authentic historical works."

The applicant before us is the printer and publisher R. Saigal, whose case has been put before us by Dr. Katju. The author Sundar Lal, has, so far as we are informed, taken no objection to the orders of Government passed under S. .99-A, and has not appeared before us in any way, or made any representation to us personally or through counsel.

The following facts are undisputed before us. The first advertisement of of the book in question apppeared in the November issue of the year 1928 of the "Chand" magazine. The advertisement appears to have been of a two-fold nature : a brief one page advertisement such as is common in regard to many books, and a large fuller advertisement extending to a number of pages and containing a synopsis of many but not all of the chapters in the book.

On 10th December 1928, this November issue of the "Chand" was declared under S. 99-A, Criminal P. C. to be forfeited, but there was no parti-

cular reference to the advertisements with which we are now concerned.

On 18th March 1929, the book was published and the publisher proceeded to issue copies. On 19th March 1929, a police officer called at the office of the publisher and informed him that the Superintendent of Police desired to see him. On 20th March 1929 at this interview the Superintendent of Police informed the publisher that the advertisement of the book had been proscribed. He also warned the publisher that he would proceed to the publication of the book itself at his own risk. The publisher then informed the Superintendent of of Police that the book had already been published two days previously.

Two days later, on 22nd March 1929. an officer of the Criminal Investigation Department informed the publisher that the book had been proscribed. The notifications proscribing the avertisement and the book are dated respectively 15th March 1929, and 22nd March 1929, and both appeared in the Gazette of 23rd March 1929.

It is against these notifications that the present application is directed.

At the commencement of the hearing before us the questions on whom the onus of proof lies and who has the right to begin were incidentally touched upon but no adequate reason was suggested why we should not follow the procedure adopted in *Emperor* v. *Baijnath Kedia* (1), and we found ourselves in complete agreement with the proposition there stated that the question of onus of proof is, after both parties have been fully heard, of very little or no practical importance and further we think that it is manifestly most convenient that the Government Advocate should begin and state the case in support of the Local Government's orders.

To deal first with the order of forfeiture in regard to the advertisement. Every document of this description must be dealt with on its own merits. We have carefully examined every word of the lengthy synopsis of the book contained in the advertisement. A summary is made of a number of chaptors. The advertisement is silent as to some others. Taking isolated phrases, it is possible to pick out some that standing by themselves might be read as having a bearing on the present British rule, but taking the advertisement as a whole we think that even those phrases must be read as bearing only on the undesirable feature of the administration by the East India Company. We shall hold later in regard to the book itself that there are in it passim passages having reference to the Government prevailing at the present day. But none of those passages appear in the abstract made for the purpose of advertisement and more particularly, we find in the advertisement no reference to the ideas which are given special prominence in the concluding chapter of the book. We do not think therefore that taking the advertisement strictly by itself as it existed at the time the order of forfeiture was passed, there is sufficient material in that advertisement to form the basis of an order of forfeiture under S. 99-A, Criminal P. C., Again we must emphasise, as indeed must be obvious, that we are speaking of this particular advertisement alone. It of course far from follows that the mere fact that the document is only an advertisement of a forthcoming book is sufficient to protect it from forfeiture under S. 99-A, Criminal P. C.

It has been suggested for the Local Governmont that the advertisement must be read in the light of the subsequent book. It is manifest that in some cases while a document may not strictly speaking by itself disclose seditious intent, it may be read in the light of other documents whether prior or subsequent in date and the seditious nature of the document in question may be apparent from those other documents. An illustration of this is to be found in the case of *Queen Empress* v. *Balgangadhar Tilak* (2). Where an article has appeared in a paper the intention and the effect of that article may be gathered not only from the article itself but from other articles connected therewith appearing prior or subsequent to the date of the article in question. But manifestly the case of an advertisement may be quite different. The intention of an advertisement of a forthcoming book is clearly primarily

(1) A. I. R. 1925 All. 195=47 All. 298 (F. B.).
(2) [1898] 22 Bom. 112.

merely to further the sale of the book. It is a step in preparation in furtherance of the sale of the book which is to appear in the future. But it is not possible to read provision for this into S. 124-A, I. P. C., or S 99-A, Criminal P. C. It is of course possible to contend that the advertisement is very intimately connected with the book and it might reasonably be considered desirable to make provision for declaring forfeitsd all documents connected and intimately associated with a book that has been found to be seditious but there is no such provision in the law which this Court have to administer.

We therefore hold that the contents of the advertisement did not themselves afford sufficient basis for the order of forfeiture and it is hereby set aside.

Before leaving this we are constrained to add that we think that the advertisement itself and standing by itself was very near the border line. Two views of it were reasonably possible but two views being reasonably possible, the applicant must have the benefit of that which is most favourable to him.

We now come to consideration of the book itself. A passing complaint was made by Dr. Katju suggesting that the Government had not given the book due consideration before it was prescribed. We have ourselves given it the very fullest consideration as must be manifest from the fact that the arguments and the placing of the book before us have occupied this Court for over seven days. We have had before us and counsel have also had before them full translation made of the whole book by Government and those translations have been accepted as fair by both the counsel before us, though, as was inevitable here and there, reference has been necessary to the original and one of us familiar with Hindi has followed the text of the original book while the translated extracts were being read. Dr. Katju has in his painstaking argument been handicapped to this extent that he has not had the assistance of the author. We have already noted that it is the publisher who has made application to this Court. We are assured that he has no interest other than financial in this book at all. We have no explanation before us of why the author has treated with indifference the prescription of his book. But the fact remains that he has not made any attempt to justify it. Dr. Katju has urged that the book must be judged as a whole with its introduction and ackuowledgment or dedication and we agree with him. In the case of a lengthy book such as this extending to nearly 1,700 pages of print it might be unfair, generally speaking, to pick out a sentence which might have found its way into the book by inadvertence and condemn the whole book on account thereof. We have therefore considered the whole book with its introduction and acknowledgment or dedication and drawn our conclusions from its general trend and not only from isolated passages.

It is contended for the applicant that the book was written and published in furtherance of the interest of vernacular education. If this were the sole motive there can be no doubt that it would be a laudable object and the last thing that anybody would desire would be to place obstruction in the way of that purpose, but whether or no that may have been one of the objects we are concerned with the means by which it was proposed to attain that object and the question whether there was or was not another illegal purpose as well.

It has been contended that the fact that the book was published at a price of Rs. 16 is an indication that no seditious purpose was intended ; that a book at such a price could not possibly be intended to reach the multitude. There is no force in this contention. It is part of the applicant's case that 2,000 copies of the book have been printed at very great expense and it is impossible to suppose that this was done except in the hope of reaching a very wide market whether through individuals or through libraries.

It has been contended that it is not usual for historians to be impartial. It may be conceded that most students of history have formed some opinion of the circumstances with which and of the characters with whom they deal and such partiality is obviously not in itself criminal or even culpable but there is manifestly a vast difference between this and the deliberate setting out of only one side of the case. It is at least the duty of a historian to make an endea-

vour to be impartial and not to make a presentation only of the evil deeds of those with whom he is dealing. In the book before us even institutions like those of railways are set out as merely unmitigated engines of oppression of the Indian and the country of India. Even the Penal Code is described as follows :

"The object of this law (the Penal Code) was to impoverish Indians, to demoralise them, to create in them the habit of dishonesty and litigation and to ruin them utterly."

It would serve no useful purpose and merely prolong this judgment to wholly unnecessary lengths were we to endeavour to reproduce in detail the passages to which we have been referred throughout this book and the arguments in reference to these passages. It is not necessary or desirable for us to do more than to state our definite and clear conclusions. We are fully satisfied :

(a) that the book that we have to consider can in no sense be regarded as merely "history" of the times with which it deals.

(b) That the book is not merely a compilation from other books but contains numerous passages which state the author's own views and his own ideas of the purpose to which Indians of the present day should direct themselves and of the means by which that purpose, the destruction of British rule in India, should be carried out. We may add that even if it was a mere compilation in the strictest sense of the term that would not be an adequate answer to the present charge.

(c) That there is passim propaganda directed to show that the evil state of affairs existing during the days of the East India Company continues to the present day. In the acknowledgment at the commencement of the first volume we find the phrase :

"In the introduction I think it necessary to present before the reader an account of the invasions of India before British advent, specially of the condition of India at the time of the coming of the British so that it may be easy for them to apprise correctly the beneficial or harmful consequences of British rule over their country,"

and again,

"It is to be hoped that this humble effort may help some fellow countrymen to ponder seriously over the deplorable condition of the country and its real remedies."

In the Introduction we find :

"On the basis of these statements by supporters of the British rule and by concealing from us the real form of the British rule we are assured that the British administration is a very great blessing for India and that all our future progress and peace in the country depends upon the continuance of British rule."

And again :

"We should also like fully to examine. . . . . . what were the causes and methods which led to the establishment of British rule in India, what were its effects on India and what are the means by which it may be hoped to secure deliverance from it in future."

In Chap. 35 :

"It has, however, always been seen that the proportion in which the rights and aspirations of the people in England have increased the fetters to subject India have tightened. It is also natural, because the interest of the rulers and the ruled always clash under an alien Government. Prosperity of England lies in the impoverishment of India and the awakening of the latter means danger to the former. The more the rights of the people of England will increase the more will the number of those who practically rule over India multiply and the more will increase the dependence and indigence of the country."

In Chap 51 of the book, in speaking of the proclamation of 1st November 1858 the author says :

"Since then the British rulers in India have in practice never cared a bit for the pledges contained in it."

In his concluding remarks he says :

"The detailed history of the 70 years following the rebellion is outside the scope of this book but the tale is the same."

The tale to which reference is made is explained at p. 1655 of the book :

"Another question which arises is what would have happened if the rebellion of the year 1857 had not at all taken place. An account of the company's administration and of the means employed and the acts done by it from 1757 to 1857 has been given in this book. It is impossible and useless to repeat that tale of woe."

We invited Dr. Katju to tell us, in reference to his defence that Major Basu's books were the foundation of the present book, whether there was any idea of a tale of woe continuing to the present time in Major Basu's books and he was unable to say that any such could be found. The quotations that we have given, and these might be multiplied, are ample to show that the book is in no sense merely a history, though of course, it contains historical facts, but it teems with propaganda directed to the elimination of British rule.

(d) That the intention of this book was and the effect of it is and must be to excite disaffection towards the present Government. Even if the book was limited to a criticism of the East India Company it would not necessarily

follow that it was not a book calculated to create disaffection towards the present Government but in view of the actual nature of the book that is not a proposition which it is necessary now for us to consider further.

(e) That in the great majority of the cases in which we have been invited to examine the authorities on which particular statements are alleged to be based and in which we have succeeded in tracing the alleged authority we have found that authority more or less misquoted, always in the direction of exaggeration or embroidery of the evidence and conclusion stated by the author in the direction of increasing the gravity of the charges made, or the clearness of the evidence by which it is endeavoured to support those charges.

(f) That generally speaking there is nothing but black in the picture painted of any Englishman or any British measure and nothing but white in the picture of anybody else. This is in truth admitted by Dr. Katju to be a fact and his only answer on behalf of his client is that the present book is based on those of Major Basu. In this connexion too we have the picture in the introduction of a "Peaceful invasion by Mahomedans of India and the statement that they only furthered their own interests and those of Islam by peaceful persuasion," the intention manifestly being to predispose Mahomedans to the more ready acceptance of the teaching in the rest of the book. Further it is to be noted that where anything is actually said in criticism of other than Englishmen it is only with the object of having a peg on which to hang immediately a more severe criticism of Englishmen any institutions established by Englishmen.

(g) That there is no force in the argument that all that is aimed at by this book is futherance of the idea of replacing the present form of Government by Dominion Status. This argument put forward by Dr. Katju at a late stage of the case after it had been brought home to him by repeated reference to passages in the book that his original contention that the book was only a history of the East India Company was wholly untenable. Even if this were the object of the book, it might still be directed against the Government established by law, it is necessary to enter into this, for there is not, in fact, throughout the book a hint of the idea of Dominion Status or a hint that the author only desired to displace the present form of Government by Domiuion Status. One conclusion and one only is possible from the very full consideration that we have had to give during these seven days to the book that the author aimed at the entire severance of the British connexion with India, and at bringing into contempt and hatred the Government established by law in British India.

Finally we have to consider the question of costs. This is of considerable importance to both parties for owing to the necessity of translating a very lengthy book the expenses incurred have been considerable, amounting to no less than Rs. 3,000 and this apart altogether from the question of the fees paid by either side. In view of our finding that the order relating to the advertisement must be set aside and the order relating to book maintained we have no difficulty whatever in holding that it will be reasonable to order that nine-tenths of the costs incurred by Government who have been successful as regards the book should be payable by the other side, but in the comparatively small matter of the advertisement the Government should bear its own costs, that is, the remaining tenth. The question, however, on what basis we should determine the amount of the costs is not so easy of solution. In the present Criminal Procedure Code it is laid down in S. 99-F that

"every High Court shall, as soon as conveniently may be, frame rules to regulate the procedure in the case of such applications, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed the practice of such Courts in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications."

The present application was filed on 10th May 1929. At that date no rules had been framed under S. 99-F, Criminal P. C. Similar provision to that which we have quoted was formerly contained in the Press Act. The rules framed as under that Act, however, are no longer in force and no steps were taken immediately to frame any rules under S. 99-F. The rules framed under the Press Act were revived in the shape of rules under S. 99-F in December 1929. Even those

rules we notice do not make any reference to exhibits filed on behalf of the opposite party but only to exhibits attached to the petition or filed by the applicant. We have, however, to consider what was the situation at the time the present application was filed and in accordance with S. 99-F the petitioner should have been guided by the "practice of the Court in proceedings other than suits and appeals." The proceedings under S. 99-F are sui generis but the particular exclusion by S. 99-F of the practice in "suits" and the very provision for an order for the payment of costs suggest that regard is intended to be had to the practice in miscellaneous civil proceedings.

As to what that practice is neither side gave us any assistance. The language of the Court is English and wherever there is any relevant provision made it is always to the effect that the person filing an exhibit must cause to be translated by a competent translator of this Court all such exhibits as he may desire to file.

Now in the matter of this petition the petitioner was directly alleging that there was nothing in his book which was seditious and, strictly speaking it was incumbent on the petitioner to file with his petition a copy of the book and a translation thereof. He did not do so. The translation in fact was made by the opposite party, the Local Government. It has been admitted on the part of the applicant that it is a fair translation. It is not a case where it would have sufficed to translate a few selected passages; the whole book had to be considered. If neither side had had a translation made we should undoubtedly have had to postpone the case until a translation had been made.

After the translation had been made by the Local Government at its expense both sides took advantage of it to read whole chapters to us.

The broad facts stand out, therefore, that the petitioner ought to have the translation made and that it was made and made satisfactorily, by the Local Government. Under circumstances we think that there can be no doubt that the only equitable course is to direct that the Local Government be recouped for such expenses as they have properly incurred. in the proportion that we have already named. The only material question then remaining is whether the sum of Rs. 3,000 stated by the Local Government to be the cost of translating the book is excessive or not. That figure is supported by an affidavit. No materials are given us by the applicant, after three days to consider the matter, to show that the sum of Rs. 3,000 is excessive. Left without any assistance we have endeavoured to ascertain for ourselves what would be the appropriate figure. So far as we have been able to ascertain Rs. 3,000 is just about the sum that either party would have paid if, in accordance with the principle we have mentioned, the book had been translated by a qualified High Court translator. We have so far referred to the cost of translation but the figure named by the Local Government includes also the cost of typing of five copies running to something over 1,200 pages for each copy and there is further the typing of some 300 pages of selections from the book. The expense was incurred because the applicant took no steps to have the translation made and we have had no materials given to us to find it excessive. Even on the basis of broad principle alone it appears to us reasonable that the costs of the other side so far as they may be found to have been reasonably incurred should be paid by the person to whose action the incurring of those costs was due.

On the question of legal fees we are given no reason for departing from the practice hitherto of allowing the fees of the Government Advocate at the rate of Rs. 200 per diem for the seven and half days, namely, Rs. 1,500.

In conclusion we set aside the order declaring the forfeiture of the advertisement, we maintain the order declaring the forfeiture of the book and we direct that the petitioner do pay to the Local Government nine-tenths of the sum of Rs. 3,000 expenses of translation etc: and nine-tenths of Rs. 1,500 fees of the Government Advocate, i. e., a total of Rs 4,050.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 407

DALAL, J.

Ratan Lal—Applicant.

v.

Hafiz Abdul Hai—Opposite Party.

Criminal Revn. No. 805 of 1929, Decided on 5th February 1930.

Criminal P. C., S. 195 (3)—Determination of superior Court is not confined to decrees which are appealable.

The determination of the superior Court, is not confined to the decrees which are appealable. What is stated is that a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees. [P 407 C 2]

Saila Nath Mukerji and *P.L. Banerji*—for Applicant.

M. Wallullah—for the Crown.

K. O. Carleton—for Opposite Party.

Judgment.—This is a civil revision, so the only question which may arise is that of jurisdiction. On facts the decision of the Additional District Judge of Meerut is binding.

An Assistant Collector of the First Class granted sanction for the prosecution of Hafiz Abdul Hai under certain sections of the Penal Code. He appealed under S. 476-B, Criminal P. C, and filed the appeal in the Court of the Additional District Judge of Meerut sitting at Muzaffarnagar. That Judge allowed the appeal, and hence the complainant has come here in revision. Two points are raised to prove want of jurisdiction of the lower appellate Court:

1. That in a case like the present no appeal lay under S. 476-B; and 2. That the Additional District Judge of Meerut sitting at Muzaffarnagar had no jurisdiction to receive the appeal.

A third point was raised that the transfer to the Court of the Temporary Additional Judge was invalid. This argument may be easily disposed of. If the appeal was validly filed in the Court of the Additional District Judge, the District Judge of Meerut had authority under S. 24, Civil P. C., to transfer the appeal to the Court of the Temporary Additional District Judge.

An appeal is allowed under S. 476-B in every case in which a civil, revenue or criminal Court has made a complaint against any person. When such a right is given it must be presumed that the Court exercising such right is properly indicated in the provisions of S. 195 (3), Criminal P. C. According to those provisions, where appeals lie to a civil and also to a revenue Court, such Courts shall be deemed to be subordinate to the civil or revenue Court according to the nature of the case or proceeding in connexion with which the offence is alleged to have been committed. In the present case the suit was one for recovery of revenue under the Tenancy Act, and as appeals from decrees in such suits lie to the civil Cour the Assistant Collector would be deemed to be subordinate to the civil Court for the purposes of this particular case. That was allowed by the applicant's counsel. His objection was that the suit was one in which no appeal lay to any Court, the valuation of the suit being less than Rs. 200. The determination of the superior Court, however, is not confined to the decrees which are appealable. What is stated is that a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees, If this Court passed any appealable decrees in matters relating to the recovery of arrears of revenue, appeals from such decrees would lie to the civil Court, and therefore, the Court under S. 476-B would be subordinate to the civil Court when a complaint is filed in any suit of this nature whether a decree therefrom be appealable or not. I feel no difficulty in interpreting the words of Cl. (3), S. 195 which must be construed in a way to permit appeals in every case under S. 476-B.

It was pointed out that the provisions of S. 21 (3), Bengal N. W. P. and Assam Civil Courts Act, (No. 12 of 1887), refer specifically to appeals from Subordinate Judges and Munsiffs, and, therefore, the District Judge cannot assign the receiving and hearing of revenue appeals to an Additional District Judge. This may be conceded so far as the provisions of S. 21 of the Act, are concerned. There is, however, another provision contained in S. 8 of the same Act, to the effect that Additional Judges appointed to any district shall discharge any of the functions of the District Judge which the District Judge may assign to them, and, in the discharge of those functions, they shall exercise the same powers as the District Judge. The function of receiving and hearing revenue appeals has been assigned by the District Judge to the

Additional District Judge of Muzaffarnagar with respect to all revenue appeals of the Muzaffarnagar District. I am, therefore, of opinion that the appeal was rightly filed in the Court of the Additional District Judge and it was not necessary that it should have been filed in the Court of the District Judge of Meerut and specifically transferred to the Court of the Additional District Judge. I dismiss this application.

V.B./R.K. *Application dismissed.*

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* A. I. R. 1930 Allahabad 408

DALAL, J.

Emperor

v.

Jiwan Singh and *others* — Opposite Parties.

Criminal Revn. No. 729 of 1929, Decided on 17th January 1930,

(a) Criminal P. C., S. 107 — Scope—It is not necessary to prove an overt act towards breach of peace.

Section 107 is one appearing in a chapter devoted in the Criminal Procedure Code to the object of preventing a breach of the peace, and to prove the existence of circumstances which may lead a reasonable man to apprehend a breach of the peace. It need not always be necessary to prove also an overt act towards a breach of the peace on behalf of any of the accused. [P 408 C 2]

(b) Criminal P. C., S. 107 — Subsequent breach of peace is best evidence.

In a criminal case, if the accused persons, seeing proceedings under S. 107 against them pending, attempt to commit a breach of the peace, such evidence would be the best evidence to prove their intention to commit a breach of the peace. [P 409 C 1]

*** (c) Criminal P. C., S. 107—Only persons definitely contemplating breach should be bound.**

Court should not treat the case of all the opposite parties in a lump but should find out the persons who could definitely be said to have contemplated a breach of the peace. [P 409 C 2]

S. Mohammad Husain—for the Crown.

Vishva Mittra—for Opposite Parties.

Judgment.—I feel considerable difficulty in deciding this matter because both the subordinate Courts have gone wrong in certain particulars. They have differed in opinion. The trial Magistrate was of opinion that the opposite party should be bound over, while the appellate Court discharged the order of the Magistrate. The Magistrate has made the mistake so often commented upon by this Court of treating all the accused in a lump without discrimination and without an attempt to discover which of them was likely to commit a breach of the peace. After reading the evidence I have not the slightest doubt that Sirajuddin is in some danger of being submitted to physical force by some of the Jats of his village. The difficulty exists in the confusion caused by the trial Court treating all the accused persons as if they formed one single individual. The appellate Court has gone wrong in his opinion that to bind over persons it is not sufficient to prove a danger of the breach of the peace but further it must be proved that the accused were guilty of some overt act towards a breach of the peace. There is no such necessity, and I emphatically disagree with any such opinion expressed by any High Court. The ruling referred to by the Sessions Court, *Mathura Sahu* v. *Emperor* (1) is not available in this Court. Counsel for the opposite side has referred me to a Lahore ruling, *Joti Sarup* v. *Emperor*, *A. I. R.* 1926 *Lah.* 689 in which such an opinion may be said to have been expressed by a Sessions Judge. There is no opinion of the High Court. The Sessions Judge's opinion is merely by the way as to the absence of any single overt act and no principle is laid down by the High Court. An overt act towards a breach of the peace would be a substantive offence to be dealt with under the Indian Penal Code. S. 107 is one appearing in a chapter devoted in the Criminal Procedure Code to the object of preventing a breach of the peace, and to prove the existence of circumstances which may lead a reasonable man to apprehend a breach of the peace It need not always be necessary to prove also an overt act towards a breach of the peace on behalf of any of the accused. The learned Judge has further expressed other opinions with which I entirely disagree. He was of opinion that if the complainant was assaulted and beaten during the proceedings that would not be any evidence to bind over the opposite party because such evidence as existed at the time of the institution of the proceedings could only be used. This will be taking a very narrow view of criminal responsibility, and it is obvious that the learned Sessions Judge's mind was dwelling on circumstances which would be considered in a civil suit where a cause of action that accrued subsequent to the filing of the suit would not be noticed by a civil Court.

(1) [1916] 14 A. L. J. 769=36 I. C. 164 = 17 Cr. L. J. 484.

In a criminal case, if the accused persons, seeing proceedings under S. 107, Criminal P. C., against them pending, attempted to commit a breach of the peace such evidence would be the best evidence to prove their intention to commit a breach of the peace. I am thus in disagreement with the general view taken by both the subordinate Courts, and I have got to arrive at a decision independently on the evidence on the record. That evidence has satisfied me that though the mosque was built a long time ago there is friction at present between the complainant and the Jats over the taking out of some Hindu procession. Rightly or wrongly the complainant as Imam of the mosque objects to the procession, while the Jats appear to be keen on taking one out. There is an existing source of dispute. This was further proved by a dead pig, an animal suffering under particular contempt of the Mahomedans, being left in the mosque. There is certainly a danger of the breach of the peace, and that danger exists in reference to the complainant and is likely to proceed from the Jats of the village. My difficulty, however, is to discover the persons among the accused who are likely to commit such a breach. As I have already pointed out, the trial Court has treated the cases of all the opposite parties in a lump. The complainant has mentioned different persons at different times as bearing a grudge against him. So far as I can make out the only persons who are definitely mentioned out of the accused are Jaggu, Sheonath and Indar about whom he made a report to the police on 16th February 1926, (Ex. A-2). No doubt the report was made a long time ago, but the same dispute is still simmering. They are the only persons out of the accused about whom it could be definitely said that they are among those Jats who contemplate a breach of the peace. I cancel the order of the Sessions Judge with regard to Jaggu, Sheonath and Indar and restore the order of the Magistrate with regard to them. The bonds and sureties given by them shall again become operative. As to the rest, I do not find definite individual evidence against them and I dismiss the application for revision as regards them.

V.B./R.K. *Application dismissed.*

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A. I. R. 1930 Allahabad 409

YOUNG, J.

Jhangtoo Barai and *another*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 579 of 1929, Decided on 28th October 1929, against order of Sess. Judge, Ghazipur, D/- 23rd May 1929.

(a) Criminal P.C., S.345 (b)—Compoundable offence compounded by document signed by all parties present in Court — Magistrate ought to pronounce acquittal without delay.

Where the offence is compoundable by parties without consent of Court, and it is so compounded and a deed of composition filed by all parties present in Court, inasmuch as only verification necessary is whether parties signed it and understood contents, the Magistrate should not adjourn case for verification but do it without unnecessary delay acquitting the accused. [P 410 C 1]

(b) Criminal P. C., S. 345 (b) — Composition—"Withdrawal."

Composition once effected cannot be withdrawn : 3 *C. W. N.* 322; 3 *C. W. N.* 548; 39 *Mad.* 946; 21 *Cal.* 103; 41 *Mad.* 685 and *A.I.R.* 1925 *Lah.* 159, *Rel. on.* [P 410 C 1]

K. D. Malaviya—for Applicants.

M. Waliullah—for the Crown.

G. S. Pathak—for Opposite Party.

Judgment.—This is an application in revision from an order of the Sessions Judge of Ghazipur refusing to convert an order of discharge into an order of acquittal. The facts are these: One Jagardeo brought a complaint against the two applicants under S. 498, I. P. C. On 28th January 1929, the day appointed for the hearing of the case, the Magistrate was informed that the complainant and the applicants wished to compound the offence, and at the same time a written petition signed by all the parties was filed, praying the Court to pass the appropriate order. On that document itself appeared in the handwriting of the complainant the words "the compromise which is written here is correct." The Magistrate passed an order that the composition was to be verified and appointed 13th February for the first hearing. The applicants take objection to this order. They contend that when the composition was filed and the offence compounded the Magistrate's duty was, under S. 345, sub-S. (6), Criminal P. C., to acquit the accused. On 13th February, the complainant told the Court that he wished to withdraw from the composition, and

the case was further postponed until 23rd March 1929. On that day the complainant did not appear to prosecute, and the Magistrate dismissed the complaint and discharged the applicants under S. 259, Criminal P. C. Subsequently the complainant brought a fresh complaint based upon precisely the same allegations as in the former complaint against the applicants. On this the applicants filed a revision against the order of the Magistrate of 23rd March 1929, by which the applicants were discharged.

The applicants contend that the order of the Magistrate should have been that of acquittal.

Section 345 makes it clear that an offence under S. 498 is compoundable by the husband of the woman without the permission of the Court. Sub-S. (6) enacts that the composition of an offence under this section shall have the effect of an acquittal of the accused. The only question, therefore, for the Magistrate on 28th January, was whether there was in fact a composition of the offence or not. The best evidence he could possibly have was before him, namely, a document signed by the parties in the handwriting of the complainant himself that the composition was correct. It seems to me that it was entirely unnecessary, when the parties were all present in Court, for any verification of the composition. The complainant was literate. He signed the document in his own writing. It must be presumed, unless it is proved to the contrary, that the complainant well understood the one small paragraph that appeared in the document. In any case, the only verification that was required was a simple question to the parties whether they signed the document and whether they understood its contents. There can be no doubt that on that day there was a valid composition within the meaning of S. 345, Criminal P. C., before the Court. It was, therefore, the duty of the Magistrate upon that day, and without any unnecessary delay, to have pronounced an acquittal. I am clear that it is incompetent for any person once having entered into a valid composition to withdraw from it. In criminal matters it is of the highest importance that there should be finality. It has been suggested in this case that the terms of the composition were not carried out, and that is why the complainant wished to withdraw from it. It is entirely immaterial whether the terms of the composition were carried out or not. The sole question is whether there was a composition on 28th January. A breach of the agreement might give rise to other remedies. I am confirmed in my view of the law in this matter by an overwhelming number of authorities in the other High Courts of India. They are unanimous that a composition once effected cannot be withdrawn : see *Kusum Bewa* v. *Bechu Bewa* (1); *Mahomed Ismail* v. *Faizuddi* (2); *Mahomed Kanni Rowther* v. *Inayathulla Sahib* (3); *Murray* v. *Queen Empress* (4): *Kumaraswami Chetty* v. *Kuppuswami Chetty* (5) ; *Ram Rup Pal* v. *Mata Din* (6). The revision is accepted, the order of 23rd March 1929, discharging the applicants is cancelled and an order of acquittal substituted.

V.B./R.K. *Revision allowed.*

(1) [1899] 3 C.W.N. 322.
(2) [1899] 3 C.W.N. 548.
(3) [1916] 39 Mad. 946=31 I. C. 819=2 M.L. W. 1200.
(4) [1894] 21 Cal. 103.
(5) [1918] 41 Mad. 685=34 M. L. J. 217=7 M.L.W. 274=44 I. C. 583=(1918) M. W. N. 493.
(6) A. I. R. 1925 Lah. 159.

A. I. R. 1930 Allahabad 410

NIAMATULLAH, J.

Ram Phal Singh and *others*—Defendants—Appellants,

v.

Bachchu Ram and *another*—Plaintiffs—Respondents.

Second Appeal No. 1282 of 1928, Decided on 9th January 1930, from decree of Sub-Judge, Allahabad, D/- 13th April 1928.

(a) Adverse possession—Acquisition of title in parti land belonging to zamindar—Actual ouster is essential.

An ordinary inhabitant of the village cannot acquire title by adverse possession by merely using part of the parti land belonging to the zamindars. Title by adverse possession, as regards such land, can only be acquired if there was an assertion of title on his part to the knowledge of the owners. Nothing short of actual ouster will set the law of limitation running against the proprietors, who may not object to the residents of the village using parti land without in any way prejudicing their own rights as proprietors. [P 412 C 1]

(b) Easements Act, S. 15—S. 15 is of wider application—Prescriptive easement

can be acquired for storing, for threshing floor and for using particular land as courtyard.

Section 15 is of wider application and is not confined to rights of way or of support specially mentioned therein. The expression 'any other easement' includes a variety of rights similar to those illustrated in the section. Pasturage, fishery, ferry and similar rights of easements have been frequently upheld as those acquired by prescription and it is possible to acquire a right of prescriptive easement for storing, for threshing floor and for using particular land as courtyard: 14 *Bom.* 213; 5 *Cal.* 945, *Ref.*

[P 412 C 2]

Shiva Prasad Sinha—for Appellant.

P. L. Banerji, H. P. Sen and *Hari Ram Jha*—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit brought by the plaintiff-respondents for recovery of possession of a piece of land shown in red and marked A in a plan accompanying the plaint. The reliefs of injunction and damages are also claimed. The plaintiffs were originally tenants in the village in which the land in dispute is situate. They appear to have had cultivation at a fairly large scale. The defendants are non-resident zamindars of part of the village. About ten years before the institution of the suit, the plaintiffs purchased a small share in 'mahal' Bhawani Baksh Singh, which is one of the three mahals into which the whole village is divided. The defendants have also a small share in mahal Bhawani Bakhsh Singh, besides being the owners of the remaining two mahals, namely, mahal Khet Singh and mahal Phaldan Singh. The plaintiffs do not appear to have ever been the tenants of the defendants. They held a small area as subtenants from one of the defendants, tenants. This subtenancy came to an end about a year before the institution of the present case. The case, as set out in the plaint, is that the plaintiffs have been in exclusive possession of the land in dispute for a very long time past and they have used it as their threshing floor, as a place for storage of rubbish (ghur), as their courtyard and for certain other purposes. The plaintiffs claim their possession to have been of a proprietary character. What led to the institution of the suit, according to the plaintiffs, was active interference by the defendants in their enjoyment of the land.

The defence, to which the defendants eventually settled down, was a denial of the plaintiffs' possession, or enjoyment of any kind, of the land in dispute.

No documentary evidence was produced by either of the parties. The witnesses examined by the parties supported the case of continued possession of one party or the other. Both the Courts below have believed the witnesses examined by the plaintiffs, their finding being that the plaintiffs have for a considerably long time used this land as a threshing floor and as land for storage of rubbish (ghūr) and cow-dung cakes. The plaintiffs' suit for possession has been decreed on that finding. The defendants have preferred this second appeal.

As already mentioned the village has been formed into three "mahals" by partition. It is not clear whether it is perfect or imperfect; but the entire 'abadi' land is joint, in the sense that actual division and allotment of it has not been made. A certain area out of it has been nominated as appertaining to each 'mahal.' In other respects it has been left joint. It is, therefore, not possible for either of the parties to assert, as regards a particular piece of land, that it is exclusively theirs. The character of the plaintiffs' possession, apart from their right, has been exactly the same during the years that they have been cosharers in mahal Bhawani Bakhsh Singh as it was before it. Ever since they obtained proprietary interest in a small fractional share, the character of their enjoyment of the land in dispute has not undergone any change. The result is that their right of user, whatever it was before they became cosharers still subsists. Over and above such right, they have, in common with other cosharers, a right to enjoy the land in dispute in proportion to their share. Under these circumstances, it becomes necessary to ascertain the extent of the plaintiffs' right to this land before they became cosharers in the village. Neither of the Courts below has considered it necessary to find the exact position resulting from their enjoyment of the land in dispute for a long time. The evidence leaves no doubt that they used this land for certain purposes for well over 20 years before they became cosharers. Several possible cases are to be considered to ascertain the character of the

plaintiffs' right to this land. They could have perfected a right of ownership by adverse possession, they could have acquired the right of easement or they may have been only licensees. As to which of these rights, if any, has been aquired depends on the nature and extent of their possession. In the first case, the right of the prcprietors, whoever they were, including the defendants, should be deemed to have been lost. In the third case, the plaintiffs are entirely at the mercy of the proprietary body, the license being always revocable. On the evidence, with due regard to the circumstances of the case, I am not inclined to hold that the plaintiffs were in adverse possession or that they were licensees.

The land in dispute, as I have already said, is part of the abadi and has all along been parti. An ordinary inhabitant of the village cannot acquire title by adverse possession by merely using part of the parti land belonging to the zamindars. Title by adverse possession, as regards such land, can only be acquired if there was an assertion of title on his part to the knowledge of the owners. Nothing short of actual ouster will set the law of limitation running against the proprietors, who may not object to the residents of the village using parti land without in any way prejudicing their own rights as proprietors. A "riyaya" cannot therefore acquire any right of ownership by more than 12 years user of such land, except under circumstances which clearly indicate his exclusive possession amounting to ouster of the landlord. Evidence adduced by the plaintiffs, and believed by the Courts below, falls far short of this requirement. I must, therefore, negative the plaintiffs' alleged title by adverse possession. At the same time I am not prepared to hold that they were only licensees. The evidence establishes that the plaintiffs have used the land in dispute, for more than 20 years before they became cosharers in the village, as their threshing floor and as land for storage of rubbish and cow-dung cakes openly and as of right and without interruption. Their residential house is in close proximity to the land in dispute. They have their cultivation in the village not far from the land in dispute. They must, therefore, use some plot of land for the purposes referred to. S. 15, Easements Act is of wider application and is not confined to rights of way or of support specially mentioned therein. The expression any other easement includes a variety of rights similar to those illustrated in the section. Pasturage, fishery, ferry and similar rights of easements have been frequently upheld as those acquired by prescription, see: for example, *Secy. of State* v. *Mathurabhai* (1) and *Chundee Churn Roy* v. *Shib Chunder Mundul* (2). It is clear from the evidence that they have acquired a right of prescriptive easement for the purposes already mentioned, and to that extent their right must be conceded by the defendant-appellants. This, however, will not entitle the plaintiffs to a decree for exclusive possession, as has been granted to them by the Courts below. The proprietor of a village is presumed to be in possession of his parti land, and user of part of such land by the riyaya is not necessarily dispossession of the former. His possession, at least constructive, continues in spite of such user. I am, therefore, of opinion that the decrees of the Courts below, in so far as they award exclusive possession to the plaintiffs, cannot be sustained. In so far as the plaintiffs are also cosharers in the mahal in which part of the land in dispute is situate, their proprietary right as cosharers to the extent of their share will not be affected and they will be entitled to enjoyment in that capacity with the defendants, who are not exclusive owners of the land in dispute. The exact amount of the plaintiffs' share in mahal Bhawani Bakhsh Singh is not clear and need not be specified for the purpose of this case.

Under the circumstances stated above, I set aside the decrees passed by the Courts below and substitute therefor a decree to the following effect:

The plaintiffs are decreed joint possession to the extent of their proprietary interest in the land in suit. The plaintiffs' right of prescriptive easement, entitling them to use the land as their threshing floor, for storage of rubbish (ghur and cow-dung cakes) is declared and an injunction is issued against the

(1) [1890] 14 Bom. 213.
(2) [1880] 5 Cal. 945=6 C. L. R. 269.

defendants directing them to refrain from interfering with the plaintiffs' right of easement detailed above. Under the circumstances of the case, parties are ordered to bear their own costs throughout.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 413 (1)

DALAL, J.

Hemendra Nath and *others*—Judgment-debtors—Appellants.

v.

Tulshi Singh and *others*—Decree-holders—Respondents.

Execution First Appeal No. 96 of 1929, Decided on 19th December 1929, from decree of Sub-Judge, Bareilly, D/- 15th January 1929.

(a) Decree—Construction—Finality—Decree becomes final after period of appeal.

Even where there is no appeal, a decree becomes final after the period allowed for appeal: 50 *All.* 68, *Foll.* [P 413 C 2]

(b) Civil P. C., O. 21, R. 19—Suit for pre-emption—Decree passed conditional on plaintiff depositing particular sum—Costs and mesne profits granted to plaintiff till delivery—Amount of costs and mesne profits can be set off against amount of deposit—Pre-emption.

If in a suit for possession the Court passes a decree for possession conditional on plaintiff depositing a particular sum and grants costs and mesne profits till the date of delivery of possession the amount of costs and mesne profits can be set off against amount of deposit under the decree: 16 *All.* 395 at 397; 18 *A. L. J.* 162, *Ref.* [P 413 C 2]

B. K. Mukerji—for Appellants.

G. S. Pathak—for Respondents.

Judgment.—The grounds of appeal here are covered by authority. A decree was passed for possession on condition of the plaintiffs' depositing in Court Rs. 352 within three months of the decree becoming final. At the same time the plaintiffs were allowed costs and Rs. 15 per mensem mesne profits from the date of the decree to the date of the delivery of possession. On 18th September 1928, they put in a declaration that they had made the payment by setting it off against the sum of Rs. 354-12-8 due to themselves for costs and mesne profits and desired that their own decree for Rs. 2-12-8 be executed. The objection of the judgment-debtors was that the suit should be taken to have been dismissed because the sum which the plaintiffs were directed to deposit was not deposited within three months of 23rd April 1928. This objection is in conflict with the terms of the decree. The words used are not three months from the date of the decree but three months from the date of this decree becoming final. It is obvious, therefore, that the Court meant some date other than the date of the decree. It was argued that the decree became final on the date of the decree, because no appeal was lodged. The answer to that is contained in a Bench ruling of this Court in *Sanoman Singh* v. *Raja Ram* (1). It was held there that even where there was no appeal a decree became final after the period allowed for appeal. The deposit, therefore, was within time.

The other objection was that there should have been actually deposited by the plaintiffs Rs. 352 and money due to the plaintiffs could not be set off. I think that the analogy of the provisions of O. 21, R. 19 (2) may be applied here. In 1894 when the previous Civil Procedure Code was in operation and S. 247 corresponded to O. 21, R. 19, a Bench of this Court pointed out in *Bhagwan Singh* v. *Ratan* (2) (at 397) that:

"the object of S. 247 is to prevent each side executing a decree in respect of amounts due, whether for costs or otherwise, under the same decree."

In pre-emption suits this rule has always been applied by the Court. The law on the subject of a pre-emption decree is summarised in *Ram Lagan Pande* v. *Mohammad Ishaq Khan* (3). When the rule is applied to pre-emption decrees it may be applied to a decree like the present on the same principle.

This apeeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(1) A. I. R. 1927 All. 848=50 All. 68.
(2) [1894] 16 All. 395=(1894) A. W. N. 133.
(3) [1920] 18 A. L. J. 162=54 I. C. 395.

A. I. R. 1930 Allahabad 413 (2)

SEN, J.

Sheo Shankar and *others*—Defendants—Appellants.

v.

Bhup Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 1053 of 1928, Decided on 13th December 1929, from decree of Sub-Judge, Etawah, D/- 5th June 1928.

Agra Tenancy Act, (3 of 1926), S. 19—Tenancy created by mortgagee authorized so to do—On redemption tenancy is binding on mortgagor and if mortgagor desires to bring tenancy to close he must do so by suit under Tenancy Act.

Where a proprietor of land mortgages it by a mortgage, simple in its inception, authorizing the mortgagee under a special stipulation either to cultivate it himself or to let it out to tenants, the act of letting out to tenants becomes an act in the ordinary course of business for proper management of the property and tenancies so created are binding on the mortgagor after the redemption of the mortgage in so far that the relationship of landlord and tenant continues and that if the mortgagor desires to bring the tenancy to a close he must do so by a regular suit under the Tenancy Act : 8 *A. L. J.* 802, *Ref. Unpublished decisions of the Board of Revenue Vol. 3, p. 377, Dist.* [P 414 C 2]

K. D. Malaviya—for Appellants.

Mansur Alam for *Iqbal Ahmad* and *Banwari Lal Dikshit*—for Respondents.

Judgment. — This is an appeal by the defendants arising out of a suit for recovery of possession of two plots namely, 170 and 176, situate in mauza Asadpur in the district of Etawah. On 16th August 1907 the plaintiffs executed a simple mortgage of 69 bighas and 6 biswas in favour of Joti Prasad for Rs. 1,000 and agreed to pay Rs. 50 annually by way of interest. In order to secure the payment of interest to the mortgagee, the plaintiffs transferred the plots in dispute to the possession of the mortgagee upon the understanding that the mortgagee was to appropriate the usufruct in lieu of interest to the extent of Rs. 45, and that the mortgagor was to pay Rs. 5 in cash to the mortgagee. For certain length of time, the plaintiffs cultivated the plots themselves, and continued to pay rent to the mortgagee. Later on they gave up possession of the two plots and authorized the mortgagee either to cultivate these two plots or to let them out to the tenants. In 1917, or thereabout the mortgagee let out the plots to defendants 3 and 4. The plaintiffs redeemed the mortgage on 18th August 1926. They obtained formal possession of the plots in dispute but did not recover actual possession which continued with defendants 3 and 4.

The plaintiffs alleged that the possession of defendants 3 and 4 after the date of the redemption of the mortgage by the plaintiffs became that of trespassers and that defendants were liable to ejectment.

The Court of first instance dismissed the suit. The lower appellate Court has reversed the decision and decreed the plaintiffs' suit upon the ground that the legal position of the defendants after the date of redemption of the mortgage by the plaintiffs was that of trespassers and they were not justified either in law or equity to resist the action for ejectment.

The lower appellate Court has not been able to view the facts of the case in its proper perspective. The mortgagee was authorized under a special stipulation either to cultivate the land himself or to let out the land to tenants. In pursuance of this agreement the land was let out to tenants. This appears to have been done in the ordinary course of businees for the proper management of the property and there is no suggestion that the land was let out for an inadequate rent. Under these circumstances defendants 3 and 4 must be regarded to be the tenants of the plaintiffs after the redemption of the mortgage. My attention has been drawn to a decision of the Board of Revenue *In re Mahant Rang Das* v. *Mangroo* (1). The head-note which supports the contention of the appellants is in the following terms :

"A person holding from a thekadar that is a lessee of proprietary rights can acquire occupancy rights."

The words of the head-note do not find a place in the body of the judgment but the proposition may by a process of reasoning, be held to be a deduction or inference from the judgment. In the *Collector of Basti* v. *Sarnam Gharak* (2) Piggot, J., held that :

"tenancies created by means of a perpetual lease granted by a usufructuary mortgagee are binding on the mortgagor after the redemption of the mortgage, in so far that the relationsip of landlord and tenant continues and that if the mortgagor desires to bring the tenancy to a close, he must do so by a regular suit under the Tenancy Act."

In the present case although the mortgage in its inception was no more than a simple mortgage but by the subsequent agreement between the parties it became a mortgage of a different character qua the arrangement as to the payment of interest.

(1) 3 Unpub. Dec. of the Board of Rev. 377.
(2) [1911] 8 A. L. J. 802=11 I. C. 817.

The principle enunciated in the last mentioned case is applicable to the facts of the present case. The fact that there was no lease at all, makes no difference. The fact that the mortgagee was not granting a perpetual lease to defendants 3 and 4 is not .the argument against the view that he was letting out the land for purposes of husbandry .in the ordinary course of management.

The redemption of the mortgage by the plaintiffs does not put an end to the tenancy created in favour of dedants 3 and 4. It is not necessary for me to consider as to whether the position of defendants 3 and 4 is that of a statutory tenant under S. 19 of Act 3 of 1926 (local). In the view that I take of the case the appeal succeeds. The result is that I decree the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs throughout.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 415

MUKERJI AND BENNET, JJ.

Khub Chand—Objector—Appellant.

v.

Lachman Das—Decree-holder — Respondent.

Letters Patent Appeal No. 131 of 1927, Decided on 20th December 1929, from a judgment of Lindsay, J., D/- 26th July 1927.

Civil P. C., O. 21, R. 97—*M* obtained possession of certain property in execution of his decree against *L*—Decree set aside in appeal—*L* applying for possession of property and *K* resisting his claim—Proceedings should be treated under O. 21, R. 97, and not under S. 144—Civil P. C., S. 144.

A suit brought by *M* against *L* for possession of certain property was decreed and in execution of that decree *M* obtained possession. The decree obtained by *M* was set aside in appeal. *L* made an application to transfer to him the possession of the property granted to *M* in execution of his decree. *K* resisted claim of *L* and claimed that he was entitled to possession. The Court passed orders treating the proceedings under S. 144.

Held: that the proceedings of the Court must be treated as proceedings under O. 21, R. 97, as that was the correct procedure to be followed in the case and therefore no appeal lay against the order. [P 416 C 1]

U. S. Bajpai and *S. S. Sastry*—for Appellant.

K. N. Laghate—for Respondent.

Judgment.—This is a letters patent appeal brought by one Khub Chand whose position is somewhat obscure. There was a suit brought by Mool Chand against Lachhman Das and Achru Lal in which Mool Chand obtained a decree for possession of certain property from the lower Courts and obtained possession in execution of that decree. Ultimately his decree was set aside by the High Court in second appeal on the grounds that a transfer which he had made in 1895 to one Bansidhar was made to defraud his creditors and on account of this transfer Mool Chand was not entitled to bring a suit. During the pendency of this suit, which was instituted on 3rd July 1919, Mool Chand the plaintiff made a deed of sale of the property in dispute to Khub Chand, the appellant before us, on 26th November 1919. On 2nd December 1919 the heirs of Bansidhar, the transferee from Mool Chand by the fraudulent sale deed, executed a deed of relinquishment in favour of Khub Chand. An application was made without any reference to any section or order, by the defendants Lachhman Das and Achru Lal, asking the Court to transfer to them the possession of the property which had been granted to the plaintiff in execution of his decree from the lower Courts. During that proceeding the present appellant Khub Chand resisted the defendants and put forward a claim that he was entitled to possession. The vakils for the defendants and for Khub Chand asked the Court to treat the proceedings as proceedings under O. 21, R. 97. That undoubtedly would have been a proper procedure, but apparently the Munsif passed his order under S. 144, and by that order he refused the claim of Khub Chand to possession.

An appeal was brought by Khub Chand to the District Judge, who also refused the claim of Khub Chand to possession. Kub Chand came in second appeal to this Court and a learned Judge of this Court held that the proceedings before the Munsif should be taken to be proceedings under O. 21, R. 97 and accordingly he remitted an issue to the lower appellate Court as follows :

"On 12th September 1923 was Khub Chand claiming in good faith to be in possession of the property in dispute on his own account or on account of some person other than the judgment-debtor ?"

A finding was returned as follows :

"Khub Chand was claiming to be in possession on his own account, but he was not claiming innocently and in good faith to be in such possession."

In accordance with this finding, the learned Judge of this Court dismissed the appeal of Khub Chand. We are of opinion in the first place that the learned Judge of this Court was correct in pointing out that the proceedings must be treated as proceedings under O. 21, R. 97 and the order of the Munsif must be treated as passed under O. 21, R. 99. O. 21, R. 103 lays down that any party not being a judgment-debtor against whom an order is made under R. 98, 99 or 101 may institute a suit to establish the right which he claims to the present possession of the property; but subject to the result of such suit, if any, the order shall be conclusive.

We consider therefore that no appeal lay to the District Judge and therefore the order dismissing the appeal of Khub Chand is a correct order. Further, even if any appeal did lie, the finding of the District Judge to the effect that the claim of Khub Chand was not a claim made in good faith would be binding on this Court in second appeal. For these reasons we dismiss this Letters Patent appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 416

SEN AND NIAMATULLAH, JJ.

Jokhu Bhunja—Defendant — Appellant.

v.

Sitla Baksh Singh and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 222 of 1927, Decided on 20th December 1929, from a decree of Addl. Sub-Judge, Jaunpur, D/- 11th June 1926.

Limitation Act, S. 28—Two mortgage deeds — Redemption of prior usufrutuary mortgage made conditional on payment of sum due under subsequent—Though suit on subsequent mortgage be barred, right is not extinguished and Court can enforce payment on subsequent mortgage in suit for redemption of prior mortgage—Transfer of Property Act, S. 61.

If a suit, if brought on the second deed of mortgage, is barred by limitation, the right of the mortgagee setting up such a deed in suit for redemption of the prior usufructuary mortgage, redemption of which is made conditional on payment of mortgage due thereunder and under subsequent deed, is not extinguished and the Court can direct payment of what is due under the second or subsequent deed: 37 *All.* 634, *Diss from. A.I.R.* 1928 *All.* 99, *Rel. on.* [P 417 C 1]

Badri Narain—for Appellant.

Shiva Prasad Sinha—for Respondents.

Niamatullah, J.—This is a defendant's appeal arising out of a suit for redemption of a mortgage evidenced by a deed dated 19th June 1901, executed by one Fateh Bahadur Singh in favour of Jokhu, the defendant-appellant, under which a two-anna share of village Hardua was mortgaged with possession for a sum of Rs. 900. The usufruct of the mortgaged property is to be set off against the interest. By a subsequent deed, dated 16th October 1903, the mortgagor borrowed a further sum of Rs. 525 and hypothecated the property already mortgaged agreeing to pay interest at the rate of one rupee per cent per mensem.

It is not disputed that the plaintiff-respondents have become the owners of half of the equity of redemption and are entitled to redeem to that extent the integrity of the mortgage having been put an end to in consequence of certain interests acquired by the mortgagee. The principal question which calls for a decision in appeal is whether the defendant-appellant is entitled to recover principal and interest due under the subsequent deed of hypothecation, dated 16th October 1903 before the plaintiff-appellants are allowed to redeem the usufructuary mortgage of 19th June 1901. It appears that the charge created by the second deed of 16th October 1903 relates, not only to the mortgaged property sought to be redeemed, but also to certain other properties, which are not covered by the mortgage-deed of 19th June 1901. The Court of first instance found that the plaintiff-respondents are not entitled to redeem without paying the proportionate amount of the mortgage-money due under the deed, dated 16th October 1903, together with half of Rs. 900 the principal amount due under the deed of the usufructuary mortgage of 19th June 1901. The amount of such proportionate amount found by that Court is Rs. 157-8-0.

The lower appellate Court has disallowed the sum alleged to be due under the subsequent deed of hypothecation, dated 16th October 1903, relying

on *Kesar Kunwar* v. *Kashi Ram* (1), which appears to have ruled that, if a suit, if brought on the second deed of mortgage, is barred by limitation, the defendant mortgagee setting up such a deed in a suit for redemption of the usufructuary mortgage, redemption of which is made conditional on payment of moneys due thereunder and under the subsequent deed, the Court cannot direct payment of what is due under the second deed. We are unable to accept the soundness of that proposition. The deed of hypothecation in question before us distinctly provides that the executant would not be entitled to redeem the usufructuary mortgage of 1901 without previous payment of the sum due under the deed of the later date. The defendant-mortgagee is really founding on this stipulation and is entitled to insist on payment of what is due to him under the second deed. No question of limitation can arise as against the defendant seeking to enforce a clause occurring in the deed which he is setting up in his defence. Apart from this, a mortgagee's remedy under a deed of simple mortgage may be barred if he omits to bring a suit within 12 years from the accrual of the cause of action but his right is not extinguished. It should be remembered that S. 28, Lim. Act, is confined to suits for possession and does not apply to a suit by a mortgagee for recovery of money due to him by sale of the mortgage property. In cases to which that section does not apply, the remedy by a suit may be barred but the right is not extinguished. We are fortified in the view we are disposed to take by a later decision of this Court in *Ram Kishore Ahir* v. *Ram Nandan Ram* (2).

For the foregoing reasons we set aside the decree passed by the lower appellate Court and restore that of the Court of first instance. The appellant will have his costs of this Court and of the lower appellate Court.

V.B./R.K. *Appeal allowed.*

(1) [1915] 37 All. 654=30 I.C. 777=13 A.L.J. 889.

(2) A.I.R. 1923 All. 99.

A. I. R. 1930 Allahabad 417

DALAL, J.

Abdul Aziz—Plaintiff—Appellant.

v.

Munni Lal—Defendant—Respondent.

Second Appeal No. 1614 of 1927, Decided on 24th January 1930, from a decree of Sub-Judge, Bareilly, D/- 25th July 1927.

Limitation Act, Art. 134—Purchaser by private treaty from auction purchaser of rights of mortgagee is entitled to protection under Art. 134.

A purchaser by private treaty from an auction-purchaser of the rights of a mortgagee is entitled to the protection afforded by Art 134 if he purchased in the bona fide belief that he was purchasing an absolute proprietary title and the limitation begins to run from the date of purchase by private treaty: 13 *A. L. J.* 877, *Foll.*; *A. I. R.* 1926 *Mad.* 81 and *A. I. R.* 1921 *All.* 389, *Ref.* [P 418 C 1]

Mahmudullah, *A. M. Khwaja* and *Mukhtar Ahmad*—for Appellant.

Benod Behari Lal—for Respondent.

Judgment.—The facts of the case have been given in the judgment of the lower appellate Court. Mr. Khwaja and Mr. Benod Behari Lal have explained the facts of the case and argued the matter with considerable ability. The plaintiff sued for redemption of 57½ sihams out of 144 sihams property in mouza Partapur. The plaintiff is the purchaser of the equity of redemption. It appears to me, however, that the defendant Manni Lal is full owner of 32 sihams out of the 57½ sihams which he holds. After various other transfers, on 9th May 1890 Abdul Sattar mortgaged to Karam Khan his mortgagee rights. At the same time Abdus Sattar, Abdul Ghaffar and Mt. Ajuban mortgaged the equity of redemption in 32 sihams. Karam Khan brought this property which was mortgaged to him to sale, and on 21st May 1895, there was purchased by Ahmadullah 57½ sihams of property out of 144 sihams in mouza Partapur. There had been considerable litigation over this property and it was definitely and finally settled by this Court on 8th March 1922 that the 57½ sihams sold in execution of Karam Khan's decree included the 32 sihams of proprietary rights in Partapur which belonged to Abd l Ghaffar and his wife Mt. Ajuban. Whether this finding be correct or not there ought to be an end to litigation. This Court's decision was given in second appeal No. 1486 of 1919

dated 9th March 1922. Even in that judgment reference is made to a litigation of 19.2, and the learned Judges of this Court relying on that decision held that the title to 32 sihams was res judicata. So far I disagree with the lower appellate Court which seems to think that the plaintiff, if there were no bar of law, was entitled to redeem 57½ sihams. I hold that the defendant is full owner of 32 sihams.

Now remains the question to decide whether by reason of limitation or of the provisions of S. 41, T. P Act, the defendant can resist the redemption of 25½ sihams. Mr. Binod Behari Lal referred to the ruling reported in *Ghasi Ram* v. *Mt. Kishna* (1), where it was held that a purchaser by private treaty from an auction-purchaser of the rights of a mortgagee, is entitled to the protection afforded by Art. 134, if he purchased in the bona fide belief that he was purchasing an absolute proprietary title. A distinction is made in various rulings between a purchaser at auction-sale and a subsequent purchaser by private treaty. In *Ram Piari* v *Budh Sain* (2) it was held that Art. 134 did not apply to persons who had acquired the mortgagees' rights by virtue of an execution sale. Applying these rulings it would seem that Manni Lal can claim limitation from the date of his purchase by private treaty from Mt. Dulari on 15th March 1923. Ahmadullah's purchase at auction-sale on 21st May 1895 has already been referred to. He was a purchaser at auction-sale, so his case would not be covered by the provisions of Art. 134. Ahmadullah made a simple mortgage to Mt. Dulari on 27th March 1903, and subsequently in 1907 he sold the equity of redemption to Bihari Lal. Mt. Dulari sued Bihari Lal and Ahmadullah and purchased the property at auction-sale in 1915 or 1916. The argument of Mr. Binod Bihari Lal was that the period of limitation would run from the purchase by Bihari Lal in 1907. This argument does not appeal to me because mortgagee rights in full were not sold, but only the equity of redemption, and the mortgagee at the time was Mt. Dulari. The defendant Manni Lal claims interest from Mt. Dulari and cannot take advantage of the sale to Bihari Lal in 1907. In my opinion, the law is clear on the point that if Manni Lal had been in possession for 12 years after purchase, or if any of his predecessors in-interest had been a purchaser by private treaty from an auction-purchaser, the suit would have been barred. The ruling of the single Judge reported in *Ghashi Ram* v. *Mt. Kishna* (1), is well supported by authority such as the case reported in *Venku Shettithi* v. *Ramachandraya* (3). Having regard to the circumstances of the present case I am of opinion that Art. 134 does not apply.

The next point is whether the suit is barred under the provisions of S. 41, T P. Act. Here the defendant had to prove the implied consent of the person interested in the equity of redemption, and the care he himself had taken to ascertain that his transferrer had power to make the transfer and that he had acted in good faith. The implied consent is presumed from the entries in the village record ever since 1895 of Ahmadullah being full owner of 57½ sihams. It must, however, be remembered that the confusion has arisen from the fact that he was full owner of 32 sihams and distinction was not kept between the two portions of properties which he purchased. There had been a great many transfers and it would have been impossible for any owner of equity of redemption to keep even with those transfers, and in a case of this nature it would not be fair to hold that the owner of the equity of redemption had given an implied consent to the entry of the name of Ahmadullah as full owner. Secondly, the matter here is not of a trespasser. Ahmadullah was a mortgagee in possession and entitled not only to possession but to have his name recorded in the village papers. What happened was that instead of being recorded as mortgagee of a portion of the property he was recorded as full owner of the entire property.

The next question is of the care taken by Manni Lal to investigate the title of Mt. Dulari. When there had been so many transfers he ought to have gone back to the mortgage of 9th May 1890 and discovered what the mortgage was. The subordinate appellate Court has thought that it was sufficient for him to

(1) [1915] 13 A. L. J. 87.=30 I.C 564.
(2) A I.R. 1921 All. 389.
(3) A.I.R. 1926 Mad. 81=49 Mad. 29.

see that Ahmadullah himself behaved as full owner, and the inquiry thereof would amount to reasonable care being taken by him. Here also the inquiry would have been satisfactory if the dispute lay between an owner and a trespasser and there was no question as to mortgagee rights. In my opinion the case is not one which would be covered by the provisions of S. 41, T. P. Act.

In the result I am of opinion that the plaintiff can redeem 25½ siham property on payment of Rs. 240. A decree for redemption shall be prepared under O. 34 R. 8, Civil P. C. If the money is not paid within the time specified the result directed in R. 8 (2) shall follow. The money shall be deposited in the trial Court within one month of today's date. The parties shall bear their own costs throughout.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 419

SEN AND NIAMATULLAH, JJ.

Data Din—Plaintiff—Appellant.

v.

Mt. Nohra—Defendant—Respondent.

Second Appeal No 860 of 1927, Decided on 7th January 1930, from decree of Sub-Judge, Basti, D/- 14th Feb. 1927.

U. P. Land Revenue Act (3 of 1901), S. 233 K—Suit for declaration of title not affecting integrity of partition proceedings is not barred

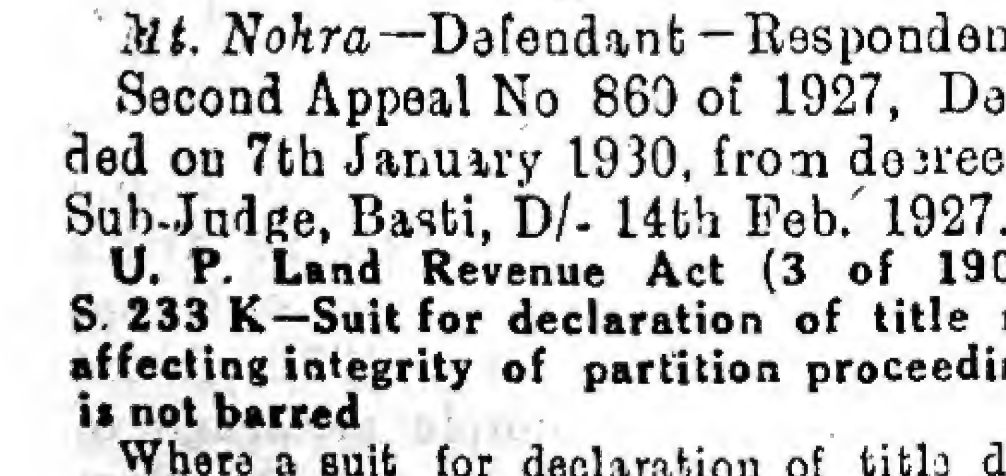
Where a suit for declaration of title does not affect partition of union or mahals but leaves the integrity of the partition proceedings absolutely unaffected, the suit is not barred by S. 233-K : 42 *All.* 30), *Rel. on.*

[P 420 C 1]

Shiva Prasad Sinha and *N. Upadhya*—for Appellant.

S. N. Verma—for Respondent.

Sen, J.—This is an appeal by the plaintiffs in a suit for declaration of title to certain zamindari property and for possession in the alternative. The relationship of the parties will appear from the following genealogical table :



Data Din and Sat Narain claimed to be the members of a joint Hindu family with Ram Sanmukh, husband of Mt. Nohra defendant. They alleged that Ram Sanmukh died in the year 1918 as a member of the joint Hindu family and that they became owners of the property which was recorded in his name by right of survivorship and that the name of Mt. Nohra was recorded in the revenue papers only by way of solatii cause.

The suit was resisted on the ground that Ram Sanmukh died as a member of a divided family, that upon his death his property devolved upon his widow by right of inheritance, and that the suit was obnoxious to the provisions of S. 233-K, Land Revenue Act.

The first Court held that Ram Sanmukh died as a member of a joint Hindu family with the plaintiffs, and that S. 233-K, Land Revenue Act, did not bar the suit. It accordingly gave the plaintiffs a decree.

The lower appellate Court has not gone into the question as to whether Ram Sanmukh died as a member of the joint Hindu family with the plaintiffs, but has reversed the decision of the trial Court upon the ground that S. 233K operated as a bar to the suit.

The property in dispute is situate in mauza Anchraul in the District of Basti. Certain cosharers of this mauza applied for partition of their shares in the revenue-paying mahal on 7th December 1921. Proclamation in due course was issued under S. 110, Land Revenue Act, against the other cosharer who did not join in the partition, including the parties to the present action. The present plaintiffs applied that a separate patti be formed of their share together with the share of Mt. Nohra. Mt. Nohra, however, did not join in this application. At a later stage, long after the expiry of the period which was fixed under the proclamation, Mt. Nohra applied that her share might be formed into a separate patti. The Assistant Collector gave effect to this petition and directed a separate patti to be formed. The order of the Assistant Collector was reversed on appeal. The result was that while a separate patti of the share of the plaintiffs was formed, the share standing in the name of Mt. Nohra was incorporated into the Baqi Manda mahal.

It is difficult to understand how on these facts, the plaintiffs' claim could

be barred by S. 233-K, Land Revenue Act. The declaration which the plaintiff's seek is that they are the owners of the property which stands recorded in the name of Mt. Nohra. The object of this suit is not to claim any relief affecting the partition of union of mahals. If the plaintiffs' claim is allowed, the only result will be that the name of Mt. Nohra will be removed from the revenue records and the name of the plaintiffs substituted in her place, leaving the integrity of the partition proceedings absolutely unaffected. This case is in many respects parallel to *Lal Behari* v. *Parbati Koer* (1). The rule of law laid down therein is directly opposed to the view of the lower appellate Court.

We hold that S. 233-K, Land Revenue Act is no bar to the suit.

The result is that we allow the appeal, set aside the decree of the lower appellate Court and remand the case to that Court for disposal of the appeal on the marits. Costs here and hitherto should abide the result.

V.B./R.K. *Case remanded.*

(1) [1920] 42 All. 309=55 I. C. 22=18 A. L. J. 110.

A. I. R. 1930 Allahabad 420

SEN AND NIAMATULLAH, JJ.

Abdul Ahad — Defendant—Appellant.

v.

Chhabi Ram—Plaintiff—Respondent.

Second Appeal No. 1407 of 1926, Decided on 8th January 1930, against decree of Dist. Judge, Budaun, D/- 7th June 1926.

Limitation Act, Art. 120—Suit for declaration that decree is not binding by person whose title is jeopardised by decree for first time is governed by Art. 120.

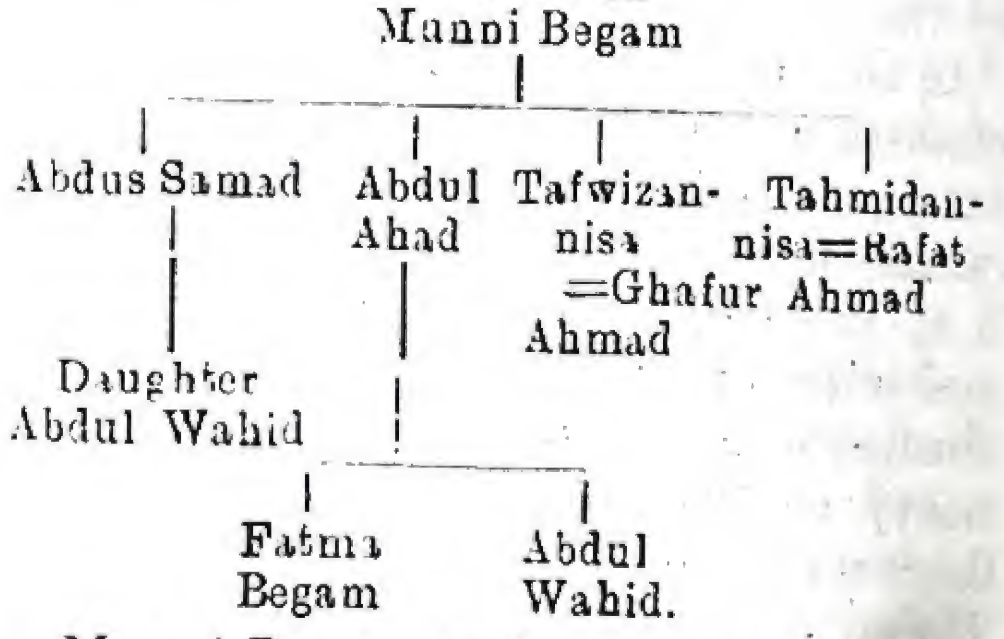
Where title of a person is jeopardised for the first time by a decree in a suit, such a person is entitled to institute a suit for declaration that he is not bound by that decree and the article applicable to such a suit is 120 and the time begins to run from the date of the invasion of the title: 5 *All.* 289 and 11 *Bom.* 119, *Dist.* [P 421 C 2, 422 C 1]

A. M. Aziz—for Appellant.

Mushtaq Ahmad—for Respondent.

Sen, J.—This is an appeal by one of the defendants, arising out of a suit for declaration that Abdul Wahid was the owner of the property in dispute, that the said property was liable to be sold in execution of decree No. 152 of 1922, obtained by the plaintiff against Abdul Wahid and that the decree in suit No. 326 of 1911 obtained by Abdul Ahad against his son Abdul Wahid was fictitious, collusive and not binding upon the son.

The relation of some of the parties will appear from the following genealogical table:



Munni Begam had a son Abdul Ahad and two daughters Tafwizannisa and Tahmidan Nisa. Abdul Ahad was married to Mt. Fatma Begam. Abdul Wahid is the son of Abdul Ahad by another wife. On 12th June 1890, an award was made on a reference to arbitration between Munni Begam and some of her relations. Under this award, a moiety of the property was given to Mt. Fatma Begam and Abdul Wahid jointly and the other half to Abdus Samad, who was another son of Munni Begam. On 30th May 1901, Abdul Wahid executed a simple mortgage of the property in suit to Chhabi Ram plaintiff-respondent. In 1905 Tafwizannissa and Tahmidunnissa the two daughters of Munni Begam instituted a suit for the avoidance of the award. The suit was decreed and their claim to a portion of the property was recognized by a decree dated 10th May 1905. On 14th July 1908, a second award was made between the members of the family under which one-sixth share of Tahmidunnissa in mauzas Rali Madhopur and Ismailpur was given to Abdul Wahid and others and the share of Tahmidannissa in mauza Gangapur was increased in exchange of the above aforesaid property. On 22nd November 1910, Tafwizunnissa sold her share in mauzas Reli Madhopur and Gangapur to Abdul Wahid and others. On 16th October 1911, Abdul Wahid executed another mortgage in favour of Chhabi Ram and the consideration for this mortgage was the earlier mortgage,

dated 30th May 1901, which has already been referred to. In 1911, a suit was launched by Abdul Ahad the father against Abdul Wahid for a declaration that the property mortgaged to Chhabi Ram was his property and did not belong to Abdul Wahid. This suit was numbered and registered as 326 of 1911. On 15th December 1911 Chhabi Ram sought to be impleaded as a defendant. This application was resisted by Abdul Ahad and was rejected by an order dated 16th December 1911. Chhabi Ram instituted a suit on foot of his mortgage dated 16th October 1911, against Abdul Ahad and Abdul Wahid the mortgagor. The suit was decreed against Abdul Wahid but was dismissed against Abdul Ahad the father. This was on 6th December 1922. A final decree was obtained by Chhabi Ram which he sought to execute by sale of the mortgaged property. Abdul Ahad intervened. Curiously enough, the Court below did not try the question raised by Abdul Ahad's application in the course of the execution proceedings. It, however, ordered that the application of Abdul Ahad be treated as a suit. The present suit was instituted by Chhabi Ram on 13th October 1925, in which he sought the reliefs which we have already enumerated, upon the ground that Abdul Wahid was the owner of the property in controversy, that he was competent to mortgage the property to Chhabi Ram on 16th October 1911, that the decree dated 6th December 1922, was properly obtained against Abdul Wahid and was executable by sale of the mortgaged property, that Abdul Ahad had no interest in the property whatsoever, and that the plaintiff was not bound by the decree obtained by Abdul Ahad, the father against his son Abdul Wahid which was a fraudulent and collusive decree.

Abdul Ahad contested the suit on the ground that he was the owner of the property, that the decree obtained by him against his son Abdul Wahid in suit No. 326 of 1911 was not vitiated by fraud or collusion and that the plaintiff's claim was time barred.

It may be mentioned that the plaintiff in repudiating the claim of Abdul Ahad relied upon S. 41, T. P. Act, as being the transferee of the property from the ostensible owner.

The Court of first instance dismissed the suit. It overruled the plea of estoppel, upheld the plea of limitation and held that Abdul Ahad the father and not Abdul Wahid was the owner of the property in dispute.

The lower appellate Court has reversed this decision and decreed the plaintiff's suit. It came to the conclusion that the plaintiff's claim was not barred by limitation. It manifestly intended to find that Abdul Ahad was precluded by S. 41, T. P. Act, from impugning the title of his son Abdul Wahid. There was no trial of the issue as to whether Abdul Wahid or Abdul Ahad was the owner of the property in dispute. Abdul Ahad appeals from this decision and his main contention is that the plaintiff's claim was time barred. It has been argued that the decree in suit No. 326 of 1911, was obtained in July 1912. Assuming that this decree was collusive or fraudulent, Chhabi Ram the plaintiff had knowledge of this fraud so far back as 15th December 1911, when he intervened in the said suit. His application, however, was rejected on 16th December 1911. The present suit was not instituted till 13th October 1925. It has been strenuously argued that the suit is covered by Art. 95, Lim. Act, and the claim for the avoidance of the decree in Suit No. 326 of 1911 is statute barred.

Our attention has been drawn to the decisions in *Radha Prasad Singh* v. *Bhagwan Rai* (1) and *Parekh Ranchor* v. *Rai Vakhat* (2). The facts of these cases are in our opinion toto caelo different from the facts which have given rise to the present appeal. This is not a suit for the avoidance of a decree, nor it is a suit for setting aside a decree obtained by fraud within the meaning of Art. 95. The claim is for declaration that the plaintiff is not bound by the decree in suit No. 326 of 1911. There can be no doubt that the article applicable to a suit for declaration of this description is Art. 120 and not Art. 95. The plaintiff was entitled to institute a suit of this description within six years from the date of the invasion of his title. Prior to 6th De-

(1) [1883] 5 All. 289=(1883) A.W.N. 33.
(2) [1887] 11 Bom. 117.

cember 1922, when he obtained the decree against Abdul Wahid mortgagor, he had no right to proceed against the property in dispute. His title to the property was jeopardized for the first time when Abdul Abad the father intervened in the course of the execution proceedings and claimed to be the absolute owner of the property. This was done sometime on or about 2nd October 1925. The suit was instituted on 13th October 1925, and is clearly within time.

The plea of estoppel was argued in the Court below, but there is no clear finding on this point. The learned District Judge held that the plaintiff had made sufficient inquiry and left the matter there. As we have already noticed there is no finding on the question of title of either the mortgagor or of Abdul Abad to the property in dispute, we are of opinion that this appeal cannot be satisfactorily disposed of without having a clear finding on this point. We remit the following issues to the lower appellate Court:

1. Whether Abdul Abad or Abdul Wahid was the owner of the property in dispute?

2. Whether Abdul Abad was precluded by S. 41, T P. Act, from asserting his title to the property mortgaged to Chhabi Ram plaintiff?

The Court below is directed to submit its findings on these issues within two months from the date of receipt of this order. The parties are permitted to adduce further evidence if they are so advised. On return of the findings the usual ten days' time shall be allowed for objections to the findings,

V.B./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 422

SEN, J.

Sheotahal Dube—Defendant — Appellant.

v.

Lal Narain Prasad Chand and *others*—Plaintiff and Defendants — Respondents.

Second Appeal No. 1018 of 1928, Decided on 27th January 1930, from decree of Second Addl. Dist. Judge, Gorakhpur, D/- 9th March 1928

(a) Cosharer—One cosharer can sue trespasser for possession of entire property.

Where property is held in coparcenary, or in co-ownership, it is open to any one of the cosharers to maintain a suit for possession of the entire property against a trespasser. The reason for the rule is that in the absence of a partition, the right of each co-owner extends to the whole property jointly with the other co-owners and that the attempt to reclaim the property is for the obvious advantage of all the cosharers. [P 424 C 1]

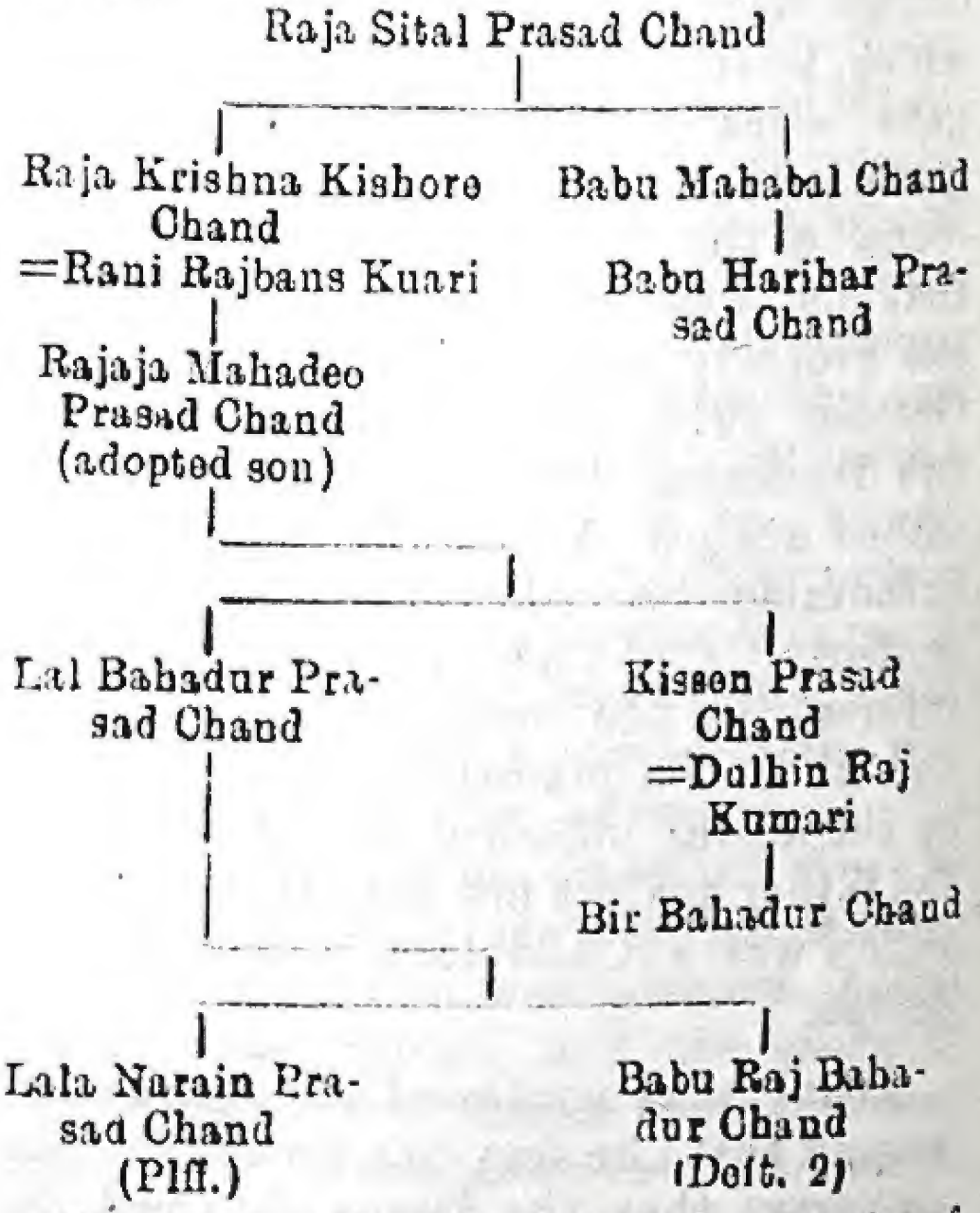
(b) Transfer of Property Act, S. 41—Benefit under S. 41 cannot be allowed to purchaser who having many avenues of enquiry before him which if prosecuted would lead to ostensible nature of transferrer's rights, refuses to do so.

Where there are certain avenues of enquiry open to the purchaser and that if the enquiry were followed in that direction, it would have led him to the discovery of the fact that the vendor was not the real owner of the property transferred, and the purchaser refuses or omits to make such enquiries, the purchaaser cannot be allowed to take advantage of S. 41: 11 *Beng. L. R.* 46 at p. 53 (*P.C.*), *Rel. on.* [P 425 C 2]

Harilans Sahai—for Appellant.

K. N. Katju and *S. P. Sinha*—for Respondents.

Judgment.—This and the connected appeal (S. A. No. 1019 of 1928), arise out of a suit for possession of certain arazidari plots in mouza Kohri in the district of Gorakhpur. The entire village Kohri Buzurg was the property of Raja Krishna Kissen Chand. The plaintiff-respondent claims descent from him and his relationship with the Raja will appear from the following genealogical table:



The plaintiff alleges that the estate of Raja Krishna Kishore Chand was honeycombed with debts and the Raja was always beset with a swarm of creditors.

The Raja with a view to save his property executed a number of transfers in favour of his relations or dependents. These transfers were merely colourable

and were no more than cloaks to shield the property from creditors and that in fact Raja Krishna Kishore Chand continued to be the owner of the property transferred. As a part of the scheme he executed a conveyance of mouza Kohri Buzurg in favour of Rani Rajbans Kunwari. The property was successively transferred to Adhin Das, Harihar Prasad Chand and Mt. Nanhi Bibi, The woman last mentioned was a mistress in the keeping of the Raja. On 18th July 1870 Mt. Nanhi Bibi executed a sale-deed relating to mouza Kohri Buzurg in favour of Mt. Mohan Kunwari, wife of Raja Mohan Prasad Chand. The plaintiff's case is that no consideration passed under the sale-deed and this transaction was the machinery employed for obtaining an acknowledgment from Mt, Nanhi Bibi that she was not the owner of the property and that the real owner of the property was Raja Mahadeo Prasad Chand. On 13th May 1914, Mt. Mohan Kunwari sold the property in dispute to Sheotahal Dubey, the defendant-appellant for an ostensible consideration of Rs. 2.100. The plaintiff alleges that Mt. Mohan Kunwari was not the owner of the property, that he was the owner of the property by reason of his descent from Raja Mahadeo Prasad Chand and that he alone was entitled to claim the property from the vendee by reason of a custom in the family whereby the property vested in a single heir and the rule of primogeniture prevailed. By a subsequent amendment, the plaintiff claimed to recover this property by reason of being a cosharer with his brother Raj Bahadur Chand and his cousin Bir Bahadur Chand, who are alleged to be members of a joint family with him.

Sheotahal Dubey contested the suit upon a variety of grounds. He denied that Mahadeo Prasad Chand was the adopted son of Raja Krishna Kishore Chand. He impugned the legitimacy of the plaintiff and averred that plaintiff's mother Mt. Sheosaran Kunwari was the daughter of one Bhanta Kunwari who was a brahmin widow. He pleaded that Bhanta Kunwari was the mistress of Babu Thakur Prasad Singh and that Mt. Sheosaran Kunwari was born to them and that Baldeo Prasad Chand was not and could not be lawfully married to Sheosaran Kunwari. The defendant contended that all the transfers which had successively taken place from Raja Krishna Kishore Chand right up to Mt. Nanhi Bibi were real transfers for consideration, that Nanhi Bibi was the full owner of the property by her purchase and that Mt. Mohan Kunwari was the absolute owner of the property under the purchase dated 18th July 1870, that the latter passed a good title to the property in dispute under the sale-deed dated 13th May 1914, and that the plaintiff's claim was barred by S. 41, T. P. Act. The defendant also contended that Raj Bahadur Chand and Bir Bahadur Chand not having joined the claim, the plaintiff was in no case entitled to possession of more than a quarter share in the disputed property.

The Court of first instance found that Mahadeo Prasad Chand had been adopted by Raja Krishna Kishore Chand, that Mt. Sheosaran Kunwari the mother of the plaintiff was a Thakur woman of legitimate descent and that the pedigree set up by the plaintiff was fully proved.

The Court of first instance, however, found that the plaintiff had failed to make out the case that the several transfers held in succession from Raja Krishna Kishore Chand right up to Mt. Nanhi Bibi were not genuine transactions. There was evidence to indicate that these transfers had taken effect and were not mere devices to protect the property from the creditors of Raja Krishna Kishore Chand.

The Court of first instance further found that the sale-deed dated 18th July 1870, executed by Mt. Nanhi Bibi in favour of Mt. Mohan Kunwari was a real transfer from the vendor to the vendee and had been executed for consideration.

The trial Court repelled the plea that S. 41, T. P. Act, was a bar to the suit. It appears that Sheotahal Dube had not cared to examine the title-deed of his vendor before he purchased the property on 13th May 1914. Reliance was placed upon several transfers made by Mt. Mohan Kunwari, but Sheotahal Dubey had not cared to examine the documents under which the transfers were made. Indeed those documents were not produced in evidence in this case. It was, therefore, not possible to say whether Mt. Mohan Kunwari was putting herself forward as the absolute owner of

the property while making the transfers or was doing so as the guardian of her minor sons. The Court of first instance held that under the sale-deed dated 18th July 1870. Mt. Mohan Kunwari was not the real owner of the property but that the property was purchased for her husband Mahadeo Prasad Chand and her two sons Baldeo Prasad Chand and Krishan Prasad Chand. The result, therefore, was that Mt. Mohan Kunwari was not the owner of the property and could pass no title to Sheotahal Dubey under the sale-deed dated 13th May 1914. The Court of first instance held that the plaintiff had failed to prove that he was a member of a joint family with his cousin Bir Bahadur Chand.

As a result of the aforesaid findings, the trial Court granted the plaintiff a decree for a moiety share in the plots in dispute.

Both the parties were dissatisfied with the decree and preferred appeals. The appeal of Sheotahal Dubey was numbered as Civil Appeal No. 73 of 1927 and that of Lal Narain Prasad Chand was registered as 689 of 1927. These two appeals were heard and disposed of by one judgment. The appeal of Sheotahal Dubey was dismissed. The appeal of Lal Narain Chand was allowed. The result was that the plaintiff's claim was decreed in its entirety.

The two decrees of the lower appellate Court have given rise to the appeals which are now before this Court for consideration.

In appeal No. 733 of 1927, the lower appellate Court agreed with the finding of the trial Court that it is proved that Mahadeo Prasad Chand was the adopted son of Raja Krishna Kishore Chand and that the plaintiff's mother was a Thakur woman of legitimate descent. It also agreed with the trial Court in holding that the various transfers impugned by the plaintiff were real transactions and for consideration. The lower appellate Court upon a consideration of the peculiar nature of the recital contained in the sale-deed dated 18th July 1870, coupled with other evidence, documentary and circumstantial, came to the conclusion that under the sale-deed referred to herein—not Mt. Mohan Kunwari—but her husband and her sons were the real purchasers of mouza Kohri Buzurg from Mt. Nanhi Bibi. A plea had been taken in the memorandum of appeal that the suit was barred by S. 41 T. P. Act. This plea, however, was abandoned and was never pressed. The lower appellate Court observed that the defendant-appellant was not entitled to the protection afforded by S. 41, T. P. Act because he was not a purchaser in good faith inasmuch as he had not even cared to look into and examine the title-deed of his vendor. Upon these findings appeal No. 733 of 1927 was dismissed.

In the cross-appeal, the lower appellate Court did not go into the question whether the pretension of the plaintiff founded upon impartibility and the law of primogeniture had been estalished; It does not even go into the question as to whether Bir Bahadur Chand was a member of a joint family with the plaintiff. Indeed, it was unnecessary to go into these questions because the plaintiff was entitled to a decree for possession of the entire property claimed by ouster of the defendant who was a rank trespasser for the obvious reason that the plaintiff was a cosharer with his brother Raj Bahadur Chand and his cousin Bir Bahadur Chand. Where property is held in coparcenary or in co-ownership, it is open to any one of the cosharers to maintain a suit for possession of the entire property against a trespasser. The reason for the rule is that in the absence of a partition, the right of each co-owner extends to the whole property jointly with the other co-owners and that the attempt to reclaim the property is for the obvious advantage of all the cosharers.

In this view appeal No. 1019 of 1928, must fail and is dismissed with costs.

In appeal No. 1018 of 1928, three points have been urged by the appellant. The pedigree has been impugned upon the ground that the lower appellate Court has not given due weight to a mortgage of the year 1899 in which Mt. Benhsa Kuar has been described as the kept mistress of Thakur Prasad Singh. In this document Mt. Benhsa Kuar has been described as kept mistress of Thakur Prasad Singh and this description, to speak the least, is very peculiar. It does not, however, appear how this recital in this document is admissible in evidence. It is not an admission by the plaintiff or of any person from whom the

plaintiff derives his title. It is not a statement of a person, who is dead, or who cannot be found and whose statement may be treated as admissible under S. 32, Evidence Act. The Courts below did not discard the document on the ground of its inadmissibility although they were clearly entitled to do so. They, however held that this document was not of much evidential value and was, in no case, weighty enough to prevail against the voluminous evidence, oral and documentary, produced by the plaintiff. The finding arrived at by the Court below was clearly based upon a balance of evidence on the record and cannot be challenged in second appeal.

The plaintiff contended that, under the sale-deed, dated 18th July 1870, Mt. Mohan Kunwari was not the owner of the property and that she was a benamidar for her husband and her sons. In this document the purchaser has been mentioned as Mt. Mohan Kunwari, wife of Raja Mahadeo Prasad Chand and guardian of her minor sons. There is nothing unusual in describing the female purchaser as the wife of Raja Mahadeo Prasad Chand but it is something very peculiar and unusual to describe her as the mother and guardian of her minor sons. There was no difficulty in the construction of the document but the Courts below were entitled to take into consideration the peculiar nature of the recital referred to above in considering the question whether Mt. Mohan Kunwari was purchasing the property on her own account or on account of her husband and her minor sons. The Courts below took into consideration a number of other matters which were relevant to the issue and which were founded upon documents of an unimpeachable character. Upon these data, they came to the conclusion that the real purchasers of the property were Raja Mahadeo Prasad Chand and his two sons. This was a finding of fact based upon evidence. The plaintiff has failed to show that this finding is vitiated by an error or misapplication of law. This finding, therefore, must stand and cannot be displaced by the appellant.

It has been argued that the suit is barred by S. 41, T. P. Act. The point was raised in the written statement. A definite issue was framed. The Court of first instance held that the defendant was not entitled to the benefit of S. 41, T. P. Act, and enumerated a number of circumstances which were fatal to the defendant's plea. It appeared that the defendant had not paid to the vendee the full amount of the sale consideration. He had made no enquiries into the vendor's title. He had not cared to examine the various documents of transfer executed by Mt. Mohan Kunwari from time to time with a view to satisfy himself whether she had held herself out in those documents as the absolute owner of the property which she was transferring under those instruments. Upon these facts the Court of first instance was justified in coming to the conclusion that the conditions of S. 41, T. P. Act, were not fulfilled in the case.

It ought not to be lost sight of that S. 41, T. P. Act, is a statutory recognition of the principle enunciated by the Judicial Committee in *Ram Coomar* v. *McQueen* (1):

"It is a principle of natural equity that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title, or there existed circumstances which ought to have put him upon an enquiry that, if prosecuted would have led to a discovery of it."

There can be no manner of doubt that there were certain avenues of enquiry before the appellant and if the enquiry had been followed up it would have led to a discovery of the fact that the plaintiff and his brother were the real purchasers of the property.

Section 41, T. P. Act, was pleaded in the memorandum of appeal to the lower appellate Court but it was not pressed That Court, however, without going into the evidence in full endorsed the finding of the trial Court that the plaintiff having refused to examine the title deeds of his vendor was not entitled to the the benefit of S. 41, T. P. Act.

The appellant cannot be allowed to take a plea in second appeal which he had deliberately given up in the lower appellate Court. It would be unfair to that Court and also to the respondent if the appellant is allowed to revive that

(1) 11 Beng. L. R. 46=I. A. Sup. Vol. 40=18 W. R. 166=3 Sar. 160 (P.C.).

plea. The result is that this appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 426 (1)

MUKERJI AND BENNET, JJ.

Jagnarain Kurmi and *others*—Defendants—Appellants.

v.

Gaya Kurmi and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 52 of 1928, Decided on 11th January 1930, from judgment of Dalal, J., D/- 23rd February 1928.

Agra Tenancy Act (2 of 1901), S. 4—zamindar accepting person as occupancy tenant in succession to last holder—Mortgagee from previous holder cannot set aside such succession.

Where a zamindar accepts a person as successor to a holder of an occupancy tenancy, such person does in fact succeed to the original tenant it is not open to a mortgagee of the holding from the previous holder to claim that the succession should be set aside. [P 426 C 1]

Harnandan Prasad—for Appellants.

Gadadhar Prasad—for Respondents.

Judgment.—This is a latters patent appeal by the defendants against a decree for redemption of the mortgage held by the defendants as mortgagees on a certain occupancy holding. The defendants claim that the plaintiffs are not entitled to redeem this mortgage. The original mortgage was executed on Chait Sudi 13, 1894 for Rs. 199 by Ahlad in favour of Bhukhan and Prithi. Bhukhan and Prithi are the ancestors of the defendants. It is found as a fact by the lower appeallate Court that Ahlat is a collateral of the plaintiffs but that the plaintiffs did not share in cultivation of Ahlad. On the death of Ahlad the zamindar accepted the plaintiffs as his successors in the occupancy holding and in a suit for enhancement of the rent of this holding in 1915 the zamindars made defendants as mortgagees and plaintiffs as mortgagors parties to the suit. We are of opinion that when zamindar accepted the plaintiffs as successors to Ahlad in this occupancy tenancy the plaintiffs did in fact succeed to Ahlad and it is not open to the defendants as mortgagees to claim that succession should be set aside. The relation of landlord and tenant is defined by S. 4, Act 2 of 1901 as a contract between the landholder and the tenant.

Accordingly we consider that the point raised by this appeal has no force and we dismiss this letters patent appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 426 (2)

SULAIMAN AND BANERJI, JJ.

Fateh Singh and *another*—Defendants—Appellants.

v.

Prithi Singh and *another*—Defendant—Respondents.

Second Appeal No. 2350 of 1927, Decided on 7th February 1930, from a decree of Sm. C. C. Judge., Meerut, D/- 23rd August 1927.

Transfer of Property Act, S. 118—Consideration partly in cash and partly proprietary interest in land—Transfer is exchange not sale—Transfer of Property Act, S. 54.

If part of the consideration given by the vendee was proprietary interest in land and part was cash consideration the transaction is not one of sale but one of exchange.

[P 427 C 1]

Ambika Prasad—for Appellants

N. C. Vaish—for Respondents.

Sulaiman, J—These three appeals are connected and arise out of two suits for pre-emption. The first was to pre-empt a sale deed and the second to pre-empt a deed of exchange which was taken during the pendency of the former suit. The defendant pleaded that by virtue of this deed of exchange they had become cosharers in the mahal and were entitled to resist the claim. The plaintiff on the other hand alleged that the deed of exchange was really a deed of sale. Both the Court below have treated this deed as one of sale on the ground that the land transferred by the vendee was the proprietary interest in certain rent-free grants which were yielding no income and that Rs. 65 was secretly paid by the vendee in consideration for the land which he acquired. The Courts below have not held that the transfer of the proprietary interest in the rent-free grant was a bogus and fictitious transaction the proprietary interest not passing. What they have thought is that because cash also was paid the transaction was one of sale. This view is obviously wrong. Under S. 118, T. P. Act, when two persons mutually transfer the ownership of one thing for the ownership of another,

neither thing or both things being money only the transaction is called an exchange. It is therefore obvious that if part of the consideration given by the vendee was proprietary interest in land and part was cash consideration, the transaction was not one of sale but one of dxchange. In these circumstances the Courts below were wrong in treating it as one of sale.

The result therefore is that both these appeals must be allowed and the decrees of the Courts below set aside and the plaintiff's suit dismissed in both the cases. But inasmuch as the deed of exchange was taken during the pendency of the first suit (No. 1082 of 1926) the pliantiff should be given his costs in the first Court which should be borne by the defendants. The defendants will have their costs in the lower appellate Court and in this Court in this case from the plaintiff who will bear his own costs. The defendants will also have their costs throughout in the other case (suit No. 775 of 1927) from the plaintiff who will bear his own costs throughout. Costs in this Court will include fees on the higher scale.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 427

SEN AND NIAMATULLAH, JJ.

Jiwan Singh—Defendant—Appellant.

v.

Kuar Reoti Singh and *another*—Plaintiff—Respondents.

Second Appeal No. 488 of 1927, Decided on 6th January 1930, from decree of Dist. Judge, Mainpuri, D/- 4th February 1927.

(a) Decree—Setting aside—Fraud must be particularised—Civil P. C., O. 6, R. 4.

Where a suit is instituted to set aside a decree on the ground of fraud, it is obligatory and imperative on the plaintiff to prove that the decree was obtained by fraud practised upon the Court. General allegations of fraud are insufficient and the plaintiff must particularise the facts upon which fraud is founded: 15 *Cal.* 533 (*P. C.*), *Rel. on.* [P 428 C 1]

(b) Evidence Act, S. 108—Presumption is as to factum and not exact time.

The presumption raised by S. 108 is confined to the factum of death and not the exact time when death may have occurred. Where a party affirms that a certain person died on or before a particular date, that fact has to be established by positive evidence. [P 430 C 1]

P. L. Banerji and *S. N. Chaube*—for Appellant.

N. P. Asthana—for Respondents.

Sen, J.—The suit, which has given rise to this second appeal, was for a declaration that an ex parte decree in suit No. 11 of 1922 *in re*, *Raja Jiwan Singh*, plantiff v. *Kunwar Tara Singh* and others, defendants passed by the revenue Court on 3rd February 1923 was vitiated by fraud and that the entire proceedings consequent upon the said decree were void, ineffectual and not binding upon the plaintiffs.

There is a small estate in the district of Mainpuri known as Eka Raj which is held by the defendant appellant as Raja and Gaddi Nashin. The plaintiffs and defendants 1, 2 and 3 and the husbands of defendants 4 and 5 are descended from a common ancestor. Raja Jiwan Singh, a defendant 1, who is the appellant in this Court is the accredited head of the family. The junior members of the family received from generation to generation either some cash allowance or some property for their maintenance. In pursuance of this custom the plaintiffs and their father Kunwar Har Govind Singh and defendants 2 and 3 and the husband of defendant 4 had received from the Raja hamlet called Nagla Rajpur for their maintenance. The names of the maintenance holders were originally entered in the khewat but in recent years their names have been removed from the khewat and have been entered in the jamabandi and they have been paying Rs. 590 as rent for the land in Nagla Rajpur which is in their occupation. The area of this land is about 65·8 acres.

In 1922, Raja Jiwan Singh instituted a suit against Har Govind Singh, father of the plaintiffs, Kunwar Tara Singh, Kunwar Sheobaran Sihgh and Mt. Bhawani Kuar for arrears of rent. The defendants did not contest the suit and an ex parte decree was passed on 3rd February 1923. Ths judgment-debtors having failed to pay the decretal amount, proceedings were initiated under S. 59, Agra Tenancy Act with the result that they were ejected from the holding and the decree-holder obtained formal possession on 31st December 1923.

The plaintiffs impugned the decree and the execution proceedings in pursuance of the decree on the ground of fraud. The defendant pleaded that the

plaint was bad because the particulars of fraud had not been clearly set out.

Where a suit is instituted to set aside a decree on the ground of fraud, it is obligatory and imperative on the plaintiff to prove that the decree was obtained by fraud practised upon the Court. General allegations of fraud are insufficient and the plaintiff must particularise the facts upon which fraud is founded. In *Ganga Narain Gupta* v. *Tiluck Ram* (1) it was held by the Judicial Committee that when fraud is charged against the defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges, and that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. Where the full particulars of fraud have not been set out in the pleadings it will be most unreasonable to expect the defendants to meet the charge of fraud.

The plaintiff seeks to avoid the ex-parte decree upon the ground that Raja Jiwan Singh in the suit for arrears of rent "had concealed the real and alleged fraudulent facts." They develop this part of the case by going into details: the rent suit was directed not against the plaintiffs but against their father Har Govind Singh and defendants 2 to 4. The plaintiffs alleged that although Har Govind was dead on the date of the institution of the rent suit, Raja Jiwan Singh had sued him as a person alive. He was impleaded as a person insane and was placed under the guardianship of Mt. Parbati Kuar, his wife. The name of Har Govind Singh's wife was not Parbati Kuar but was Mt. Jaidevi Kuar. Raja Jiwan Singh as a member of the family was fully aware of these facts. He got the summons to be served "fictitiously, fraudulently and clandestinely" and continued the fraud in the execution of the ex parte decree under S. 59, Act 2 of 1901. We are of opinion that fraud has been set out in detail and with sufficiency and the defendant's contention to the contrary is of no force.

The sole contesting defendant was Raja Jiwan Singh. He denied that the plaintiffs' father was dead at the date of the suit. He maintained that the plaintiffs' father was a lunatic and that the decree passed ex parte against him and the proceedings in execution thereof which culminated in the ejectment of the judgment-debtors were validly obtained and were not vitiated by fraud.

The Court of first instance struck no less than eight issues, only three of which are material for the purpose of this appeal:

"(1) Was the decre in suit No. 11 of 1922 obtained by defendant 1 by fraud? (2) Were the proceedings under S. 59, Agra Tenancy Act taken after the date of the decree aforesaid fraudulent? . . . . (8) Is the father of the plaintiffs dead and have they no right to maintain the suit."

The trial Court sustained the defence and dismissed the plaintiffs' suit.

It may be noted that the written statement was not signed or verified by Raja Jiwan Singh, defendant 1. It is signed and verified by one Tilak Singh, General Attorney of the Raja. The written statement stops short with the denial that Har Govind Singh was dead at the date of the rent suit. He also traverses the statement that Har Govind Singh was never insane. It does not appear to have been a substantive part of the defendant's case that Har Govind Singh was still alive or that he was alive and was the victim of insanity in the year 1922 when the rent suit was instituted against him.

Tilak Singh made a statement in Court under O. 10, R. 1, Civil P. C. on 13th February 1925, in which he says:

"Har Govind has been mad for a long time. He is alive. I do not know where he is. He has not been heard of for 1½ or 2 years. Before that he used to live in Shyampur, a Nagla of Eka. The plaintiffs' mother is alive. Her name is Mt. Parbati Kunwar."

Of the two plaintiffs, Reoti Singh who is adult was examined by the Court, and he stated that his father Har Govind Singh had died at Hardwar about 10 or 11 years ago, that his father was never mad and that the plaintiffs or their mother did not get any information of the decree for arrears of rent and the subsequent ejectment.

The plaintiffs closed their evidence on 16th August 1926. On 17th August 1926, Tilak Singh stated in the course of his deposition in Court that he had alighted upon Har Govind Singh at

(1) [1888] 15 Cal. 533=15 I. A. 119=5 Sar. 168 (P. C.).

Hathras on 8th August 1926 and had got him photographed A photograph was shown to Kuar Reoti Singh, plaintiff and he denied that it was the photograph of his father Har Govind Singh. The photograph was shown to one Pitamber, a witness for the plaintiffs who is resident of Harnoth or Arnoth, a village in the district of Aligarh. The witness identified this photograph to be that of Har Govind Singh. On 24th August 1926 a man was actually introduced in Court as Har Govind Singh, father of the plaintiffs. Some attempt was made to procure the attendance of the plaintiffs in Court with a view to ascertain from them if this man who was produced on 24th August 1926, was really their father. The plaintiffs did not turn up. The Court of first instance came to the conclusion that the man who was introduced in Court was really the plaintiff's father. It further came to the conclusion that he was insane. The finding of the trial Court was mainly influenced by two facts: (1) That the man produced in Court was identical with the man in the photograph and (2) that Pitambar who was witness for the plaintsffs had identified the man in the photograph as plaintiffs' father.

The lower appellate Court accepted the evidence adduced by the plaintiffs and came to the following conclusions: (1) That Har Govind had disappeared from his village Nagla Shyampur 10 or 11 years before suit (2): that it must be presumed in law that he was dead; (3) that it must be presumed that he was not alive in 1922 when the rent suit was instituted against him (4); that he was not insane; (5) that on the date of the institution of the rent suit he was not residing in mouza Shyampur Nagla nor was he under the guardianship of his wife and (6) that the rent decree and the ejectment proceedings were vitiated by fraud. The lower appellate Court therefore reversed the decree of the trial Court and passed the following order:

"The rent decree, according to my finding, is ineffectual as against Har Govind Singh or the present plaintiffs. On a declaration being made to that effect the result will be that the parties to the rent case will be restored to a position which they originally occupied prior to the passing of the rent decree. On the rent decree and the subsequent proceeding taken on its basis being declared ineffectual, defendant 1 will have to restore the property to the plaintiffs. He may, if advised, revive the proceedings of the rent case and properly represent Har govind Singh in it and fight it out. The result is that I allow the appeal, set aside the order of the Court below and declare that the rent decree passed and the proceedings of ejectment taken against Har-Govind Singh are ineffectual and not binding upon the plaintiffs."

The lower appellate Court was not at all satisfied that the man produced before the Court was the real Har Govind Singh. How Tilak Singh discovered this man in Hathras on or about 8th August 1926 is somewhat mysterious. His explanation is that he learnt of Har Govind Singh from an arhatia of Sanwant Khera. Tilak Singh is unable to give the name of this arhatia. The arhatia did not accompany Tilak Singh in his search for Har Govind Singh. The arhatia has not been produced as a witness in the case. It is not unlikely that this arhatia is a figment of the imagination of Tilak Singh and does not exist in flesh. Considerable emphasis was laid by the trial Court upon the evidence of Pitambar. It ought to be remembered that Pitambar is not a resident of Nagla Shyampur where Har Govind Singh originally resided. It ought also to be borne in mind that Pitamber is not a member of the family of Har Govind Singh. He is the purohit and pundit of Har Sukh Singh, father-in-law of Har Govind Singh. For 10 or 11 years since Har Govind Singh's disappearance he had never seen Har Govind Singh. If any value is to be attached to the statement of this witness, it is no more than this that the man in the photograph is like Har Govind Singh as he was 10 or 11 years before the suit. It is remarkable that this 10 or 11 years' time had made no ravage upon Har Govind Singh and had treated him with remarkable tenderness. We are clearly of opinion that no importance could be attached to the statement of Pitamber and the lower appellate Court has appraised the said statement at its true value.

The finding of the Court below is that Har Govind Singh has not been heard of for the last 10 or 11 years. This finding may give rise to a presumption of law about his being dead and it may affect the question of onus. S. 108, Evidence Act, provides that when the

question is whether a man is alive or dead, and it is proved that he has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. The presumption raised by this section is confined to the fact of death and not to the exact time when death may have occurred. Where a party affirms that a certain person died on or before a particular date, that fact has to be established by positive evidence. Har Govind Singh not having been heard of by the members of his family who would naturally have heard of him if he had been alive for a period of more than seven years, a presumption arises that Har Govind Singh is dead at the date of the suit but no presumption arises that Har Govind Singh was dead in the year 1922. There being no materials before the lower appellate Court to support a finding as to the actual time of the death of Har Govind Singh, the said Court was not justified in holding that Har Govind Singh was dead in 1922 when the rent suit was instituted against him. To this extent the finding of the lower appellate Court is erroneous and ought to be set aside.

The lower appellate Court had before it sufficient materials for coming to the conclusion that the ex parte decree for rent and the subsequent ejectment proceedings were vitiated by fraud. Har Govind Singh had been away from Nagla Shyampur for a long number of years before the institution of the rent suit. He was never insane. If living, he would be sui juris and could not be placed under the guardianship of his wife. From its inception right up to its finish the procedure adopted by the defendant-appellant does not redound to his credit and was bound to seriously prejudice the interest of the plaintiff-respondents in the property in dispute. We are of opinion that, in view of the finding of the lower appellate Court on the question of fraud, this appeal is bound to fail. We accordingly dismiss it with costs.

V.B./R.K. *Appeal dismissed.*

✲ A. I. R. 1930 Allahabad 430

DALAL, J.

Nakched Chaudhari —Plaintiff — Appellant.

v.

Sukhdeo Chaudhari and *others* —Defendants— Respondents.

Second Appeal No. 1036 of 1928, Decided on 7th February 1930, from decree of Second Addl. Sub-Judge, Gorakhpur, D/- 15th March 1928.

✲ **(a) Hindu Law—Reversioner — Estoppel — Reversioner becoming party to compromise and taking benefit under it is estopped from claiming as reversioner — Evidence Act, S 115.**

The interest of a Hindu reversioner is an interest expectant on the death of a qualified owner; it is not a vested interest, it is a spes successionis or a mere chance of succession, it cannot be sold, mortgaged, assigned or relinquished, for a transfer of a spes successionis is a nullity and has no effect in law. But though transfer of his interest by a reversioner is void, he may, by becoming a party to a compromise and by taking the benefit of the compromise, be estopped from claiming as a reversioner: 15 *Cal.* 556, *Foll.*; *A. I. R.* 1918 *P. C.* 70; 33 *All.* 356 and 41 *All.* 611, *Ref.*; *A.I.R.* 1917 *P. C.* 95, *Dist.* [P 431 C 1 2]

✲ **(b) Civil P. C., S. 11—Value in previous suit one-fourth of subsequent suit — Decision is not res judicata.**

If in previous suit the value of the property included was one-fourth of the property included in the second suit the decision in previous suit cannot be res judicata in subsequent suit. [P 431 C 1]

Haribans Sahai and *Sir Narain Sahai* —for Appellant.

Sankar Saran —for Respondents.

Judgment. — The plaintiff sued for possession of the property to which his deceased father Gaya became entitled as next reversioner on the death of a Hindu widow of the family Mt. Richhpali in 1917. It is admitted by the subordinate Courts that Gaya was next reversioner on the death of Mt. Richhpali but the suit was dismissed on the ground that Gaya was party to a compromise during a litigation in 1863 and was therefore estopped from suing Sukhdeo and others for recovery of the property whose succession opened out on the death of Mt. Richhpali. The litigation in 1863 arose when two other widows of the family Mt. Jaddu and Mt. Reshma had died. Several parties applied for mutation of names whereupon a compromise was effected on 9th January 1863. Gaya and his cousin Jaddu who were then minors under the guardianship of a female were given the property which was in the

possession of Mt. Reshma whereas Rambhajan, ancestor of Sukhdeo defendant received the property left by Mt. Jaddu and also a relinquishment from Gaya and Jaddu as to their expectant reversionary rights in the property held by Mt. Richhpali. It is admitted that at the time Rambhajan was the next reversioner to the husband of both the ladies Mt. Reshma and Mt. Jaddu and that Gaya and Jaddu had no right whatsoever to the property of the husband of Mt. Reshma. Under the compromise therefore Gaya obtained the property to which he was not entitled and has enjoyed that property for over 60 years since 1863. Subsequently in 1873 Gaya sued to have the compromise cancelled but that suit was dismissed.

The defence here that the present suit is barred by the provisions of res judicata and by reason of the compromise. It does not appear to me that the present suit would have been triable by a Munsif in 1873. The lower appellate Court argued that the value of the property had increased and the value of the present suit could have been only Rs. 1,000 if the suit had been brought in 1873. It appears to me that the Court is under a misapprehension : Rs. 1,000 was valuation of the suit in which the claim was only with respect to one-fourth of the property while the present suit is of four times that value as the property included therein is four times the property included in the suit of 1873. The defence of res judicata must therefore fail in my opinion.

The other defence is strong and fully supported by case law on the subject. The whole point has been summed up in the case of *Ananda Mohan Roy* v. *Gour Mohan Mallick* (1), after an exhaustive discussion as was usual with the learned Judge who delivered the judgment. The conclusion is summed up in these words at pp. 541 and 542 (of 48 *Cal.*) of the report :

"We must accordingly take it as settled by the decisions of the Judicial Committee that the interest of a Hindu reversioner is an interest expectant on the death of a qualified owner ; it is not a vested interest, it is a spes successionis or a mere chance of succession, it cannot be sold, mortgaged, assigned or relinquished, for a transfer of a spes successionis is a nullity and has no effect in law. But though a transfer of his interest by a reversioner is void, he may, by becoming a party to a compromise and by taking the benefit of the compromise, be estopped from claiming as a reversioner."

(1) A.I.R. 1921 Cal. 501=48 Cal. 535.

One ruling of the Privy Council *Ramhai Lal* v. *Brij Lal* (2) and one of this Court *Khanni Lal* v. *Gobind Krishna Narain* (3), are quoted among others in support of this conclusion. The question here therefore is not one as was in the Privy Council case of *Amrit Narain Singh* v. *Gaya Singh* (4), as to whether an expectant right of a reversioner may be disposed of by agreement but the question is whether the reversioner under the circumstances of the present case, can sue for his right or is debarred from doing so by reason of a family settlement under which he has obtained a certain benefit. As far back as 1919 a Bench of this Court had held in *Chahlu* v. *Parmal* (5), such an agreement to be binding on the reversioner. It is clear to me that the compromise of 1863 estopped Gaya from claiming his reversionary right on the death of Mt. Richhpali and the plaintiff being the son of Gaya and as he derives his title from Gaya is equally barred.

This appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(2) A.I.R. 1918 P.C. 70=40 All. 487=45 I.A. 118 (P.C.).
(3) [1911] 33 All. 356=10 I.C. 477=38 I.A. 67.
(4) A.I.R. 1917 P.C. 95=45 Cal. 590=45 I.A. 35 (P.C.).
(5) [1919] 41 All. 611=51 I.C. 919=17 A.L.J. 822.

* A. I. R. 1930 Allahabad 431

DALAL, J.

Beni Misir—Defendant—Appellant.

v.

Mahabir Sukla and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 93 of 1929, Decided on 21st February 1930, from decree of 2nd Addl. Sub-Judge, Jaunpur, D/- 10th September 1928.

*** a) Transfer of Property Act, S. 59—Possession under registered document — Want of registration of subsequent secret burdens of less than Rs. 100 cannot be justified by such possession.**

If after obtaining possession publicly under a publicly notified document by means of registration, the mortgagee goes on adding secretly to the burden of the mortgage by obtaining further charges each of less than Rs. 100 he will not be allowed to justify his want of registration by his possession which originated on the basis of his public document.

[P 432 C 1]

(b) Evidence Act, S. 115—Advancing loan after notice of previous burden—Estoppel.

Where after receiving notice of a previous burden a person takes a mortgage of a property and advances money, he must be considered to have thought the property worth the further advance subject to the previous burden : 28 *All.* 315, *Ref.* [P 433 C 1]

N. Upadhya and *S. P. Sinha*—for Appellant.

A. Sanyal and *Gadadhar Prasad*—for Respondents.

Judgment.—The defendant-appellant holds a mortgage of 9th October 1906 under which he is in possession and there is a second document in his favour of 10th September 1907 as to the nature of which there is a dispute. The plaintiff holds two mortgages, one a simple mortgage dated 21st May 1915 and the second a mortgage by way of conditional sale dated 24th February 1927. The document of 10th September 1907 is not registered. The plaintiff had formerly sued on a simple mortgage of 21st May 1915 for redemption, when he obtained information of the document of 10th September 1907 in favour of the defendant. He withdrew that suit because it was premature by reason of the usufructuary mortgage of 1906 in favour of the defendant not having come to an end at the time of the institution of the plaintiff's former suit. In the present suit for redemption the only dispute is whether the plaintiff should be compelled to pay off the document of 10th September 1907 in favour of the defendant or not. The lower appellate Court has given two reasons why he should not be so compelled: (1) that the document of 1907 ought to have been registered and it not having been registered did not create any interest in immovable property and (2) that even if the document of 1907 created such interest the plaintiff was entitled to priority on his deed of 1915 because at the time of the execution of that deed it is not proved that the plaintiff had knowledge of the 1907 bond in favour of the defendant.

The lower appellate Court has taken the view that whether the document be a mortgage or a charge it should be registered. As regards the charge he quotes from Gaur's Treatise on the Transfer of Property Act, where the commentator has given his opinion that a charge need not be created by a document but if it is created by a document that document should be registered. In my opinion the document of 10th September 1907 is a document evidencing a mortgage, so the question as to whether a document evidencing a charge should be registered or not need not be enquired into. As usually happens in this Court the directions of the Court as regards translation are not carried out and my practice of reading the vernacular makes the Bar more and more indifferent in carrying out this specific rule of the Court. From what can be gathered as to the terms of this document from the judgments of the two subordinate Courts my opinion is that it is a mortgage. In this case I have not read the vernacular document and I shall maintain that practice in all future appeals not to have a vernacular document read, when in spite of a specific rule of the Court counsel persist in not having documents translated into English for the information of the Court hearing the appeal. In the case of mortgage the appellant's learned counsel argued that the sum secured being less than Rs. 100 the mortgage may be effected either by a registered instrument signed and attested as laid down in the Act or by delivery of property.

In the present case, however, delivery of property was not possible because the defendant was already in possession. This possession is sought to be utilized by the appellant's counsel in a different way and it is urged that when the defendant was already in possession it was tantamount to delivery of the property. Such an argument would be in conflict with the intention of the law. What the law desires is that there should be a public notice of mortgage liens, so that future transferees may be warned. Future transferees would be warned by the possession of a person other than the owner or by discovering a registered document in the registration office. If, however, possession can be traced to a registered document found in the Registrar's office, the subsequent transferee would not be put to the necessity of any further enquiry and would presume that the pessession was in pursuance of the registered document. It cannot be the intention of the law that after obtaining possession publicly under a notified publicly document by means of registration, the mortgagee may go on adding secretly to the burden of the mortgage by obtaining further

charges each of less than Rs. 100 and justifying want of registration by his possession which originated on the basis of a public document. I am of opinion that when the defendant was already in possession subsequent mortgage in his favour can raise an interest in immovable property only if the document is registered.

In that view it is not necessary to enquire into ground 2 put forward by the lower appellate Court against making the plaintiff liable to pay the bond of 1907. If I had to decide that ground, possibly I would not have agreed with the lower appellate Court because after receiving notice of this bond of 1907 the plaintiff advanced money again in 1927 and he must have considered the property worth the further advance after taking into consideration the defendant's bond of 1907. Following the principles laid down in *Amu Mal* v. *Collector of Bareilly* (1), I would have held the plaintiff liable to redeem the bond of 1907 if that bond in my opinion had created interest in the property in suit.

For these reasons the appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1903] 28 All. 315=3 A. L. J. 100=(1906) A. W. N. 17.

A. I. R. 1930 Allahabad 433

DALAL, J.

Nazir Khan and *others*—Defendants—Appellants.

v.

Faiz Mohammad Khan and *another*—Plaintiffs—Respondents.

Second Appeal No. 1156 of 1928, Decided on 6th January 1930, from decree of Sub-Judge, Muzaffarnagar, D/- 13th April 1928.

Landlord and Tenant—Trees—Timber of tree belongs to zamindar even though tenant is ex-proprietary one.

The timber of a tree belongs to the zamindar when the tree is growing on a tenant's land and that it makes no difference if the tenant happens to be an ex-proprietary tenant who himself has planted the tree : 9 *A. L. J.* 672 ; 24 *I. C.* 81, *Rel. on.* [P 433 C 2]

K. C. Mital—for Appellants.

Panna Lal—for Respondents.

Judgment.—The defendants are admittedly ex-proprietary tenants of the land on which the tree grew. The plaintiff zamindar complained that the defendants lopped off branches of the tree and brought the wood to their own use. It was contended in appeal that the lower appellate Court had not considered the defendants' case that it was necessary for them to lop off the branches in order to protect other trees on the same plot of land and the crops of neighbouring fields. This matter has been considered by the lower appellate Court because that Court refused to grant the plaintiff an injunction to prevent the defendants from lopping off branches when necessary. The real question at issue is to whom the wood of these lopped off branches belonged. It is not dry wood which has fallen off by itself. The wood is living wood which is part of the timber of the tree. The lower appellate Court has rightly referred to the ruling of this Court in *Lachman Das* v. *Mohan Singh* (1). There the whole previous law on the subject was referred to and it was held that the timber of a tree belonged to the zamindar when the tree was growing on a tenant's land and that it made no difference if the tenant happened to be an ex-proprietary tenant who himself had planted the tree. This decision was explained by Piggot, J. in *Khan Chand* v. *Mt. Chandun* (2). The observation of the learned Judge was :

"I take it to be established by a number of rulings of this Court, of which the cases of *Lachma Das* v. *Mohan Singh* (1) and of *Ganga Dei* v. *Badam* (3), may be taken as specimens, that the trees planted by tenants on their holdings will be the property of the zamindar and the tenants will have no transferable rights therein. This will be presumed in the absence of evidence to the contrary."

As the timber belonged to the plaintiff and part of the timber was cut off by the defendants they ought to have made over the wood to the plaintiff and not appropriated it themselves. The lower appellate Court was, therefore, fully justified in decreeing in favour of the plaintiff the value of the wood which was misappropriated by the defendants.

I dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1912] 9 A. L. J. 672=14 I. C. 582.
(2) [1914] 24 I. C. 81.
(3) [1908] 30 All. 95=5 A. L. J. 99=(1908) A. W. N. 51.

A. I. R. 1930 Allahabad 434 (1)

SULAIMAN AND BANERJI, JJ.

Khelari and *others*—Defendants—Applicants.

v.

Har Prasad and *others* — Plaintiffs—Opposite Parties.

Civil Revn. No. 317 of 1928, Decided on 7th February 1930, from an order of Dist. Judge, Allahabad, D/- 13th September 1928.

Agra Tenancy Act (3 of 1926), S. 230—Suit for ejectment—Defendants admitted to be joint tenants — Suit does not lie in civil Court.

In a suit for ejectment if the plaintiffs admit that the defendants are joint tenants, they are precluded by S. 230 from going to the civil Court for declaration of their status. Their remedy is to go to the revenue Court under S. 121 : *A. I. R.* 1929 *All.* 571 (*F.B.*), *Rel. on.* [P 434 C 2]

Ambika Prasad, *Anant Prasad*, *Sehat Bahadur Lal* and *A. P. Verma*—for Applicants.

S. D. Sinha—for Opposite Parties.

Sulaiman, J.—This is an application in revision from an order of the lower appellate Court setting aside an order of the first Court returning the plaint for presentation to proper Court. As the question involved is whether the Court had jurisdiction to entertain the appeal, this would be a matter relating to jurisdiction if the Court below has acted illegally or with material irregularity. A civil revision would, therefore, lie.

The suit admittedly relates to a large number of agricultural holdings only. According to the plaint, the plaintiffs attempted to eject the defendants through the revenue Court, alleging that they were subtenants. The revenue Court found that they were not subtenants but were tenants-in-chief, being in possession of undivided property as members of one family, and dismissed the ejectment suits. The plaintiffs now in their plaint repeat their case that the defendants are in possession as subtenants, the plots having been allotted to the plaintiffs under a private arrangement. They go on to allege in the alternative that if the said private arrangement is disputed, they should be granted a decree for partition of these plots. Although the plaint has been carefully drafted so as to make it look as one which ought to be filed in the civil Court, there is no doubt that the plaintiffs' case is that in the first place the defendants are subtenants and in the alternative they are joint tenants with the plaintiffs. The question of subtenancy has been disposed of by the revenue Court. If the plaintiffs admit that the defendants are joint tenants, they cannot come to the civil Court for a declaration of their status. Their remedy is to go to the revenue Court under S. 121, Agra Tenancy Act. S. 230 bars the present suit. The case is similar to *Sahdeo* v. *Budhai* (1) decided by a Full Bench of this Court where it was remarked that the defendants, though they had not claimed to be landholders, certainly claimed to be tenants, and, therefore, must be deemed to be persons claiming through the landholder Such a suit would fall within the scope of S. 121, and, the present plaint cannot be entertained by virtue of S. 230, Tenancy Act.

We accordingly allow this revision, set aside the order of the lower appellate Court and restore that of the Court of first instance.

V.B./R.K. *Revision allowed.*

(1) A. I. R. 1929 All. 571 (F.B.).

A. I. R. 1930 Allahabad 434 (2)

SEN AND NIAMATULLAH, JJ.

Mt. Wahidan— Defendant— Appellant.

v.

Nasir Khan and *another*— Plaintiff and Defendant—Respondents.

Second Appeal No. 1076 of 1927, Decided on 7th February 1930, from decree of Dist. Judge, Agra, D/- 14th April 1927.

(a) Contract Act, S. 2 (d)—Execution of sale deed by mother-in-law in consideration of dower of her daughter-in-law is for consideration.

The execution of a sale deed by a Mahomedan mother-in-law in satisfaction of the contemplated dower of her daughter-in-law is for a valid and legal consideration : 32 *All.* 410, *Rel. on.*; *Tweddle* v. *Atkinson I. B. & S.* 393, *Diss. from.* [P 435 C 2]

(b) Evidence Act, S. 115 — Release on foregoing definite claim against third party —Claim cannot be asserted to detriment of that party.

Where a person obtains a release from a liability upon the understanding of forgoing a definite claim against a third party, that person is estopped from asserting or enforcing the claim to the detriment of the third party. [P 436 C 1]

(c) Evidence Act, S. 115—Estoppel affects substantive rights.

Rule of estoppel although primarily a rule of evidence affects substantive rights. [P 436 C 1]

(d) Practice—Plea—Plea not raised in ground of appeal—It can be allowed if it cuts root of case.

Although a plea may not have been specifically raised in the grounds of appeal in second appeal, High Court can allow the point to be argued if it cut at the root of the case.

[P 436 C 1, 2]

T. A. K. Sherwani—for Appellant.

Akhtar Husain Khan—for Respondents.

Sen, J.—The suit which has given rise to this appeal was originally instituted by Mt. Munni, minor daughter of Nasir Khan through one Mashir Baksh, who claimed to be the guardian and sarparast of the minor. The claim related to a moiety share in a house situate in mohalla Panni Gali in the city of Agra and to mesne profits.

Mt. Munni died on 7th September 1926 and the suit was continued by her father Nasir Khan.

The house in dispute belonged to Mt. Wahidan defendant-appellant and Nawab Khan who is the pro forma respondent is the husband of this lady. They have a son of the name of Farid Khan who is no party to this suit.

On 10th March 1923, Mt. Wahidan in contemplation and consideration of Mt. Munni's marriage with her son Farid Khan sold an undivided moiety of the house to Mt. Munni for Rs. 500. Though no marriage had taken place, the amount of dower appears to have been settled for Rs. 500. A formal deed was executed, which was duly registered.

Mt. Munni was married to Farid Khan on 20th March 1923. This marriage proved a failure. Dissensions began between the married couple. On 2nd July 1926, Mt. Munni brought a suit for possession of her half share in the house. About a month and a half later, a mutual divorce took place between the husband and the wife. Two documents were executed and registered with due formality, one by Mt. Munni and the other by Farid Khan. These documents bear the same date namely 14th August 1926. In the documents executed on behalf of Mt. Munni, it was clearly stipulated that in consideration of the divorce given by the husband, Mt. Munni agrees to forgo her right to dower and maintenance and further agrees to withdraw the suit which she had instituted against Mt. Wahidan for possession of a moiety share of the house. The suit was accordingly withdrawn.

Curiously enough, a second suit was instituted by her on 20th August 1926 in which she claimed partition of this house and also mesne profits.

Mt. Munni was a minor at the date of the suit and she died a minor. She could not be held responsible for the suit but the responsibility lay heavily with her guardian and we cannot avoid the conclusion that important facts have studiously been omitted from the plaint. It would have been fair and honest on the part of the plaintiff to state in the plaint the terms and conditions under which Mt. Munni obtained her divorce.

The suit was directed against Nawab Khan and his wife Mt. Wahidan of whom the latter only contested the suit. She denied that the plaintiff was the owner of the property and contended that the sale deed dated 10th March 1923 was obtained from her fraudulently and was without consideration. There were also other pleas but we are not concerned with any in the present appeal. No issue was framed on the question of title. The first Court decreed the claim on the finding that the sale deed was duly executed by Mt. Wahidan and that it was for consideration. The lower appellate Court has affirmed the decision.

No attempt has been made to challenge the findings of fact arrived at by the lower appellate Court and these findings are not open to any criticism. It has been argued, however, that the execution of the sale deed by the mother in satisfaction of the contemplated dower of her daughter-in-law must in law be held to be without consideration. This contention is opposed to the principle enunciated by the Privy Council in *Khwaja Mohammad Khan* v. *Hussaini Begum* (1). The Privy Council refused to apply the rule of common law laid down in the case of *Tweddle* v. *Atkinson* (2). Their Lordships laid stress upon the fact that :

"In India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents

(1) [1910] 32 All. 410=7 I. C. 237=37 I. A. 152 (P.C.).

(2) [1861] 1 B & S 393=9 W. R. 781=8 Jur. (n.s.) 332=30 L. J. Q. B. 265=9 L. T. 468.

and guardians it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connexion with such contracts."

Under S 2, Cl. (d), Contract Act it is clear that consideration may move either from the promise or any other person. We are, therefore, of opinion that the sale deed dated 10th March 1923 was supported by consideration and passed an absolute title to the vendee.

The crucial question, however, was whether Mt. Munni was the owner of the property at the date of the suit. The defendant-appellant had impugned her title in the clearest terms. No issue has been framed on this point and neither of the Courts below has recorded any finding as to plaintiff's ownership. From the facts that we have stated above it is abundantly clear that it was intended to be one of the articles of divorce between the parties that Mt. Munni must forgo her claim to a moiety share in the house in dispute. That is the identical share which is the subject of the present controversy. On the eve of the divorce proceedings litigation between the parties about this house was pending. Mt. Munni in consideration of procuring a divorce from her husband agreed to withdraw the suit. The suit was withdrawn and divorce obtained. After obtaining her release from the matrimonial bondage Mt. Munni could not be permitted to institute a second suit against the same party upon the same cause of action. Where a person obtains a release from a liability upon the understanding of forgoing a definite claim against a third party, that person is estopped from asserting or enforcing the claim to the detriment of that party. The rule of estoppel although primarily a rule of evidence affects substantive rights. The legal effect of the document dated 14th August 1906 is that Mt. Munni has definitely precluded herself from asserting a title to the house in dispute. The result is that she had no title to claim a partition of the house at the date of the suit. Her father Nasir Khan is bound by this disability.

In this aspect of the case the plaintiff's suit is bound to fail. The plea was not specifically raised in the ground of appeal in this Court but we allowed this point to be argued because it cuts at the root of the plaintiff's claim.

We allow the appeal and set aside the decrees of the Courts below. For the reasons set forth above, we make no order as to costs.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 436

DALAL, J.

Abdul Haq—Plaintiff—Appellant.

v.

Lallu and *others*—Defendants—Respondents.

Second Appeal No. 1594 of 1928, Decided on 19th February 1930, from decision of Dist. Judge, Shahjahanpur, D/- 17th May 1928.

Limitation Act. S. 22—Addition of party not for validating suit but for settling dispute—Original defendants cannot claim limitation from such addition.

Where a party is added to the suit not in order to validate the suit but to settle the dispute finally, the original defendants cannot claim limitation from the date the new party is added to the suit. [P 437 C 1]

A. M. Khwaja—for Appellant.

M. A. Aziz—for Respondents.

Judgment.—The plaintiff-appellant who is a zamindar along with his brother of a certain plot of land in a village sued the defendants-tenants Lallu and Abdul Ghani for recovery of rent. The other brother Abdul Rashid was not made a party either as plaintiff or as defendant. It is obvious from the tenor of the plaint that he desired to sue under the provisions of S. 266 (1), Tenancy Act. What was stated in para. 1 of the plaint was that he was the zamindar making collections in respect of the muafi land situated in a certain village. The obvious interpretation of these words will be that he sued for himself and as agent of his brother. It was argued here by the respondents' learned counsel that the mere statement of being a collecting cosharer did not indicate a claim that he was an agent of his brother. It is not apparent how otherwise except by reason of agency one cosharer can collect rent on behalf of another. A specific issue was raised whether the plaintiff was agent of his brother or not, but that issue was missed through the incapacity of the legal practitioners in the Court of the Assistant Collector. That issue must now be decided. If the plaintiff is held to be the agent of his

brother Abdul Rashid for the purpose of collecting rents then he is entitled to collect the entire amount of rent which may be due from the defendants Lallu and Abdul Ghani.

If he is not such agent, he has made Abdul Rashid a defendant to the suit, and, therefore, he is entitled to receive half the rent under the provisions of S. 266 (3). On this point the lower appellate Court was of opinion that under the provisions of S. 22, Lim. Act, the suit for the recovery of half the rent of 1321 Fasli was time barred because the other brother was not made a party within the period of limitation for the recovery of rent due for that year. The learned Judge has not attached the importance that is due to the words "as regards him" in S. 22. What that S. 22 lays down is :

"Where, after the institution of a suit, a new plaintiff, or defendant, is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party."

The words of importance are "as regards him." If the substitution of a new defendant is made the other defendants cannot claim limitation from the date the new defendant is made a party. This reasoning is supported by a Bombay ruling reported in *Shivubai* v. *Shiddeshwar* (1). It was argued by the contesting defendants' learned counsel here that the plaintiff's suit was not valid until Abdul Rashid was made a party. Abdul Rashid, however, is not made a party to validate the plaintiff's suit but merely to settle disputes between cosharers in case the tenants should plead that payment was made to the other cosharer. It is quite true that if the Courts should consider Abdul Rashid as plaintiff and desire to give relief to Abdul Rashid, in that case, of course, Abdul Rashid's suit as plaintiff for his half share of the rent of 1331 would be time barred. If a Court desires to give relief to the plaintiff in case he is not an agent of his brother on the ground that the brother is now a party (defendant) and is willing that the plaintiff should receive the entire rent, in that case, of course, Abdul Rashid's share of the rent cannot be recovered for the year 1331 Fasli. In that case the limitation must be considered as regards Abdul Rashid and as regards him the suit must be considered to have been instituted for his benefit on the date on which he was made a party.

On these considerations I set aside the decrees of both the subordinate Courts and remand the suit to the trial Court for a trial in accordance with the instructions given here. The first point to be determined is whether Abdul Haq is an agent of Abdul Rashid. If he is proved to the satisfaction of the Court to be such agent he will be entitled to recover the entire amount of rent due from Lallu and Abdul Ghani for both the years 1331 and 1332 Fasli. If he is held not to be such agent, the plaintiff can recover only half the rent which is his share, but that half he can recover for both years 1331 and 1332 Fasli. The amount of the rent due will of course have to be determined by the trial Court.

Costs here and heretofore shall abide the result. The parties may produce further oral and documentary evidence.

V.B./R.K. *Case remanded.*

(1) A. I. R. 1921 Bom. 152=45 Bom. 1009.

A. I. R. 1930 Allahabad 437

SULAIMAN AND KENDALL, JJ.

Banshidhar and *others*—Plaintiffs—Applicants.

v.

B. Suraj Prasad Singh—Defendant—Opposite Party.

Miscellaneous Case No. 779 of 1929, Decided on 9th January 1930.

Allahabad High Court Rules Chap. 21, R. 20—Costs.

Under Chap. 21, R. 20, the party entitled under a decree or an order to pay costs in a suit by another party shall not be entitled to any larger allowance for legal practitioner's fees in the suit, including all proceedings in the execution of the original decree, than the fees provided in R. 22, by reason of the fact that the case has been sent back to the lower Court for trial de novo. [P 438 C 1]

S. S. Shastry—for Applicants.

Shiva Prasad Sinha—for Opposite Party.

Sulaiman, J.—The main point which arises in this application is whether only one set or two sets of costs can be allowed under the rules on account of the legal practitioners' fees. So far as this Court is concerned it is quite clear that the appeal which was originally filed was distinct and set apart from the appeal which was filed from the decree passed on remand. These two being different appeals separate costs must be allowed.

As regards the costs in the Court below the decree was set aside by the High Court and the suit was remanded for trial de novo. But the suit continued to be the same suit. Under Chap. 21, R. 20, the party entitled under a decree or an order to pay costs in a suit by another party shall not be entitled to any larger allowance for legal practitioner's fees in the suit including all proceedings in the execution of the original decree, than the fees provided in R. 22. It seems to us that as the rule stands the parties are entitled to only one set of costs on account of both the hearings in the Court below, viz.: that before and after the remand.

We accordingly direct that the decree be amended on the following lines: The parties are entitled to the fees paid to their respective legal practitioners in the Court below up to the maximum taxable amount allowable, (only one set of costs being taxed for the proceedings before and after the remand) provided the certificates of fees were duly filed in that Court. The costs of both the parties should be calculated in the Court below on this basis.

Both the parties are entitled to separate costs on account of the legal fees for the two appeals pending in this High Court provided certificates were duly filed before those appeals were disposed of. In each case the fees in this High Court are to be calculated on the higher scale. We make no order as to costs of this application.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 438

YOUNG, J.,

Phagoo Murao—Plaintiff—Appellant.

v.

Tulshi Ram Tewari and *another*—Defendants—Respondents.

Second Appeal No. 1498 of 1928, Decided on 10th February 1930, from decree of 2nd Addl. Sub-Judge, Basti, D/- 5th May 1928.

Transfer of Property Act, S. 53—Conveyance of immovable property with intention to defeat creditors—Creditor not avoiding conveyance within reasonable time and allowing transferee by his laches to transfer same for value and bona fide to third person—To such subsequent transfer proviso to S. 53 applies.

Every conveyance of immovable property made with the intent of defeating the claims of creditor is voidable at the instance of any person so defeated. But if such a person does not with reasonable promptitude avoid the transaction and by his laches allows the transferee to convey the same to a third person for value and such third person takes it in good faith and for good consideration, proviso to S. 53 applies and the person whose claim is defeated is estopped in equity from denying such third person's title : 30 *All.* 297, *Dist.* [P 440 C.1]

H. P. Sen—for Appellant.

N. Upadhiya—for Respondents.

Judgment.—This is an interesting case and from one point of view not without difficulty. The plaintiff-appellant brought this suit for a declaration that certain property, which he alleged was his, was not liable to be sold in execution of a decree in another suit No. 489 of 1929.

The facts are that one Parmeshwar Datt mortgaged a certain property to one Tulshi. In 1876 Tulshi sold his mortgagee rights to one Dewa Datt. In 1893 the mortgagor Parmeshwar Datt sold the equity to Gurcharan, and Gurcharan in his turn gave the property, subject to the mortgage, to Nageshar and his brother. The sons of the original mortgagor, one Ram Bharos and Nageshar No. 2, in spite of the fact that their father had already transferred the equity, transferred it again to Kamta and Tulshi. A suit was brought by Nageshar and his brother against Kamta and Tulshi for recovery of the property, and that suit very naturally failed because it was obvious that their transferrers had nothing to transfer. Then Kamta and Tulshi very properly brought a Suit No. 489 of 1920, against their transferrers for return of the purchase-money. This suit was successful. This suit was on 14th August 1920. On the same date the plaintiffs Kamta and Tulshi filed an application for an interlocutory injunction restraining the defendants from transferring any other property that they might have. This application was not dealt with until 19th August 1920 and in the meantime the defendants on 17th August, no doubt having knowledge of the application, had transferred all their other property by way of gift to their brother-in-law, Nankoo. That this transfer was done with the purpose of defeating Kampta and Tulshi claim there can be no doubt. On 26th January 1921 Kampta and Tulshi were successful in their suit and a

decree was passed in their favour. Nothing apparently, however, was done by the successful plaintiffs to execute their decree or to proceed to have the transaction between the defendants in that suit and Nankoo set aside under S. 55, T. P. Act. One year and seven months passed, and eventually on 28th July 1922 Nankoo sold the property which had been given to him by Ram Bharosa to the present plaintiff-appellant, one Phagoo. Up to date the defendants have done nothing whatever to have the transaction between Nankoo and Ram Bharosa set aside or declared to be void under S. 53, T. P. Act, having in fact by their laches allowed Phagoo to buy the property in question and to pay money for it. It is to be noted that if the defendants in this suit had taken proper action with reasonable promptitude, this case would never have been had to be brought and the present plaintiff would never have been placed in the position in which he now is. It was not till 1923 that the present defendants took steps to execute the decree against the property which had been sold to the present plaintiff. That, of course, necessitated the plaintiff bringing the present action. Both the lower Courts have found that the plaintiff had brought the property in dispute bona fide and for value. The trial Court found in favour of the plaintiff, but the lower appellate Court set aside the decree on the ground that the proviso to S. 53, T. P. Act, had no application in this case.

It is clear that the transfer from Ram Bharosa to Nankoo was under S. 53, T. P. Act, a voidable transaction at the option of the defendants in this case. They have, however, never exercised that option. They certainly had not exercised the option at the date of the transfer from Nankoo to the present plaintiff and, therefore, I have difficulty in following the learned Judge of the lower appellate Court. The whole question is : did Nankoo have anything to transfer ? It is clear that he had a perfect title to transfer until the transfer to him had been avoided by the defendants under S. 53. The learned Judge of the Court below, in my opinion, has gone wrong in his law through a misapprehension of the effect of the decision in *Basti Begam* v. *Banarsi Prasad* (1).That authority was dealing with the question of a fictitious mortgage and it is clear from a perusal of the judgment in that case that it is no authority for the present case which has nothing to do with a mortgage but is concerned with conveyance. In fact the distinction between a conveyance and a mortgage in a matter like this is clearly pointed out in the case of *Basti Begam* v. *Banarsi Prasad* (1).

It is contended, however, by the respondent that the Judge found that in fact Ram Bharosa had transferred nothing to Nankoo and that, therefore, Nankoo had nothing to transfer to the present plaintiff. I cannot read any such finding of fact in the judgment of the lower appellate Court. What the Judge says is :

" As the transfer to Nankoo had the effect of defeating the defendants as the donor had left no property with him."

That is, the Judge clearly means, in my opinion, that the defendants were defeated because the donor had, in fact transferred all his property to Nankoo, and if, as the Judge here finds, the defendants had actually transferred the property to Nankoo, it is clear that until that transaction was set aside under S. 53, he could transfer the property to somebody else, and if that some one else took it in good faith and for good consideration, the proviso to S. 53 would apply. When the Judge talks about the fictitious transaction latter on in his judgment where he says :

" the gift to Nankoo was thus voidable at defendants' option and was fictitious,"

it does not follow at all from his reasoning that the transaction was fictitious in the sense that there was never any real transfer of the property to Nankoo. There is nothing whatever to show in this case, as far as one can see, that there was not a real transfer of the property to Nankoo, and in fact the Judge in the trial Court does find that the plaintiff was in possession. The plaintiff is now in possessiou, and if the plaintiff is now in possession. it must be presumed that Nankoo was in possession too with the consent of Ram Bharosa. It, therefore, follows that the plaintiff in this case is the purchaser of something and that the authority of *Basti Begam* v. *Banarsi Prasad* (1), does not apply.

(1) [1908] 30 All. 237=5 A. L. J. 805=(1908) A. W. N. 116.

There is one other consideration to which I wish to draw attention. As I have pointed out above, the defendants, if they had taken reasonable and proper steps to have the transaction between Ram Bharosa and Nankoo set aside or had put in execution their decree with reasonable promptitude, the plaintiff would never have been in the position of being able to buy this property. The defendants by their conduct have allowed the plaintiff to put himself in the position of a bona fide transferee for value of this property. In my view, in equity the doctrine of estoppel arises and the defendants are estopped, therefore, from denying the plaintiff's title to this property. The result is that the appeal is allowed with costs, the decree of the lower appellate Court is set aside and that of the trial Court is restored.

V.B./R.K. *Appeal allowed.*

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* A. I. R. 1930 Allahabad 440

MUKERJI AND BENNET, JJ.

Kali Deen Singh —Appellant

v.

Jagdat Pathak—Respondent.

Letters Patent Appeal No. 29 of 1928, Decided on 9th January 1930.

*** Evidence Act S. 92, Proviso. (2)—Money bond stipulating payment of interest—Simultaneous oral contract that no interest was to be paid but creditor to take usufruct of certain land in lieu of interest—Contracts held inconsistent and oral agreement held inadmissible.**

A bond declared that money was to be repaid with interest at a certain rate. A simultaneous oral contract declared that no interest was to be paid, but the creditor was to be in possession of certain piece of land and was to pay himself the interest out of the usufruct.

Held; that the two contracts were inconsistent with each other and so oral evidence was excluded. [P 440 C 2]

Harnandan Prasad—for Appellant.

Haribans Sahai and *Shiva Prasad Sinha*—for Respondent.

Mukerji, J. — This is an appeal against a judgment of a learned single Judge of this Court who allowed the second appeal by holding that under the provisions of S. 92, Evidence Act, it was not open to the plaintiff to prove by oral evidence a contract which was inconsistent with a written bond of 31st May 1914.

The first point taken before us is that the learned Judge of this Court has upset a finding of fact.

It appears that the respondent Jagdat Pathak brought a suit against the appellant Kali Deen Singh for his ejectment in the revenue Court alleging that Kali Deen was his tenant. The appellant Kali Deen pleaded there that he was holding the land in lieu of interest of a bond which had been executed by Jagdat's brother on 31st May 1914. Kali Deen was referred to the civil Court and accordingly he instituted the suit out of which the present appeal has arisen.

The first Court dismissed the suit, but the lower appellate Court decreed it finding that the contract alleged by the plaintiff had been established.

On second appeal, a learned Judge of this Court came to the conclusion that the plaintiff had alleged that an oral contract took place at the same time as the bond was executed. Then applying S. 92, Evidence Act, he held that the oral evidence to prove the separate oral contract was inadmissible.

In our opinion, the entire matter considered by the learned single Judge was one of law. He had to interpret the plaint and to find out from the four corners of it whether the plaintiff alleged the oral contract to be a subsequent one or to be one contemporaneous with the bond. Having arrived at the conclusion that the two contracts were simultaneous, he applied S. 92.

On the merits, we think that the learned Judge of this Court was right. The bond declared that the money was to be repaid with interest at a certain rate. The oral contract declared that no interest was to be paid but the plaintiff was to be in possession of a certain piece of land and was to pay himself the interest out of the usufruct. Under S. 92, Proviso 2, Evidence Act, the existence of a separate oral agreement may be proved only when it is not inconsistent with the terms of the written document or when the matter involved in the oral agreement is a matter on which the document is silent. In our opinion, the two contracts are inconsistent with each other and, therefore, the learned Judge of this Court was right in holding that oral evidence should be excluded.

In the result, the appeal fails and it is hereby dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 441 (1)

MUKERJI AND BENNET, JJ.

K. B. H. Mohammad Mohiuddin Haidar—Defendant—Appellant.

v.

Doori Singh—Plaintiff—Respondent.

Letters Patent Appeal No. 163 of 1928, Decided on 14th February 1930, from a judgment of Dalal, J., D/- 10th July 1928.

Agra Tenancy Act (2 of 1901), S. 35—"Sharing cultivation" explained.

Assisting one's uncle at an advanced age in looking after his holding would amount to sharing in the cultivation. [P 441 C 2]

Mahmudullah—for Appellant.

Bennet, J.—This is Letters Patent appeal brought by the defendant against the judgment of a learned single Judge of this Court in favour of the plaintiff. The plaintiff brought a suit in the revenue Court under S. 95, Agra Tenancy Act (Act 2 of 1901), for a declaration that he was an occupancy tenant of the defendant zamindar in succession to his uncle Khiali in whose cultivation he shared. The Court of first instance granted a declaration, and as a question of jurisdiction had been decided, the defendant appealed to the Court of the District Judge. The District Judge reversed the decree and came to a finding in the following terms :

"It appears that the plaintiff did return to the village, but it is not proved whether he shared in the cultivation, or whether he was merely lending a helping hand to an elderly relation."

The evidence on the record was that the last occupancy tenant Kheali was an old man of 80 years and it was admitted by a witness for the defendant that over a year before his death, the plaintiff Doori Singh lived with Kheali. The caste of these people was Thakur and Kheali, partly from his caste and partly from his advanced age did not himself cultivate but directed his labourers. The patwari also gave evidence to the effect that he had seen the plaintiff assisting in looking after the crops, although he had not seen the plaintiff doing the manual work of cultivation. It appeares to the learned single Judge of this Court that the finding of the District Junge was indefinite, as he appeared to find that either one of two alternatives existed, and in the opinion of the learned single Judge of this Court, either of these alternatives would amount to the legal definition of sharing in the cultivation. That is, the assisting of his uncle at an advanced age in looking after his holding would amount to sharing in the cultivation. We see no reason to differ from that conclusion and accordingly we dismiss this Letters Patent appeal. No costs are allowed, as the plaintiff-respondent is not represented.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 441 (2)

MUKERJI AND BENNET, JJ.

Baij Nath Prasad—Defendant — Appellant.

v.

Dharam Pal Singh and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 135 of 1928, Decided on 31st January 1930, from a judgment of Dalal, J., D/- 17th July 1928.

Agra Tenancy Act (2 of 1901), Ss. 34—and 156—Person occupying land without consent of proprietor or asserting right in himself acquires right by prescription and is not assessable under Ss. 34 or 156.

Where a person enters into occupation of land without the consent of the proprietor and with an assertion of proprietary rights and 12 years have elapsed, that person acquires ownership by proscription and the former proprietor cannot have rent assessed on that person, either under S. 34 or under S. 156. If, however the period of occupation in the assertion of proprietary rights were less than 12 years, then the zemindar could sue under S. 34, for the determination and recovery of rent. [P 442 C 2]

U. S. Bajpai—for Appellant.

Janaki Prasad—for Respondents.

Bennet, J.—These are two Letters Patent appeals by the defendants against the judgment of a learned single Judge of this Court upholding the order of the lower appellate Court of remand and a decree of the lower appellate Court passed after remand for compensation and rent due from defendant to plaintiff under S. 34, Act 2 of 1901.

The suit is in regard to plot 214 (a) in village Sangror. The plaintiffs, Dharampal Singh and others are zamindars in this village and in the settlement khewat of 1913, the No. 214 (a) is entered as a plot in the area of which the plaintiffs are zamindars. Apart from that entry, the plaintiff has not proved that he exercised any proprietary rights over the plot in question. The plot in ques-

tion along with other plots was originally a grove and belonged to Bhairon Singh and Bisheshar Singh who were zamindars. In 1843 there was an auction sale by which the zamindari rights of Bhairon Singh and Bisheshar Singh were purchased by Ahar Singh who was the predecessor of the present plaintiffs. The next trace that we can find of this grove is that it was in the possession of two persons Arjun Singh and Indar Pal Singh. These persons made a mortgage of their rights in the grove to the defendant Baijnath Prasad before 1905 and made a sale deed to Baijnath Prasad after 1905. Neither of those documents are on the record. In 1905, it is admitted, that there was au ejectment suit brought by the predecessors of the present plaintiffs against Baijnath Prasad, defendant and it is admitted that that ejectment suit failed. There are certified copies on the record of the judgment of the Assistant Collector or the Commssioner in appeal and of the Board of Revenue in second appeal.

The Assistant Collector held that the land was grove and therefore he dismissed the suit for ejectment without coming to a finding on the other ground of defence that the defendants were in possession as proprietors. In first appeal, the Commissioner held that the land was not grove, and had been cultivated for a long time, but that the appellants, plaintiffs, had no locus standi, because they had never been proprietors of the land in suit. The Board of Revenue upheld the Commissioner to this extent that the relation of landlord and tenant did not exist between the parties and that therefore there could be no ejectment in the revenue Court and the application for revision was dismissed. It has been subsequently pointed out that it was not open to the Commissioner to come to a finding on the question of proprietary right. That is no doubt correct, and the finding of the Commissioner therefore on that point does not operate as res judicata between the parties. But the Commissioner was entitled to come to a finding of fact that the land in 1905 was no longer grove but had been for a long time cultivated land. It is also a fact that the written statement of the defendants in 1905 put forward the contention that the defendants were proprietors. In the settlement of 1913, the plaintiff made an attempt to have rent assessed. Although the name of the plaintiff was entered in that settlement as proprietor, that application was refused by the settlement officer on the ground that the defendant was not an occupancy tenant. The settlement officer acted apparently because S. 87, Act 3 of 1901 only empowers him to determine the rent of ex-proprietary and occupancy tenants and not of non-occupancy tenants. The next proceeding by the plaintiff was an application under S. 95, Act 2 of 1901, to have the defendant declared as his tenant. That matter came before this Court in second appeal and it was held that as the relation of landlord and tenant had not previously existed between the parties, the plaintiff could not succeed under S. 95, although he might make an application for fixation of rent under S. 34. In accordance with that order, the plaintiff has now proceeded under S. 34.

We consider, however, that as the land has been held to have been cultivated by the defendant from 1905 continuously up to the date of the present suit in 1924, and as the defendant has never had any relation of landlord and tenant with the plaintiff and as the defendant asserted his proprietary right in the proceeding of 1905, the defendant therefore cannot be assessed to rent under S. 34, Act 2 of 1901. Where a person enters into occupation of land without the consent of the proprietor and with an assertion of proprietary rights and 12 years have elapsed, that person acquires ownership by prescription aud the former proprietor cannot have rent assessed on that person, either nnder S. 34 or under S. 156, Act 2 of 1901. If, however, the period of occupation in the assertion of proprietary rights were less than 12 years, then the zamindar could sue under S. 34, Act 2 of 1901, for the determination and recovery of rent.

Accordingly we allow these two Letters Patent appeals and we restore the decree of the Court of first instance and dismiss the suit of the plaintiffs with costs in all Courts.

V.B./R.K. *Appeals allowed.*

A. I. R. 1930 Allahabad 443

KING, J.

Jai Pratap Narain Singh and *others* —Plaintiffs—Appellants.

v.

Rabi Pratap Narain Singh—Defendant—Respondent.

Stamp Report in First Appeal No. 143 of 1928, Decided on 21st February 1930.

Court-fees Act, Sch. 2, Art. 17 (b)—Suit for partition alleging joint possession — Plaintiff directed to pay difference between ad valorem court-fee and court-fee paid—Suit dismissed for failure to make deficiency —Appeal not challenging finding as to court-fee on court-fee of Rs. 10—Failure to pay deficiency on memorandum of appeal held not fatal.

Plaintiff sued for partition of a certain property alleging that he was jointly in possession of the property with the defendant. The defendant contended that he was out of possession. The Court decided in favour of the defendant and since the plaint was valued at Rs. 10 for court-fee called upon the plaintiff to make good the difference between the court-fee payable ad valorem and court-fee actually paid. The plaintiff did not pay the court fee whereupon the suit was dismissed. The plaintiff preferred an appeal against this decree again paying Rs. 10 on memorandum of appeal under Sch. 2, Art' 17 (b) without challenging the order as to court-fee.

Held: that the omission to include in the memorandum of appeal a ground expressly challenging the finding on the question of court-fee is immaterial and the plaintiff was not liable to make good the alleged deficiency of court-fee until the question of joint possession was not finally settled in appeal.

[P 444 C 1, 2]

Iqbal Ahmad and *Shiris Prasad Sinha* —for Appellants.

U. S. Bajpai—for the Crown.

Judgment.—This is a reference under S. 5, Court-fees Act, 1870.

The plaintiff brought a suit for partition of certain property upon the allegation that he and the defendants were members of a joint Hindu family who were jointly in possession of the property in suit. The plaintiff prayed that his share in the joint family property should be determined and partitioned and that he should be put in separate possession thereof. The suit was valued at Rs. 4,00,000 for the purpose of jurisdiction and he paid a court fee of Rs. 10 under Art. 17 (6), Sch. 2.

The defendants in their written statement traversed the principal allegations of the plaintiff, denying that the parties were members of a joint Hindu family and denying that the plaintiff was in joint possession of the property in suit. One of the pleas raised by the defendants was that the court-fee paid by the plaintiff was insufficient because he was not in joint possession of the property in suit, and that as the suit was in fact a suit to establish the plaintiff's title to a share in the property, and to recover pessession of the same, he was liable to pay an ad valorem court-fee calculated on the value of his share.

The trial Court held that the plaintiff was out of possession and that as he claimed possession and partition he must pay a court-fee calculated on the value of the share claimed by him. The trial Court also decided the other important issues in the defendant's favour and dismissed the suit.

The plaintiff has come up to this Court in first appeal and has stamped his memorandum of appeal, as he did his plaint with a court-fee stamp of Rs. 10 under Sch. 2, Art, 17 (6). The Taxing Officer was iuclined to hold that the appellant must pay Rs. 3,830 to make good the deficiency in conrt-fees in both Courts but has referred the question for my decision. It is conceded that if the plaintiff is found to be in joint possession of the property in suit then his plaint and his memorandum of appeal have been sufficiently stamped. If, on the other hand, the finding of the trial Court, to the effect that the plaintiff is not in joint possession of the property, is upheld by this Court, then he is liable to pay upon his plaint and memorandum of appeal a court-fee calculated on the value of his share in the property in suit.

It is contended by the learned counsel for the appellant that liability to pay the court-fee depends in the first instance upon the allegations made in the plaint and the relief sought, apart altogether from the evidence. I think this contention must be accepted in view of the ruling in *Waliullah* v. *Durga Prasad* (1). The plaintiff asserted in para. 23 of the plaint that since the management of the Court of Wards terminated on 20th October 1914, plaintiff 1 and defendant 1 have been managing the property jointly and taking money for their expenses out of the profits of the said property. Iu my opinion this is a clear assertion that the plaintiff is

(1) [1906] 28 All. 340=3 A. L. J. 181=(1906) A. W. N. 38.

in joint proprietary possession of the property in suit. The trial Court has also understood that the plaintiff did claim to be in joint possession and has come to a distinct finding upon issue 2 that the plaintiff was out of possession and as he prays for possession of his share he must pay a court-fee calculated on the value of his share. So far as the allegations made in the plaint, and the relief claimed, are concerned. I am satisfied that the proper court-fee was Rs. 10 under Sch. 2, Art. 17 (6).

It has also been urged for the appellant that in his memorandum of appeal he challenges the whole decree dismissing his suit and in ground 8 of appeal he has expressly challenged the finding of the trial Court with reference to his joint possession of the property. His argument is that as the finding regarding joint possession is challenged in this Court he is not liable to pay an ad valorem court-fee unless and until the finding of the trial Court on this point is upheld. He further claims that he is not liable to pay an ad valorem court-fee until his appeal has been decided.

The learned Government Advocate contends that although the appellant's memorandum of appeal contains no less than 19 grounds there is no ground which expressly challenges the trial Court's finding on the question of court-fee and the appellant must therefore submit to that finding, and must pay the deficiency in court-fee on his plaint and memorandum of appeal before his appeal is admitted.

In my opinion the omission to include in the memorandum of appeal a ground expressly challenging the finding on the question of court-fee is immaterial. The appeal is against the decree, not against the judgment, and the decree does not contain any direction ordering the plaintiff to make good the alleged deficiency in court-fee. The decree merely dismisses the plaintiff's suit with costs. I think the appellant is entitled to contest the finding regarding the court-fee, which depends upon the finding regarding possession.

The learned counsel for the appellant relies strongly upon the decision of a Division Bench of this Court in *Bachnu* v. *Ghulam Ali* (2). The facts of the case are on all fours with the case before me. The plaintiff in that case sued for the partition of a house alleging that he was in possession over a part of it and paid Rs. 10 as the court-fee for partition. The defendants contended, inter alia, that the plaintiff was out of possession. The Court of first instance decided all the issues and held that the plaintiff was out of possession and called upon him to make good the deficiency by paying the difference between the court-fee payable ad valorem and the court-fee actually paid. The plaintiff did not pay the deficiency and the suit was dismissed. He went in appeal to the District Judge. One of his contentions was that the finding of the first Court, that he was out of possession, was wrong. The District Judge, without looking into the question of possession, called upon the plaintiff-appellant to make good the alleged deficiency. This was not paid and the appeal was dismissed. The decision of the Bench of this Court was that the learned District Judge was not justified in not trying the issue as to the plaintiff's possession before calling upon the plaintiff to pay ths additional court fee.

In my opinion it is impossible to distinguish the two cases. The facts are practically identical.

Following the decision cited above, I hold that the plaintiff-appellant is not liable to make good the alleged deficiency of court-fees, either in the Court below or in this Court. until the question of the plaintiff's joint possession has been determined by this Court. As the appellant has not been completely successful I fix the costs against Government at Rs. 32.

V.B./R.K. *Reference answered.*

(2) All. Second Appeal No. 896 of 1924 decided on 19th January 1927.

A. I. R. 1930 Allahabad 444

MUKERJI AND BENNET, JJ.

Ram Sarup Ahir—Plaintiff—Appellant.

v.

Nageshwar Tewari and *others*—Defendants—Respondents.

Letters Patent Appeal No. 117 of 1928, Decided on 17th January 1930.

Transfer of Property Act, S. 62—Period for foreclosure and redemption are same unless contrary is agreed.

Unless the terms of the mortgage deed clearly state the contrary, the period for re-

demption and the period for foreclosure are to be considered the same: *A. I. R.* 1914 *P. C.* 36 *Rel. on.* 25 *I. C.* 93, *Dist.* [P 445 C 1]

S. N. Verma—for Appellant.

Bennet, J.—This is an appeal by the plaintiff against the judgment of a learned single Judge of this Court dismissing the suit of the plaintiff for redemption on the ground that the suit is premature. There were four usufructuary mortgages of four separate plots of fixed rate tenancy made by the plaintiff's predecessor in favour of the defendant, all the mortgage deeds being executed in the year 1904. The deeds all contained the clause which was as follows:

"*Bebilwafa miadi 45 sal pass mahajan mazkur ke karke iqrar Karta hun . . . . . jam miad par hul rupea asl mundarja wasiqa haza yakmusht ada karen tab arazi marhuna takkerahu kara lewen wa agar miad muaiyanb par kul rupea yakmusht ada na karen tab araza marhunp bad 45 sal ke be kamil hojawe.*"

The suit for redemption was brought in the year 1924. The learned counsel for the appellant argues that in general, under any mortgage by conditional sale, S. 58 (c). T. P. Act, gives a right to redeem at any period prior to the certain date on which the sale shall become absolute. He endeavours to support this theory by reference to *Mahomed Muzaffer Ali* v. *Ashref Ali* (1), We do not consider that the ruling is any authority for such a proposition.

We consider that unless the terms of the mortgage deed clearly state the contrary, the period for redemption and the period for foreclosure are to be considered the same. S. 62 lays down that at any time after the principal money has become payable, the mortgagee has a right to redeem. We consider that in the present mortgage deeds the mortgagor does not acquire the right to redeem until the period of 45 years has expired from the execution of the deeds. We would refer for this view of the law to a ruling of the Privy Council in *Bakhtwar Begam* v. *Husaini Khanam* (2).

Accordingly we find the suit of the plaintiff to be premature and we dismiss this Letters Patent appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1914] 25 I. C. 93.
(2) A. I. R. 1914 P. C. 36=36 All. 195=41 I. A. 84, (P. C.).

A. I. R. 1930 Allahabad 445

SULAIMAN AND KENDALL, JJ.

Rahim Baksh and *another*—Plaintiffs—Appellants

v.

Mt. Bachauna and *others*—Defendants—Respondents.

Second Appeal No. 2081 of 1927, Decided on 14th December 1929.

(a) Mahomedan Law—Pre-emption — Demand when is not combined explained.

Where there has been an interval of time between the first and the second demand and the first demand is neither made on the premises, nor in the prsence of the vendors or the vendees the demand cannot be considered as combined. [P 446 C 1]

(b) Mahomedan Law— Pre-emption — Absence of reference to first demand is fatal.

Under Mahomedan Law absence of reference in the second demand to the first demand is fatal ; *A. I. R.* 1923 *All.* 251, *Ref.* [P 446 C 1]

Haribans Sahai and *S. Majid Ali* — for Appellant.

M. Waliullah—for Respondents.

Sulaiman, J.—This a plaintiffs' appeal arising out of a suit for pre emption of a house situated in mohalla Shaikhpur in the city of Gorakpur. The plaintiffs are Mahomedans. The half shares of the same house were sold under two separate deeds by two separate vendors, one of whom was a Hindu and the other a Mahomedan. The plaintiffs alleged that there was a custom prevailing in this 'mohalla' under which there was a right of pre-emption. They further alleged that they had made the necessary demands under the Mahomedan Law and were entitled to pre-empt the house. It was obvious that their claim under the Mahomedan Law could not be entertained as regards the sale by the Hindu vendor.

Both the Courts below have dismissed both of the suits. The lower appellate Court has distinctly found that no custom of pre-emption has been proved, and has also found that the demands under Mahomedan Law were defective, inasmuch as at the time of making the second demand there was no reference to the first demand.

We agree with the Court below that the evidence to prove the alleged custom is wholly insufficient. The plaintiffs rely principally on a judgment in a second apeal of 1882, in which the only point urged in the High Court was whetther a custom of pre-emption was or was not invalid in law. The High Court never

considered the sufficiency or otherwise of the evidence. Reliance is also placed on a decree of 1887, which is a compromise decree. The judgment is not produced, and its value cannot be great. As against this, there are three recent judgments pronounced by the Gorakhpur Courts, in which it was distinctly held that the custom had not been established. The plaintiffs have failed to prove that within the last 40 years a right of pre-emption has been exercised, although, in view of the fact that 'mohalla' Shaikpur is in a big town like Gorakhpur, a large number of sales of houses must have taken place during this interval.

The learned counsel for the respondents wanted to produce a certified copy of a judgment of this Court delivered in 1927, in which all the documentary evidence was reviewed and it was held that the custom was not proved to prevail in this 'mohalla.' We do not think that we should admit the fresh evidence at this stage, though we might, if we like, refer to it as a ruling explaining the judgment of 1882. Having considered the whole evidence, we have come to the conclusion that the custom has not been established.

As there was an interval of time between the performance of the first and the second demands and the first demand was neither made on the premises nor in the presence of the vendors or the vendees, we cannot possibly hold that there was a combined demand. The finding of the Court below that there was no reference in the second demand to the first demand is fatal. We may only refer to the case of *Sadiq Ali* v. *Abdul Bagi Khan* (1).

The result is that the appeal fails and is dismissed with costs, including fees in this Court on the higher scale.

V.B./R.K. *Appeal dismissed.*

(1) A. I. R. 1923 All. 251=45 All. 290

A. I. R. 1930 Allahabad 446

SULAIMAN AND KENDALL, JJ.

B. Dallu Singh and *another*—Defendants—Appellants.

v.

B. Chhakan Singh and *another* — Plaintiff and Defendant—Respondents.

Second Appeal No. 1792 of 1927, Decided on 13th January 1930.

(a) Agra Pre-emption Act (1922), S. 5 —Right of pre-emption recorded in wajibularz—Presumption exists regarding right of pre-emption.

The existence of an entry in the wajibularz as to the existence of a right of pre-emption raises the presumption under S. 5 that a right of pre-emption exists and that right is to be exercised in accordance with the provisions of Ss. 11 and 12 of the Act. [P 447 C 2]

(b) Agra Pre-emption Act (1922), S. 4 (1) —Proprietor as defined in S. 4 includes both a superior and inferior proprietor—S. 11 applies to transfer by such proprietor and S. 12 gives right to pre-empt.

There is no reason to suppose that the word "proprietor" in S. 4 is not used in that general sense so as to include both a superior and an inferior proprietor. It, therefore, follows that even if an inferior proprietary interest in land has been transferred, S. 11 would be applicable and therefore, person in S. 12 would have a right to pre-empt. [P 448 C 2]

(c) Agra Pre-emption Act, S. 4 — Manzooridar is inferior proprietor.

A manzooridar is an inferior proprietor and a cosharer is defined as a person other than a petty proprietor entitled as proprietor to any share or part in a mahal or a village. [P 448 C 2]

K. N. Katju and *Akhtar Husain Khan* —for Appellants.

N. Upadhya and *Gadadhar Prasad*—for Respondents.

Sulaiman, J.—Second Appeals Nos. 1792, 1793, 1794 and 1795 are defendants' appeals and are connected with each other. On 3rd April 1925, a sale deed of five annas four pies share in two mahals of mauza Lohradih was executed by Jagpat Singh in favour of Dallu Singh was Rs. 1,000. On the same date a perpetual lease was executed by the same person in favour of Sukhdeo Singh, who was a nephew of the vendee. This lease related to *sir* lands and was in lieu of a premium of Rs. 3,000 fixing an annual rent of Rs. 90. By a subsequent compromise, dated 14th October 1925, in a suit brought by the transferrer to set aside these two transfers it was ultimately agreed to return the share in one mahal to the transferrer, the transferee retaining the share in mahal Katwaru only. It is this share which is in dispute in these appeals.

The present plaintiffs instituted a suit (out of which S. A. No. 1792 arises) to pre-empt both the sale and the perpetual lease of the shares in mahal Katwaru, alleging that the two were part and parcel of one transaction and constituted a single transaction of sale. They also alleged that the subsequent com-

promise was a fraudulent device and was a mere paper transaction.

In order to meet the claim the defendants obtained a deed of gift of a share in mahal Katwaru from one Baij Nath on 19th April 1926, while the pre-emption suit was pending, and the claim was resisted on the strength of this deed of gift. Second appeal No. 1793 arises out of this suit to avoid the deed of gift.

The plaintiffs also instituted a suit to pre-empt the transfer under this deed of gift, alleging that, though ostensibly a gift, it was in reality a sale transaction. Second appeal No. 1795 arises out of this second suit for per-emption.

Subsequently, there was another sale deed, dated 18th September, 1926, under which another share was transferred to the vendees for Rs. 800 in mahal Katwaru. A suit for pre-emption was instituted by the present plaintiffs to claim this share also. Second appeal No. 1794 arises out of this third suit for pre-emption.

The lower appellate Court has found as a fact that the gift of 19th April 1926, was in reality a sale transaction, and being a transfer of joint family property without legal necessity, was not binding on the minor. It has accordingly set aside that sale. It has further found that the sale and the lease of 3rd April 1925, were part and parcel of one single transaction in favour of the same joint family, the total consideration being Rs. 4,000. It has then, assuming that the compromise of 14th October 1925, was a good one, held that the vendees who have actually parted with Rs. 4,000 and retained only the share in mahal Katwaru, are entitled to recover that amount from the plaintiffs.

It seems to us that the finding that the gift was voidable at the instance of the son of Baij Nath cannot be disturbed in second appeal. The gift having been set aside, the plea based on it must also lose its force. It is not also possible to interfere with the finding that the two transactions of the same date in favour of the same family made by the same person were not part and parcel of one and the same transaction, two documents instead of one having been used to handicap the pre-emptor. We must accept the finding that the real intention of the parties was to sell the share in mahal Katwaru to the defendants.

The only point urged on behalf of the plaintiffs which remains for consideration is whether a right of pre-emption exists in the case of the present vendee appellants.

Mauza Lohradih was originally a part of the family domain of His Highness the Maharaja of Benares. In 1911 it came under the direct administration of the Governor of the United Provinces. The Maharaja of Benares is now recognized as the zamindar of this village and is recorded as the superior proprietor malike ala in the khewat. The plaintiffs and the vendor were recorded as manzooridars and classed as inferior proprietors (malike adna).

In the wajibularz of 1247 Fasli prepared for this village there is an entry in para. 6, which records a right of pre-emption. It is immaterial to consider to what extent that right was limited or confined. The existence of such a Record-of-Rights raises the presumption under S. 5, Agra Pre-emption Act, that a right of pre-emption exists, and that right is to be exercised in accordance with the provisions of Ss. 11 and 12 of the Act.

If the interest transferred is a "proprietary" interest within the meaning of S. 11, and the plaintiffs are co-sharers within the meaning of S. 12, as defined in S. 4, sub-Cl. (1), the right to sue undoubtedly exists. The learned advocate for the appellants has argued that these sections have no application to a mere under-proprietor like the plaintiffs and the vendor.

Shortly before the wajibularz in question was prepared, Regulation No. 7 of 1828 was in force which defined the authority of the Raja of Benares within his territories. Para. 5 of that Regulation clearly shows that in making assessment of the land and the settlement of the villages, a selection had to be made of parties to engage who were designated as "raees" and the tenures belonging to them were to be considered heritable and tranferable, subject to the conditions in regard to the payment of the jama assessed upon them. In the absence of such "raees," the settlement might be made for a fixed period with farmers, unless the Raja should prefer making a ryotwari settlement, collect-

ing the dues directly from the ryots. The word "manzooridar" was presumably used because these persons were selected for purposes of the engagement for the payment of revenue. They were not mere tenants or ryots but possessed heritable and transferable rights in the lands. Payment of the revenue was also enjoined upon them.

Under the Pargana of Kaswar Raj Act (Act No. 1 of 1911 and Act 6 of 1915), the status of the Maharaja was altered, and although he became an independant Chief in his own territory, he was given the status of a zamindar or superior proprietor as regards the lands under the direct administration of the Governor of these provinces. In S. 4 of the latter Act an under-proprietor is defined as being a person possessing as against the proprietor a heritable and transferable right in land. An earlier Act, Act 3 of 1904 (Benares Family Domains Act), S. 2, sub-Cl. (2), also provided that an inferior proprietor would include a manzooridar at least for the purposes of that Act.

The learned Munsif, who wrote out an excellent judgment, has correctly stated the position of manzooridar in the following words:

"He is an under-proprietor. He is recorded in the khewat. He holds *sir*. Tenants under him have fixed rate tenancy and occupancy rights. The superior proprietor has nothing to do with the village except to receive a certain percentage of profits from the manzooridars. It is the manzooridar who lets out land and who brings suits against the tenants. The manzooridar is not recorded in the village papers as a tenant. He exercises all the proprietary rights except that he does not pay land-revenue to the Government."

There can be no doubt that the manzooridars possess a proprietary interest in the lands held by them. They are under-proprietors or inferior proprietors.

The main question for consideration before us is whether such an inferior proprietor is a proprietor within the meaning of that word as used in S. 4, sub-Cl. (1). There a cosharer is defined as a person other than a petty proprietor entitled as proprietor to any share or part in a mahal or village. Although inferior propietary interests are not common in the Agra province, they do exist in some parts. S. 76, Land Revenue Act, contemplates the existence of such inferior proprietary right and provides how a subsettlment can be made with them. Obviously, therefore, a proprietor may either be a superior or an inferior proprietor. There is no reason to suppose that the word "proprietor" in S. 4, Pre-emption Act is not used in that general sense so as to include both a superior proprietor and an inferior proprietor. It, therefore, follows that even if an inferior proprietary interest in land has been transferred, S. 11 would be applicable, and therefore, persons in S. 12 would have the right to pre-empt.

In the present case the plaintiffs are inferior proprietors in village Lohradih and come within Cl. (5). The vendees are perfect strangers to the village. The right of pre-emption, therefore, undoubtedly exists.

The plaintiffs have filed a cross-objection urging that they should be called upon to pay only a proportionate amount of the consideration, as a share in one mahal has been returned to the vendor. The Courts below, however, seem to have found that the original sale-deed was not a complete transfer and that the suit brought to set it aside on the ground of misrepresentation and fraud was not a collusive one, and the compromise in that suit was entered into in good faith by the parties to the transaction. This happened before the present suits for pre-emption were instituted. The ultimate result was that the vendees retained the share in mahal Katwaru only and had parted with Rs. 4,000. Having regard to these circumstances, the courts below have come to the conclusion that the real ond effective transaction, which should be pre-empted, is the transfer of this five anna four pies share in mahal Katwaru for a sum of Rs. 4,000.

Having regard to the peculiar circumstances of the case, and the findings which have been arrived at by the Courts below, we do not think that we can interfere.

The result, therefore, is that all these appeals and the cross-objection are dismissed with costs including in this Court-fees on the higher scale.

J.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 449

DALAL, J.

S. F. Rich—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 46 of 1930, Decided on 2nd April 1930, against order of Sess. Judge, Meerut, D/- 6th January 1930.

(a) Criminal P. C., 'Ss. 179 and 181 (2)—Provisions of Chap. 15-A are not independent of each other and S. 179 applies to cases of breach of trust and cheating.

The provisions under Chap. 15-A are not separately independent of one another so that if one provision applied, the other would not so apply; and consequently merely because there are certain provisions with regard to place of inquiry, in a case of criminal breach of trust under S. 181 (2) it does not follow that S. 179 would not apply to that enquiry. S. 179 does cover that offence as also cheating under S. 408, Penal Code: 19 *All.* 111, *Rel. on.*; 32 *All.* 397; 35 *All.* 29; *A. I. R.* 1924 *All.* 77, *Ref.*; 34 *All.* 487, *Dist.* [P 449 C 2]

(b) Penal Code, S. 408—"Cheque" is property.

Cheque is property within the meaning of S. 408. [P 450 C 2]

Kumuda Prasad and *Benod Behari Lal*—for Applicant.

M. Waliullah—for the Crown.

Saila Nath Mukerji—for Opposite Party.

Judgment.—One Mr. Rashid Ahmad filed a complaint in the Court of a Magistrate of the district of Meerut against Mr. Rich, Manager of the French Motor Car Company, Delhi, for an offence under S. 408, Penal Code. On behalf of the defendant the question of jurisdiction was raised and both the Magistrate and the Sessions Judge have decided it in favour of the complainant. What was complained of was this. The complainant had negotiations with the defendant for the purchase of a lorry of which the body was afterwards made at Meerut. The entire lorry with the body was delivered to the complainant at Meerut when he made over to the driver of the lorry for Mr. Rich a cheque for a sum to cover the price of chassis and insurance not only for the chassis but for the body as well. When the lorry happened to be burnt it was discovered that the body costing Rs. 500 had not been insured by the defendant who was alleged on these allegations to have committed a breach of trust with respect to the money which he received through his driver at Meerut by a cheque. The cheque was drawn on the Dehra Dun branch of the Imperial Bank and was cashed at Delhi.

The learned Judge has held that the Meerut Court had jurisdiction both under S. 179 and S. 181 (2), Criminal P. C. S. 179 runs as follows:

"When a person is accused of a commission of any offence by reason of anything which has been done and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued."

The learned Judge has argued that the thing was done in Delhi by Mr. Rich in omitting to insure the body of the lorry, though, according to the allegation of the complainant, he had received money for such insurance also. The doing of the thing brought into play the jurisdiction of the Delhi Court, but the consequence which was the loss by the omission of insurance to the complainant was suffered by the complainant in Meerut, and, therefore, the jurisdiction of the Meerut Court did arise. To meet this contention the applicant Mr. Rich's learned counsel quoted the ruling in the case of *Girdhar Das* v. *Emperor* (1), by a single Judge of this Court. Personally I am not clear whether the learned Judge desired to rule that the provisions of S. 179 would not apply to a case of criminal breach of trust because there were certain other provisions under S. 181(2) which would apply to criminal breach of trust. I do not remember it to have been held in any case that the provisions under Chap. 15, are all separately independent of one another, and if one of the provisions apply another would not. It is apparent that if such was the desire of the learned Judge to make a pronouncement, he has made that pronouncement in conflict with a continuous opinion of this Court ever since 1896. The first case to which my attention has been drawn is that of *Queen-Empress* v. *O'Brien* (2). An employee of a company, the office of which was at Cawnpore, was charged with the offence punishable under S. 408, I. P. C. The complainant alleged that *B* being in charge on behalf of the company, at a place in Bengal, of certain goods belonging to the company and being ordered to

(1) A.I.R. 1924 All. 77.
(2) [1896] 19 All. 111=(1896) A.W.N. 191.

return the same goods to Cawnpore, never did so, and failed to account for the goods or their value, to the loss of the company. On this allegation the learned Chief Justice held that the Court at Cawnpore had jurisdiction to inquire into the charge, because the consequence of *B s* acts, namely, the loss to the company, occurred in Cawnpore. Reference is given in the judgment to the provisions of S. 179, Criminal P. C.

The next is that of 1910 : *Emperor* v. *Mahadeo* (3). The case of *O'Brien* was followed by a learned Judge of this Court. These two cases were followed by another learned Judge in *Langridge* v. *Atkins* (4). Another ruling of 1912 quoted by the learned counsel for the applicant is distinguishable: *Ganeshi Lal* v. *Nand Kishore* (5). In this case the complainant firm had a branch shop at Gauriganj and the criminal breach of trust was committed at Gauriganj. For this reason a learned Judge held that the direct consequence happened in Gauriganj where the complainant firm had a shop, and the subsequent consequence of a loss at Cawnpore should not be taken into account to give the Cawnpore Courts jurisdiction. In this case the learned Judge specifically relied on the provisions of S. 179, Criminal P. C., but he did not think that in that particular case the direct consequence of loss ensued at Cawnpore. He was of opinion that the consequence ensued at Gauriganj where the complainant had a shop and a subsequent consequence of loss to the main firm would not give jurisdiction to the Courts where the main firm was situated. So far without any reference to the provisions of S. 181 (2) I hold that the Meerut Court had jurisdiction in accordance with the provisions of S. 179, Criminal P. C. Coming to S. 181, the learned Judge was correct in pointing out that jurisdiction must follow the complaint and not the final decision.

In the present case the allegation is that part of the property which is the subject of the offence was received in Meerut. It was argued that the cheque was not payable in Meerut ; nor was it cashed at Meerut. The cheque, however, was property as understood in S. 408. According to the definition, moveable property is intended to include corporeal property of every description (S. 22, I. P. C). Under both sections, therefore, the criminal Courts at Meerut had jurisdiction to take cognizance of an offence under S. 408. The complaint is filed under that section. It is not very clear from what point of time a charge of cheating was started. As to cheating also the provisions of S. 179 would cover the offence and give the Court at Meerut jurisdiction.

I dismiss this application, The stay order shall be discharged.

V.B./R.K. *Application dismissed.*

(3) [1910] 32 All. 397=6 I.C. 563=7 A.L.J. 319.

(4) [1913] 35 All. 29=17 I.C. 792=10 A.L.J. 431.

(5) [1912] 34 All. 487=15 I.C. 319=10 A.L.J. 45.

A. I. R. 1930 Allahabad 450

BOYS AND YOUNG, JJ.

Ramnath—Appellant.

v.

Emperor

Criminal Appeal No. 273 of 1929, Decided on 11th June 1929, against order of Addl. Sess. Judge, Allahabad, D/- 15th February 1929.

Criminal P. C., S. 465—Demeanour of accused raising suspicion as to sanity and capability to make defence — Court must come to definite finding on point—Absence vitiates conviction and sentence.

Where there is something in the demeanour of the accused which would raise or raised doubt in the minds of Judge, jury or assessors or both, the Court cannot proceed with the trial unless the Court comes to a decision and is satisfied that the accused is not of unsound mind and consequently not incapable of making his defence under S. 465. The absence of any proper trial and finding as to the question of accused's capacity to make his defence vitiates conviction and sentence.

[P 451 C 2; P 452 C 1]

M. Waliullah—for the Crown.

Boys, J.—Ramnath, the appellant, was put on his trial on a charge under S. 302, I. P. C., of having murdered his wife on 26th August 1928. We have read the judgment of the learned Additional Sessions Judge and the material evidence and, as the learned Additional Sessions Judge says in his judgment, the facts are not in dispute. We need not therefore recapitulate them further than is necessary for the purposes of the present judgment. On 28th July 1928, Ramnath made a confession which was recorded under S. 164, Criminal P. C.

It is only necessary to read that statement to appreciate that Ramnath was at that time either wandering in his mind or shamming. The committing Magistrate, however, who heard the witnesses and who again had of course to take the statement of Ramnath, recording it under S. 364, expressed in his commitment order the view that whether or no Ramnath was at the time of committing the offence of unsound mind, he was at the time of the inquiry before the committing Magistrate capable of making his defence. He found as follows :

"From the statement of this very witness (Bachchoo) it appears that thare is a history of accused having gone mad at one time some two years ago. He is, however, quite fit to make his defence, gave quite rational replies to all questions put to him by the Court at the inquiry."

The case apparently came before the Additional Sessions Judge and the assessors for the first time on 13th October 1928. The learned Additional Sessions Judge on that date took the statement of Dr. Gade, an Assistant Civil Surgeon, who furnished a certificate (Ex. K) to the effect that in his opinion the accused was not insane. Dr. Gade further stated on oath that he had had the accused under observation for three days from 10th October to 12th October, that Ramnath answered questions rationally, looked sane and slept well and showed no signs of insanity. He stated that he thought that Ramnath could understand the nature of the proceedings and that if the three days' observation had indicated any suggestion of insanity he would have kept the man under observation longer. Ramnath was also examined by the Court and he made a statement which again clearly indicated that his mind was wandering or that he was pretending. All three assessors thought, on hearing the doctor's statement and the evidence of an uncle of the accused and what the accused had to say, that the latter was "sanki," which the learned Judge says was stated to mean "a state of mind when a man ceases to act like a responsible agent." We think that both the Judges and the assessors were right, on the materials at any rate that they then had before them, in not being satisfied that the accused was capable of defending himself. The learned Judge said that he thought that it was desirable that Ramnath should be kept under observation in a hospital for at least three weeks before he could be certified to be in a fit state of mind to stand his trial. The case was adjourned until 12th January 1929, but owing to the absence of two out of the three assessors had to be adjourned again to 6th February. The order-sheet shows that in the interval an Assistant Civil Surgeon had certified that he could find no reason for holding the accused to be insane. This is disclosed further by a certificate of the doctor of 30th November 1928. It was upon receipt of this certificate by the learned Judge that on 12th December he fixed a date for the trial.

So far there is, in our view, no fault to be found with the proceedings. S. 465 requires that the question of whether the accused is of unsound mind and consequently incapable of making his defence should be tried by the Court with the aid of assessors, and should be deemed to be part of his trial before the Court. We are satisfied that the learned Judge was himself of opinion, on seeing the second certificate by an Assistant Civil Surgeon given after observation for a considerable period, that the accused was not then of unsound mind and was capable of making his defence ; but we are unable to find any trace of any proceeding by which the Judge put to the assessors, or in any other way with their aid tried, the question of the accused's capacity to make his defence, and came to any decision with the aid of the assessors on that point. We conclude that the Judge was personally himself satisfied for otherwise we could not understand how he could have proceeded with the trial. But we find in his judgment in the case the following phrase :

"From his appearance in Court also one got the impression that he was an insane person, but whose insanity normally ran in a subdued course making it easy for people to believe that there was nothing seriously wrong with him."

This would suggest that actually in Court there was something in the demeanour of the accused which raised doubts in the Judge's mind.

The absence of any proper trial and finding as to the question of the accused's capacity to make his defence might well have resulted in our having

to set aside the conviction and sentence and direct a retrial of the accused at Sessions. But in this particular case, for the reasons which we shall now give, we are satisfied that this is not necessary.

The evidence, in our view, indubitably establishes that the accused was entitled to the benefit of S. 84, I. P. C. It is unnecessary to recapitulate the facts which are all set out in the judgment of the learned Judge. He himself appears to have wavered in regard to the question of the state of mind of the accused at the time he committed the act. After quoting S. 84 he says :

"I have set out all the facts of his mental history from which it may be inferred whether the accused was not in possession of his sense of responsibility in spite of his insanity at the time when he committed the murder. I find it difficult to answer that question and from the case law it appears that unless one can answer that question in the affirmative there should be a conviction for the offence."

All the assessors were of the opinion that the accused was not guilty. The learned Additional Sessions Judge's doubts may, we think, fairly be expressed as follows :

"I am satisfied that the accused was of unsound mind at the time he committed the act, I am not satisfied that he was by reason of that unsoundness of mind incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.'.

In other words, he was satisfied that the accused was "medically" insane and insane in the ordinary vulgar acceptation of the term, but he was not satisfied that the accused was "legally" insane. If we are putting his view correctly, he was right. On the other hand, we are satisfied ourselves, on the history of this man and the circumstances on the material date when he killed his wife, that he was not at the time capable of knowing that what he was doing was wrong and contrary to law. We, therefore, allowing the appeal hold that Ramnath did kill his wife, but is entitled to the benefit of S. 84, I. P. C.

We, therefore, direct that he be detained in his present place of detention, which we are informed is the Central Jail at Naini in the district of Allahabad, until orders have been passed on his case by the Local Government, and we direct that a copy of this order be sent forthwith to the Local Government. We further direct that a copy also be sent immediately to the Superintendent of the Central Jail at Naini with the request that he will take such steps as may be necessary in view of the possibility of a recurrence of violence on the part of Ramnath.

V.B./R.K. *Order accordingly.*

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* A. I. R. 1930 Allahabad 452

DALAL, J.

Daya Ram—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 577 of 1929, Decided on 5th December 1929, from an order of Sess. Judge, Agra, D/ 9th August 1929.

(a) Criminal P. C., S. 147—"Application."

Section 147 applies to disputes as regards entry into a temple or mosque and it would so apply whether the right claimed is an easement or otherwise: *A. I. R.* 1926 *Cal.* 437, *Dist.* [P 454 C 1]

(b) Criminal P. C., S. 147—Samadhs of Radhaswami sect in U. P.—Entry in compound of samadhs is covered by words "right to use of any land."

The shrines of the followers of the Radhaswami sect known as samadhs are of as great religious sanctity to the followers of that sect as a temple and entry in the compound of the samadh would be covered by the words "right of use of any land" [P 454 C 2]

*** (c) Criminal P. C., S. 147—"Three months."**

Three months are not the three months prior to order, but three months next before the institution of the inquiry. [P 455 C 1]

K. N. Katju, Kumuda Prasad and *M. L. Chaturvedi*—for Applicant.

U. S Bajpai—for the Crown.

Tej Bahadur Sapru, Harnandan Prasad, K. Varma, Ladli Prasad Sinha and *Ravi Nandan Prasad*—for Opposite Party.

Judgment.—Dr. Katju who argued this application for revision desired to impress the Court by stating that members of both sections of the Radhaswami sect were mostly LL. Bs. and not likely to cause a breach of the peace. He has been kind enough to furnish this Court with a typed copy of all the relevant papers which has been a great help and saved a considerable amount of time. On the very first page there is a letter of the then District Magistrate Mr. Dreyfus, dated 12th June 1927, in which he speaks of a complaint by members of the faction whom Dr. Katju represents that they

were pummelled and pushed by LL. B's. of the opposite faction. The whole typed record is full of indication as to a fear of a breach of the peace, if no orders were passed to restrict the two parties and it is therefore idle to argue here that there was no possibility of a breach of the peace. The heading of the very order objected to shows *Emperor* v. *Nehal Chand*, that proceedings were started on the complaint of Dr. Katju's party, and that it was not the other party which first sought the protection of a criminal Court. The order complained of is by the District Magistrate of Agra, dated 22nd June 1929, and the typed book gives in serial order the various proceedings which followed the letter of the District Magistrate of 12th June 1927 referred to by me above. I consider the present order of 22nd June 1929, to be merely in continuation of the proceedings instituted in 1927. It is not necessary to go into details as to the dispute between the two factions but some summary of the dispute is necessary. There was no schism in the Radhaswami sect till the death of the Guru Mahraj Saheb in 1907. He was an accountant deeply versed in finance before it was discovered that he was an emanation of God.

He, therefore, took the very wise step of establishing a trust in 1904, and putting all the properties of the brotherhood in charge of the trust. Of the two present factions the Swamibagh faction and the Dayalbagh faction, this trust has been captured by the Swamibagh faction and that faction is in charge of the properties. The dispute arose after the death of Maharaj Saheb as he had indicated his sister as the next emanation, but on his death some of his followers did not accept that indication, but seceded and discovered the emanation in a gentleman of the name of Mr. Kamta Prasad Sinha, known after his recognition as Sarkar Saheb. The trust being captured by the Swamibagh section, the other section of the Dayalbagh found difficulty in worshipping at the shrines of their religion, two of them being at Agra, known as the samadhs, and a dispute arose as to the right of the Dayalbagh section to enter these samadhs for the purposes of worship.

It appears that in 1927, the Dayalbagh people insisted on entering which led to the complaint to the District Magistrate by members of the Swamibagh section against the rough behaviour of members of the Dayalbagh section. At that time an appeal had been pending in this Court from a decision of the Subordinate Judge of Benares in a suit filed for a declaration by an official of the Swamibagh section, and it was desired by that section that the trust may be declared a private trust and not a public one and that the men of the opposite faction may be debarred from the use of the properties belonging to the trust. That suit failed in the Court of the Subordinate Judge and the appeal was dismissed by this Court on 12th June 1929. As the dispute was brought to the District Magistrate in 1927, proceedings continued and various orders were passed restricting the Dayalbagh section from the free use of the two samadhs at Agra. Finally on 11th June 1929, the two parties came to a settlement and agreed to abide by the judgment of the High Court. The judgment of the High Court was delivered on 12th June and the District Magistrate's order complained of was passed on 22nd June. He removed all the restrictions placed on the Dayalbagh section as to the use of the semadhs. Dr. Katju frankly admitted that no objection can be raised to that portion of the order. If according to him the District Magistrate had no jurisdiction to interfere necessarily, it will follow that the District Magistrate will have no jurisdiction to place any restrictions on the use of the samadhs by the Dayalbagh section and he could not complain of the removal of these restrictions. After removing these restrictions the order goes on:

"provided only that they shall not hold any ceremonies or worship on such day or days as may be reasonably required by the Swamibagh branch for similar ceremonies for their party."

(This proviso is against the Dayalbagh party and the applicant here would naturally not object to it). The objectionable portion so far as the applicant is concerned now follows:

"The Swamibagh branch are hereby directed that they shall freely permit to the Dayalbagh branch opportunities for such worship etc., so far as may be equal in number and

convenience with the opportunities which they reserve for themselves."

The view of the learned Sessions Judge that the District Magistrate had passed this order in his executive capacity, a capacity not known to me or to the law, was not supported by counsel on either side here. What was definitely argued before me was on the side of the applicant that the order did not fall within the provisions of S. 147, Criminal P. C. and on the opposite side that the order was covered by the provisions of that section. I have held that there is a danger of a breach of the peace. The application of the provisions of S. 147 can only be doubted if the question of entry into a place required by any religion were not subject to action under S. 147, Criminal P. C. There was a conflict of opinion between the Madras and Calcutta High Courts: see *Kader Batcha* v. *Kader Bakha*(1) in opposition to *Guiram Ghosal* v. *Lal Behari Das* (2). This conflict was, however, set at rest by Act No. 18 of 1923 amending the Criminal Procedure Code wherein the view of the Madras High Court was adopted. Originally the words were :

"a right of use of any land or water including any right of way or other easement over the same."

These words indicated to the Calcutta High Court certain rights which were confined to rights of easement and similar rights. In the amended section, the wider view of the Madras High Court was adopted and it was specifically noted that the provisions of that section would apply whether such right be claimed as an easement or otherwise.

Dr. Katju the editor of a commentary on the Criminal Procedure Code knew of this amendment and so he quoted a Calcutta case subsequent to the year 1923. *Surendra Nath Banerji* v. *Shasi Bhushan Sarkar* (3). In that case the learned Judge who delivered the judgment of the Bench specifically noted that there was no dispute then as to the right of a user of any land or entry into any building, but the dispute related only to the performance of pooja of an idol. Argument was addressed to the Bench there that the ruling in *Guiram Ghosal* v. *Lal Behari Das* (2) was no longer operative after the amendment of the Code in 1923. But that argument was not examined for the reason that the dispute before the Bench was in a very narrow compass as to the right to perform pooja and not as to the right of entry into any temple or mosque. After the amendment of the Code no doubt remained as to the provisions of that section attaching to disputes as regards the entry into a temple or mosque. In the present case a samadh is of as great religious sanctity to the followers of the Radhaswami as a temple and the entry in the compound of the samadh would be covered by the words "right of use of any land."

Dr. Katju next pointed out that there had been no proper enquiry as directed in the section, that no order was recorded, and no written statements from the two parties called for. Again reference should be made to the typed copy of the relevant papers, in which such a declaration by a Magistrate will be found and such request to the parties to enter into written statements (notice issued under S. 147, Criminal P. C. on 15th November 1927). The proceedings were suspended under a compromise by both parties, which was accepted by the District Magistrate that the parties would abide by the decision of the High Court here. This compromise has given rise to the argument of Dr. Katju that a District Magistrate is not entitled to interpret a judgment of this Court in criminal proceedings. The Magistrate has, however, to decide the question of the right of the Dayalbagh party according to Cl. (2), S. 147. That clause runs as follows:

"If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right."

It is difficult to understand how a Magistrate can adjudicate upon the existence or non-existence of a right without interpreting the judgments of a civil Court. In the present case Dr. Sapru has referred on behalf of the respondent to the last sentence of the judgment of this Court:

"We find also that the defendants are entitled to have an interest in the alleged trust and in the trust properties."

Clearly therefore, the judgment gave evidence of the existence of the right

(1) [1916] 29 Mad. 237.
(2) [1910] 37 Cal. 578=11 C. L. J. 292=6 I. C. 132=14 C. W. N. 611.
(3) A. I. R. 1926 Cal. 437=52 Cal. 959.

of the Dayalbagh section to use all the properties of the trust and it was admitted that these samadhs in Agra are properties of the trnst.

Finally Dr. Katju referred to the proviso and pointed out that the District Magistrate overlooked the necessity of the party, in whose favour the order was made, exercising such right within three months. Three months,however, are not the three months prior to the order, but three months next before the institution of the enquiry. The enquiry was instituted in June 1927, and from the fact of the Dayalbagh party exercising the right which gave rise to the complaint to the District Magistrate. On the part of the Swamibagh section, I am satisfied that the right of entry was exercised by the Dayalbagh party within three months of 12th June 1927.

I dismiss this application. The stay order is withdrawn.

V.B./R.K. *Application dismissed.*

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DALAL, J.

Gambhir Singh and *another*—Applicants.

v.

Surendra Singh and *another*—Opposite Parties.

Civil Revn. No. 346 of 1929, Decided on 7th February 1930.

(a) Agra Tenancy Act (3 of 1926), S. 243—Suit for recovery of rent—Question of proprietary right in issue both in appeal from original decree and also certainly to be in issue in appeal from appellate order—Appeal lies to District Judge.

Where in a suit for recovery of rent the question of proprietary right has been in issue between the parties, and the same is in issue in appeal before the Collector and is certain to be in issue in appeal from the order of the Collector, an appeal lies from the order of the Collector to the District Judge. [P 455 C 2]

(b) Agra Tenancy Act (3 of 1926), S. 249—Scope.

Section 249 has to be read in reference to the heading above S. 247. [P 455 C 2]

(c) Agra Tenancy Act (3 of 1926), S. 244—Second appeal is prohibited from order but not decree.

An appeal is prohibited from an order passed in appeal from another order and not from an order passed in appeal from a decree. [P 455 C 2]

R. K. Malaviya—for Applicants.

G. Agarwala—for Opposite Parties.

Judgment.—The District Judge has wrongly refused jurisdiction. His attention does not appear to have been drawn to the provisions of S. 248 (3), Agra Tenancy Act. What happened in the present case was this. A suit for recovery of arrears of rent was dismissed by an Assistant Collector of the Second Class on the ground that the plaintiffs had no rights in the *sir* land. This was the contention raised both by the tenants and by the other defendants who were zamindars. Clearly a question of proprietary title wes raised. The plaintiffs went in appeal to the Collector, and he held that the plaintiffs and the zamindar-defendants were jointly proprietors of the *sir* land and that, therefore, the plaintiffs were entitled to sue for recovery of rent. The suit was, therefore, remanded under O. 41, R. 23, Civil P. C. This was an order, and an appeal has been provided from an order of the Collector under S. 248 (3), Agra Tenancy Act. The provisions of the section run as follows :

"An appeal shall lie from the following orders of an Assistant Collector of the First Class or of a Collector, namely, orders mentioned in Ss. 47 and 104 and in O. 43, R. 1, Civil P. C., 1908."

Under O. 43, R. 1 (u) an appeal shall lie from an order under R. 23, O, 41, remanding a case, where an appeal would lie from the decree of the appellate Court. The question, therefore, to be decided is whether in a case like the present an appeal would lie from the decree of the Collector to the District Judge. Such an appeal would lie from the appellate decree of a Collector in the present case under S. 243, Tenancy Act because a proprietary right has been in issue between the parties in the first appellate Court and is certain to be in issue in the appeal. The learned Judge's reference to S. 249 of the Act arises out of a misapprehension. He has omitted to notice that this section comes under the heading "appeals from orders." Possibly the language of S. 249 is not happy. But this section should be read in reference to the heading above S. 247. An appeal is prohibited from an order passed in appeal from another order and not from an order in appeal from a decree. The District Judge had jurisdiction to hear the appeal. His decree dated 23rd April 1929, is set aside and he is directed to hear the appeals 1 and 57 of 1928 of his Court according to law.

Costs here and heretofore shall abide the result.

V.B./R.K. *Application allowed.*

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* A. I. R. 1930 Allahabad 456

SULAIMAN AND KENDALL, JJ.

Latafat Ali Khan and *another*—Defendants—Appellants.

v.

Mohammad Yar Khan and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1242 of 1927, decided on 12th December 1929, from decree of Addl. Dist. Judge, Meerut, D/- 10th December 1926.

*** (a) Civil P. C., O. 32, R. 3 (1)—Guardian ad litem represents minor defendant both in trial Court as well in appellate Court.**

The guardian ad litem appointed for a minor defendant continues to represent him until he has been removed by an order of the Court. Even for purposes of appeal it is only the guardian ad litem appointed by the trial Court who can represent the minor, and that so long as he has not died, retired or been removed, no one else can be allowed to represent the minors in appeal: 14 *All.* 35; *A.I.R.* 1922 *All.* 332; *A.I.R.* 1924 *All.* 79; 2 *A.L.J.* 489 and (1893) *W.N.* 203, *Foll.* [P 457 C 2; P 456 C 1]

*** (b) Civil P. C, O. 32, R. 3 (1)—Trial Court after passing decree becomes functus officio for purposes of removing guardian ad litem.**

After the passing of a decree the lis, in at least the trial Court, comes to an end for the time being, and as the rules under O. 32 do not expressly apply to execution proceedings, it would seem that the Court becomes functus officio for the purposes of removing the guardian and appointing a fresh guardian in his place: *A.I.R.* 1921 *Cal.* 476, *Foll.* [P 457 C 1]

*** (c) Civil P. C., O. 32, R. 3 (1)—Next friend of defendant should be allowed to prefer appeal with application for removal of guardian ad litem—Practice.**

It would be simplifying procedure if an appeal were allowed to be preferred within the time allowed by law by another next friend, coupled with an application for the removal of the guardian ad litem on any of the grounds mentioned in O. 32, R. 1, and if such an application is ultimately granted, the appeal may be treated as having been properly filed. [P 457 C 2]

M. L. Agarwala and *S. N. Chaube*—for Appellants.

M. Wallullah—for Respondents.

Judgment. — A preliminary objection is taken to the hearing of this appeal and for the purposes of this objection only a few facts need be mentioned.

The plaintiffs instituted a suit for pre-emption of a zamindari property as well as a house. The defendants vendees were minors. A relation of theirs refused to act as their guardian, and the Court appointed Mr. Makhan Lal, a vakil of the Court, as the guardian ad item of the minors. The case was fought out and was decreed both as against part of the zamindari and a house. The guardian ad litem did not prefer any appeal from that decree; but a memorandum of appeal was filed on behalf of the minors by their father Wilayat Ali. A note was added to the memorandum of appeal to the effect that

"in the original suit, Babu Makhan Lal vakil was appointed the guardian ad litem of the appellants by the Court. As he is not ready to prefer this appeal, he has been included in the array of the respondents."

There was no formal application filed by the father of the appellants for the removal of the guardian ad litem and for the appointment of himself in his place. Nor does it appear that Mr. Makhan Lal appeared at the time of the hearing of the appeal. During the course of the argument a suggestion was thrown out by the advocates for the appellants that the defect of the appeal having been preferred by a person other than the guardian ad litem might be remedied by ordering that the person through whom the appeal had been filed should be appointed guardian ad litem for the purpose of the appeal. The learned Judge thought that he had no power to do this and refused to take any such step. He dismissed the appeal as being incompetent. But to avoid any further remand he proceeded to record his opinions on the merits as well. The father of the minor defendants has now filed a second appeal and he is met by the same objection before us.

In the trial Court the position of a minor plaintiff is slightly different from that of a minor defendant, inasmuch as under O. 32 a suit can be filed through a next friend without any formal appointment by the Court, but a guardian ad litem of a minor defendant has to be appointed by the Court itself, and such guardian once appointed cannot be removed unless he desires to retire, or does not do his duty, or there is other sufficient ground for permitting him to retire (O. 32, R. 11 (1)). It has, however, been held in a series of cases of this Court that the guardian ad litem appointed for a minor defendant continues to represent him until he has been removed by an order of the Court. In the words of Straight, J., in *Jwala Dei* v. *Pirbhu* (1),

(1) [1891] 14 All. 35=(1891) A.W.N. 192.

"where a person is appointed as the guardian of a minor for the purposes of a lis, that means of such lis in all its remifications and so long as it subsists, whether in the Court of first instance or in the Court of appeal, unless he takes the necessary steps to have himself discharged from that position which has been put upon him by the Court."

This view has been accepted in subsequent cases:

Bawan Das v. *Bishnath* (2), *In the matter of the application of Sukhdeo Rai* (3), *Shambhu* v. *Kanhaiya* (4), *Bhagelu* v. *Dharma* (5).

It must therefore now be taken as settled law that even for purposes of appeal it is only the guardian ad litem appointed by the trial Court who can represent the minor, and that so long as he has not died, retired or been removed, no one else can be allowed to represent the minors in appeal. A suggestion was thrown out in the case of *Bawan Das* v. *Bishnath* (2), that the proper remedy would be to apply to the lower appellate Court for an order removing the guardian ad litem from his office and, if such an order were obtained, to present a fresh appeal together with an application under S. 5, Lim. Act. That of course was an observation not necessary for the purposes of that case.

After the passing of a decree the lis in at least the trial Court comes to an end for the time being, and as the rules under O. 32 do not expressly apply to execution proceedings, it would seem that the Court becomes functus officio for the purpose of removing the guardian and appointing a fresh guardian in his place: *Fani Bhusan* v. *Surendra Nath Das* (6). It would therefore be both inappropriate and inconvenient to apply to the trial Court to appoint a fresh guardian in order that an appeal may be preferred by him. In cases where the guardian ad litem dies after the decree, the practice of this Court is to permit an appeal to be preferred by another next friend or guardian along with an application praying for his formal appointment. It seems to us that if the allegation is that the guardian is either not doing his duty or is negligent or has colluded, or if there is other sufficient ground for his removal, any other person interested in the welfare of the minor may prefer an appeal accompanied by an application for the removal of the guardian and the appointment of himself in his place. It is very doubtful if without any such appeal pending before the appellate Court it would be seized of the case and would have jurisdiction to order the removal of the previously appointed guardian ad litem. A mere application for such a purpose without an appeal may therefore be defective. On the other hand, even if there is some defect in the presentation of the appeal by a person who has not yet been formally appointed as guardian, that defect can be easily cured under the provisions of S. 153, Civil P. C., to which there was no corresponding section in the old Code which was in force at the time when *Bawan Das's* case was decided. We think it would be simplifying procedure if an appeal were allowed to be preferred within the time allowed by law by another next friend, coupled with an application for the removal of the guardian ad litem on any of the grounds mentioned in O. 32, R. 1; and if such an application is ultimately granted, the appeal may be treated as having been properly filed.

In the present case, however, there is this difficulty in the way of the appellant, that no formal application for the removal of the guardian ad litem was preferred, and there was no suggestion that there was any ground for his removal as contemplated by O. 32, R. 11. Nor does it appear that the guardian ad litem had any notice to oppose an application for his removal. At best it can be suggested that the guardian ad litem was not ready to prefer an appeal, possibly because he thought that the appeal would have no force. The learned District Judge could not have entertained such an oral application at the late stage at which the suggestion came without an opportunity having been given to the guardian ad litem to meet it. We therefore think that, although it would not be correct to say that he had no jurisdiction to entertain any such application, he was perfectly justified in refusing to entertain it as it was made at a very late stage in the

(2) [1899] A.W.N. 203.
(3) [1905] 2 A.L.J. 489.
(4) A.I.R. 1922 All. 332=44 All. 619.
(5) A.I.R. 1924 All. 79=45 All. 623.
(6) A.I.R. 1921 Cal. 476.

case and gave no grounds which would justify the removal of the guardian.

In this view of the matter it is not necessary to go into the other questions which have been raised in this appeal. We accordingly dismiss this appeal with costs.

We have taken into consideration the circumstances under which the appeal was preferred in the lower appellate Court and in this Court, as well as the grounds of decision, and we think that on the whole it would be just and proper to direct that the parties should bear their own costs in both these Courts.

V.S./R.K. *Appeal dismissed.*

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NIAMATULLAH AND BENNET, JJ.

Murtaza Khan and *others* — Defendants—Appellants.

v.

Ajit Prasad—Plaintiff—Respondent.

Second Appeal No. 1348 of 1926, Decided on 25th November 1929, from decree of Second Sub-Judge, Moradabad, D/- 25th March 1926.

Agra Tenancy Act (2 of 1901), S. 202—Suit for possession of land—Reference under S. 202 — Case decided in accordance with revenue Court's decision — In appeal from decision, appellate Court finds Court wrong in making reference—Party held competent to raise question of competency of the reference and further appellate Court not bound to dispose of suit according to revenue Court's decision.

S sued for possession of plot of land as a grove and for recovery of damages on account of produce appropriated by *M*. *M* was the zamindar and was in possession of the grove in question and they had sold their zamindari and the grove in dispute to *S*. *M* contested the suit on the ground that the grove was his *sir*, and that by the sale he acquired ex-proprietary rights in it. The Court passed order under S. 202 requiring *M* to institute a suit within three months in the revenue Court for the determination of the question. The revenue Court decided in favour of *M* and the civil Court accordingly dismissed the suit. *S* appealed and the appellate Court found that the lower Court was wrong in making reference and so decreed the suit. *M* appealed on this decision.

Held: that it was open to *S* to raise the question if the decision of the lower Court in refusing the case was correct or not in appeal.

Held further, that if the appellate Court comes to a finding that the Court was not so entitled to refer the case, it was not bound under S. 202 (2) to dispose of the suit in accordance with the decision of the revenue Court: *A. I. R.* 1922 *All.* 442 and 39 *All.* 254, *Ref.* [P 459 C 2]

N. C. Vaish and *S. N. Seth*—for Appellants.

P. L. Banerji—for Respondent.

Bennet, J.—This is a second appeal in which a Bench of this Court remanded an issue for finding by the lower appellate Court as to whether a certain plot in dispute was "land" as defined by the Agra Tenancy Act (2 of 1901) or not, and the finding of fact by the lower appellate Court is in the negative and is that the plot is a grove.

The appeal is by the defendants The plaintiff sued for possession of this plot as a grove and for recovery of damages on account of the produce appropriated by the defendants. It has been found that the defendants were zamindars and in possession of the grove in question and that they sold their zamindari and the grove in dispute to the plaintiff. The case for the defendants was that the grove was their *sir* and that by the sale they acquired exproprietary rights in it. In the Court of first instance, that of the Munsiff, at the instance of the defendants, the Munsif passed an order under S. 202, Agra Tenancy Act (2 of 1901), requiring the defendants to institute a suit within three months in the revenue Court for the determination of the question. The final decision of the revenue Court (the Commissioner) is to the effect that the land was *sir* and that by the sale defendants acquired exproprietary rights in it, and he directed that exproprietary rent should be assessed under S. 35, Land Revenue Act. The Munsiff accordingly dismissed the plaintiff's suit following the decision of the revenue Court.

The plaintiff appealed to the Court of the District Judge, and the lower appellate Court came to the decision that the Munsiff was wrong in making the reference under S. 202, Tenancy Act, because the land was a grove and not an agricultural holding. Accordingly, the lower appellate Court gave a decree to the plaintiff for possession of the disputed grove and for Rs. 30 on account of damages for the past three years.

The defendants have brought an appeal in this Court contending that S. 202, Tenancy Act, did apply to the case and that the judgment of the revenue Court that the relation of landlord and tenant existed was binding on the civil Court. When the matter first came in second

appeal, the argument was advanced that the defendants did not have an opportunity of producing evidence to show in the civil Court that the land was agricultural land and that that question was not before the revenue Court, because the order under S. 202 rendered such a question unnecessary. Accordingly the case was remanded to the lower appellate Court on an issue whether the plot in dispute was land as defined in the Agra Tenancy Act, in order that the defendants might have opportunity of producing evidence on this point. The defendants did not produce any evidence, and the plaintiff tendered evidence on which the lower appellate Court came to the finding of fact that the land was a grove and not agricultural land.

It is now argued for the defendant-appellants that, even if the lower appellate Court is correct in holding that the land is not an agricultural holding and therefore the reference by the Munsiff under S. 202 was incorrect, still as that section directs the defendants to bring a suit in the revenue Court, such a suit is binding on the parties in the civil Court. The learned counsel stated that if his clients, the present defendant-appellants, had instituted a suit for a declaration under S. 95, Act 2 of 1901, such a suit, if decided before proceedings in the civil Court, would be binding on the parties and that it would not be open to the unsuccessful party to ask for a decision of the civil Court, that the decision of the revenue Court under S. 95 was incorrect on the ground that the land was a grove and not an agricultural holding. But, as pointed out by the learned counsel for the respondent, there is a difference in the procedure under S. 202. When the Munsiff passed the order under S. 202, the plaintiff did not have an opportunity of putting forward the plea in the revenue Court that the revenue Court had no jurisdiction to entertain the suit, and accordingly he did not put forward any such plea. If he had put forward such a plea, the revenue Court would have refused to entertain it, because there was the order of the civil Court under S. 202, Tenancy Act, directing the defendants to file a suit in the revenue Court and that order not having been set aside then was binding on the parties.

Accordingly we consider that this circumstance makes a distinction between a suit brought in consequence of an order under S. 202 and an independent suit brought under S. 95. It is for this reason that we consider that it was open to the plaintiff to raise the question before the lower appellate Court as to whether the Munsiff was correct in making a reference to the revenue Court; and when the lower appellate Court came to the finding that the Munsiff was not entitled to make such a reference, then the lower appellate Court was not bound by S. 202 (2) and need not dispose of the suit in accordance with the final decision of the revenue Court. We may refer to a somewhat similar case reported in *Dhandei Kuar* v. *Chotu Lal* (1). This was a first appeal to this Court from a decision by a Subordinate Judge in which the plaintiff had sued for possession of a number of villages, a market, groves and several houses. The defendant applied before the Subordinate Judge for a reference to the revenue Court under S. 202, Agra Tenancy Act, as he alleged that he was the tenant of the property in dispute. The Subordinate Judge made an order directing the defendant to institute a suit in the revenue Court for establishment of his right and decided the suit in accordance with what he considered to be the decision of the revenue Court. This Court in first appeal held that the Subordinate Judge was wrong in making a reference under S. 202, Agra Tenancy Act, and accordingly held that the decision of the revenue Court was not binding on the civil Court. The matter had also been considered in a previous case between the same parties, reported in 39 *All.* 254.

Accordingly we consider that the lower appellate Court was entitled to grant the decree to the plaintiff, and we dismiss this second appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) A.I.R. 1922 All. 442.

A. I. R. 1930 Allahabad 459

DALAL, J.

Gopi Singh—Defendant—Appellant.

v.

Kesho Saran and *others*—Plaintiffs—Respondents.

Second Appeal No. 472 of 1927, Decided on 19th July 1929.

Agra Tenancy Act—Sir land sold by one brother—Brother not selling his sir land retains only his share of sir property.

Where two brothers own property including *sir*, and one of them sells his *sir* land, the other brother not selling his *sir* land retains only his share of the *sir* property and is not the *sir* holder of the entire land not being in possession of the *sir* lost by his brother. What is really important in these cases is the actual physical cultivating possession of the land : *A. I. R.* 1925 *All.* 93; *Sel. Dec. No.* 9 *of* 1918, *Ref.* [P 461 C 1]

K. N. Katju—for Appellant.

B. Malik, H. K. Mukerji, P. L. Banerji, K. Varma, Gadadhar Prasad and *Sahdeo Singh*—for Respondents.

Judgment.—It is difficult to understand the facts of the case on the basis of the evidence on the record. There were two brothers Kesho Saran and Ram Baran. It is not necessary to note what Kesho Saran did with his *sir* land. He is at present in possession of his share. Ram Baran and his sons mortgaged the zamindari property first and then sold the equity of redemption. When the persons who purchased the equity of redemption redeemed the mortgage, the sons of Ram Baran along with Kesho Saran sued the subtenants in possession of the land for ejectment. There is considerable confusion as to whether Kesho Saran has any interest in the land in suit or not nor is it evident whether Ram Baran mortgaged the *sir* land. There is no enquiry made whether, after the mortgage, exproprietary rights in half the *sir* land were extinguished or not. The decisions of both the subordinate Courts are exceedingly summary. The following issues are remitted to the lower appellate Court for decision after receiving further oral and documentary evidence which may be produced by the parties. The record shall not be sent to the Assistant Collector for further enquiry. The issues are :

(1) Did Kesho Saran and Ram Baran hold separate plots of *sir* land and was every plot of *sir* land held jointly by them ?

(2) When Ram Baran mortgaged his half share in 1906 of the zamindari, was the *sir* land also mortgaged ?

(3) After the mortgage of 1906, who was in possession of Ram Baran's share of the *sir* land, Ram Baran or the mortgagees ?

(4) On the basis of the above findings, was the exproprietary right of Ram Baran and of his sons extinguished subsequent to 1906 and prior to the transfer of equity of redemption by the sons of Ram Baran ?

(5) On redemption of the mortgage who became entitled to possession of the *sir* land of Ram Baran the sons of Ram Baran or the purchaser of the equity of redemption who redeemed the mortgage ?

(6) Were Gopi Bhaggal and Suddhan subtenants of the mortgagees or of all the plaintiffs or of some of them if so of which of the plaintiffs ?

Return shall be made within four months from today's date. Ten days shall be granted to file objections.

Kesho Saran and Ram Baran were brothers. Kesho Saran mortgaged his property including *sir* but redeemed it, so he may be taken to be proprietor and *sir*-holder of the plots in suit. He is one of the plaintiffs. He has been joined by another plaintiff, a son of his brother Ram Baran. Ram Baran mortgaged his zamindari property including *sir* and subsequently sold the equity of redemption to the defendant among others. The defendant and the persons who purchased along with him redeemed the mortgage. The defendant is in actual possession of the plots in suit. Kesho Saran and Ram Baran's son Ram Nath sued for the ejectment of Gopi on the ground that Gopi was a subtenant. The names of Kesho Saran and Ram Baran fictitiously continued as *sir*-holders in the village record, though Ram Baran entirely parted with all his interest in zamindari and *sir*. Ram Nath plaintiff, therefore, has certainly no cause of action.

The next question is whether Kesho Saran can be considered as a *sir*-holder of the entire plots or only half the plots. The learned counsel for the respondent has somewhat puzzled the Court by producing conflicting rulings, one of this Court in *Ram Prasad* v. *Janki Prasad* (*A. I. R.* 1925 *All.* 93) and the other of the Board of Revenue *Mahesh* v. *Hori Khan* (1). According to one judgment, the learned counsel desires me to hold that the zamindar who does not sell his *sir* land retains only his share of the *sir* property, while according to the other judgment, I am desired to hold that Kesho Saran is *sir*-holder of the entire land. In the present case, however, distinction may be made from the ruling of the Board of Revenue because Kesho Saran has not been in actual possession and Gopi.

(1) Sel. Dec. No 9 of 1918.

the purchaser, is in actual possession. Kesho Saran is not in possession of the *sir* lost by his brother, I am, therefore, of opinion that Kesho Saran is *sir*-holder of only half the plots.

It was suggested by counsel for the defendant-appellant that a joint decree to the extent of half may be granted to Kesho Saran. That would merely be a paper decree and, unless Kesho Saran gets it framed, he is not likely to get much pleasure out of it. What is really important in cases of this nature is the actual physical cultivating possessior of the land. In my opinion Kesho Saran has not lost his right to half the *sir* land and is entitled to actual physical possession of half of the plots.

In the result I modify the decrees of the two subordinate Courts and grant to the plaintiff Kesho Saran alone possession of half of the plots mentioned in the plaint.

The plaintiff Kesho Saran shall receive half costs throughout and Gopi Singh shall receive half costs throughout from Ram Nath.

R.M./R.K. *Decree modified.*

A. I. R. 1930 Allahabad 461

DALAL, J.

Bans Gopal—Judgment-debtor —Appellant,

v.

Mewa Ram and *another*—Decree-holders—Respondents.

Execution Second Appeal No. 1865 of 1928, Decided on 17th December 1929, from decree of Sub-Judge, Etawah, D/- 12th May 1928.

(a) Limitation Act, Art. 182—"Certificate of payment."

Certificate of payment is not an application within the meaning of Art. 182 : *A. I. R.* 1928 *All.* 629, *Foll.* [P 461 C 2]

(b) Provincial Insolvency Act, S. 28 (7)—Date of adjudication does not become same as date of petition.

Although S. 28 enacts that an order of adjudication shall relate back to and take effect from the date of the presentation of petition, it does not state that the date of adjudication shall be the same as the date of the petition. [P 461 C 2]

(c) Limitation Act, S. 19, Expl. 1—Acknowledgment of definite sum can be used for that sum only.

Although no doubt if no definite sum is mentioned and there is acknowledgment in general terms, the amount of debt can be discovered from evidence as mentioned in S. 19, Expl. 1, where a definite sum has been acknowledged, the acknowledgment can be used to save limitation only with respect to sum acknowledged. [P 462 C 1]

Baleshwari Prasad—for Appellant.

G. Agarwala—for Respondents.

Judgment.—A decree was passed on 29th March 1922. There was an application for execution in September 1923. A payment was certified on 16th February 1924, to the effect that a sum of Rs. 70 was paid in December 1923. The present application is one of 20th October 1927.

The learned Judge of the lower appellate Court held that limitation should count from 16th February 1924, when the certificate of payment was filed and the period of eight months eighteen days between the adjudication of the judgment-debtor as an insolvent and the annulment of the adjudication should be deducted under the provisions of S. 78 (2), Provl. Insol. Act. That Court has made a slip in regarding the certificate as an application. Under Art. 182, the period of limitation runs from the date of the application, and a certificate of payment is not an application as held recently in a Full Bench ruling *Jotu Prasad* v. *Sri Chand* (1). The period of limitation must therefore run from December 1923 and in that case the application of 20th October 1927, would be time barred, even after the deduction of eight months and 28 days. Mr. Agarwala thereupon argued that the date of adjudication must be taken to be the date of the petition for insolvency i. e., 8th December 1924, and relied on the provisions of Cl. (7), S. 28, Provl. Insol. Act. It is enacted there that an order of adjudication shall relate back to, and take effect from the date of the presentation of the petition on which it is made. It is not, however, stated there that the date of adjudication shall be the same as the date of the petition. That would not be correct, because until the order of adjudication is passed, the provisions of S. 28 (2) stopping the remedy to creditors do not come into operation and the decree-holder is entitled to execute his decree between the date of presentation of the petition of insolvency and the order of adjudication, unless a definite stay has been ordered by the insolvency

(1) A. I. R. 1929 All. 629 (F.B.).

Court. in which case alone the period of limitation will be suspended in running.

The other argument of Mr. Agarwala was that on 8th December 1924, Bans Gopal in his insolvency petition acknowledged the debt of Mewa Ram. Unfortunately for the creditor, however, a sum of Rs. 200 only is mentioned. Acknowledgment of a sum of Rs. 200 cannot be taken as an acknowledgment of a sum of Rs. 585 as claimed by the decree-holder. It is true that if no definite sum had been mentioned and there had been an acknowledgment in general terms the amount of the debt could have been discovered from the evidence as mentioned in Expln. (1), S. 19,Lim. Act. In the present case, however, there is a definite acknowledgment of Rs. 200 and if this is to be used to save limitation, it could be done only with respect to the sum acknowledged, and not with respect to any sum that may be proved to be due on that date.

For these reasons I hold that the decree-holder is entitled to execute the decree for Rs. 200 and not for a larger sum. Execution shall be taken out for that sum according to the application of 20th October 1927. Parties shall bear their own costs throughout.

V.B./R.K. *Order accordingly.*

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* A. I. R. 1930 Allahabad 462

SULAIMAN AND SEN, JJ.

Bismillah Begam and *others*—Defendants—Appellants.

v.

Tahsin Ali Khan — Plaintiff — Respondent.

First Appeal No. 79 of 1926, Decided on 6th February 1930, against decree of Second Addl. Sub-Judge, Aligarh, D/- 13th November 1925.

*** Transfer of Property Act, Ss. 53 and 2—S. 53 applies to Mahomedan wakf—Mahomedan Law—Wakf.**

There is no rule of Mahomedan Law which allows an indebted person to make a wakf of his property with intent to defraud his creditors. Further under the Mahomedan Law the Qazi has the power to make the debtor pay all his debts before he maintains the wakf and the rule under which a manager can be appointed by the Judge to realize the rents and profits and to pay the debts is a mere rule of procedure and not of substantive law and therefore is not as such enforceable. Thus the provisions of S. 53 in no way offends against any rule of Mahomedan Law and is not inoperative by virtue of S. 2 and therefore apply to the case of Mahomedan wakf: *A. I. R. 1929 All. 277, Rel. on.* [P 465 C 2]

Iqbal Ahmad and *Panna Lal*—for Appellants.

Tej Bahadur Sapru and *M. A. Aziz*—for Respondents.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for declaration that the property in suit is endowed property and is not liable to be attached and sold in execution of decrees held by the defendants. The plaintiff relies on a wakfnama executed by himself on 16th July 1924. The wakf is in favour of his descendants and he has constituted himself the mutawalli of the property for his lifetime. The defendants challenged the validity of this dedication and pleaded that the deed had been executed fraudulently with the intention of defeating and delaying his creditors and was not binding on the defendants. Objections had been raised by the plaintiff Tahsin Ali Khan in the execution department which were decided against him; hence this suit.

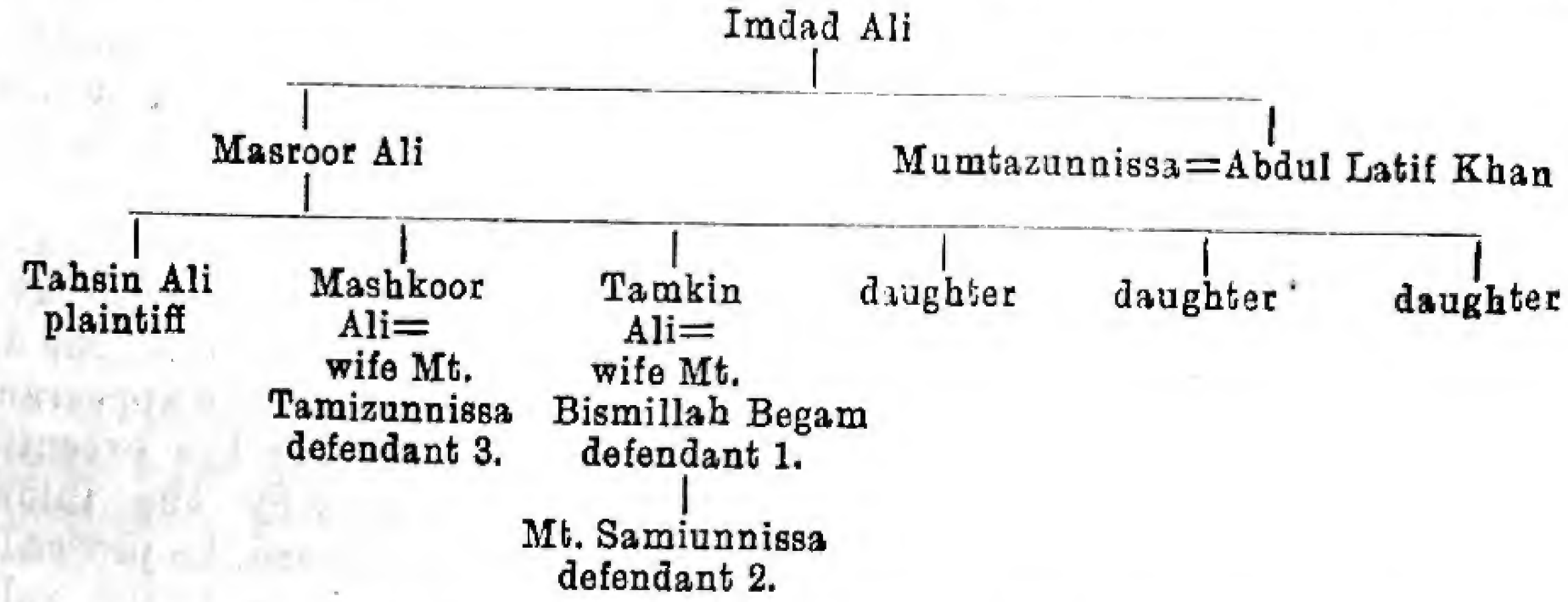
The learned Subordinate Judge in a very short judgment has found the validity of the wakfnama in favour of the plaintiff. He has based his conclusion entirely on the oral evidence and has altogether ignored the documentary evidence that is on the record. We were not satisfied with his finding that at the time when Tahsin Ali Khan executed the wakfnama his assets were more than sufficient to discharge all the liabilities. We accordingly remitted two issues the findings on which have now been returned. There is considerable history previous to the present litigation which the learned Subordinate Judge has altogether omitted to consider but which in order to have a good perspective it is necessary to bear in mind. The pedigree to the family is as follows:

(*For pedigree see p.* 463.)

The plaintiff's father Masroor Ali Khan died on 8th January 1904 leaving three sons and three daughters. Tahsin Ali Khan appears to have been the eldest son. On 14th March 1904 an agreement was executed by the three brothers jointly under which the management of the entire estate which was

considerable was left with Tahsin Ali, and his two brothers were allowed Rs. 3,650 between them and were admittedly deprived of their power to transfer the property. This was followed by a lease for 60 years granted by the two brothers to Tahsin Ali on 15th January 1909. The position of Tahsin Ali, however, did not become absolutely secure. In 1912 his two brothers filed a suit for the cancellation of the lease and their suit was decreed on 28th January 1914. The judgment is printed on p. 17. The finding was that the two brothers were subject to attacks of epilepsy long before the execution of the disputed thekanama which fact was admitted by Tahsin Ali himself, and that their mental capacity had been considerably affected by illness. Although their share of the profits amounted to Rs. 20,000 a year they were only given Rs. 3,650. Not only was the lease to last for 60 years but it gave an unlimited power to Tahsin Ali to deduct a further sum for costs as he liked and to prevent an alienation by his brother. The Court found that the brothers were entirely under the control of the defendant who had dominated their will and procured an unconscionable bargain. The lease was accordingly set aside.

The brothers, however, did not have an easy course for realizing their arrears of the profits. Tahsin Ali Khan being the lambardar they had to institute suits for profits in the revenue Courts time after time. Some of the decrees for profits are printed on pp. 31, 33, 35 and 37. These decrees were for large sums of money and remained outstanding. On 22nd October 1915 Tahsin Ali executed a sale deed of a considerable part of his property in favour of his own sons. Objection was taken in the execution department on the strength of this sale deed and was disallowed. The sons then brought a suit for a declaration that the property had been validly sold to them and was no longer liable to be attached and sold in execution of the decrees for the profits. The suit was dismissed and the judgmeut is printed on p. 53. The Court found that the sale deed was an entirely fictitious transaction and was without consideration and had been executed with a view to defraud the creditors of Tahsin Ali Khan, namely his brothers. On p. 54 is a long list of the decrees for profits which the unfortunate brothers had obtained against Tahsin Ali and which had remained unpaid. In 1920 Tamkin Ali died leaving a widow Mt. Bismillah Begam defendant 1 and a daughter Mt. Samiunnisa, defendant 2. Part of the property of Tamkin Ali was inherited by Tahsin Ali. In 1922 the other brother Mashkoor Ali also died leaving a widow Mt. Tamizunnisa defendant 3



Tahsin Ali inherited a part of his estate also.

The position so far as the realization of profits went did not improve in any way. There are numerous decrees for profits printed which show that year after year the trouble of non-receipt of profits continued as usual. Some of such decrees are printed on pp. 59, 61, 157, 159, 161, 233, 235 and 238.

There are also two mortgage decrees which are worth mentioning separately. On p. 81 is the decree for Rs. 1,042,56-4-0 dated 30th June 1920 in favour of Kunwar Man Singh, and on p. 89 is a decree dated 8th November 1921 for Rs. 35,130-6-0 in favour of Pearey Lal. Under these decrees Tahsin Ali Khan was liable to pay a substantial portion of the decretal amounts. On the death of his brothers an attempt was made by Tahsin Ali Khan to get

himself appointed guardian of his minor nieces although he himself was indebted to them heavily. Tahsin Ali was not appointed guardian of his nieces but their mother was so appointed in August 1923 (vide p. 117). Tahsin Ali also failed in the succession certificate case against defendants 1 and 3 on 11th January 1924 (p. 119). Another act of Tahsin Ali, which we may mention in this connexion, was an attempt on his part to marry his niece Mt. Samiunnisa to one of his sons or anybody else. A suit for an injunction restraining him from doing so was decreed. This suit had been pending for some time and was decreed on 1st September 1924 shortly after the execution of the wakfnama (p. 153.) We now come closer to the creation of the wakf. On pp. 98 and 104 we have two applications for execution of her decrees by Mt. Bismillah Begum against Tahsin Ali Khan printed as samples for showing that the numerous decrees outstanding were being kept alive. On 20th June 1924 Mt. Mumtazunnisa who had considerable property of her own and was the aunt of Tahsin Ali died, so that another inheritance devolved upon him.

On 5th July 1924 Mt. Bismillah Begam got an application filed in suit No. 68 of 1928 to the effect that Tahsin Ali judgment-debtor had inherited some property on the death of his father's sister Mt. Mumtazunnisa and was contemplating a transfer of the property in order to evade payment of her decretal amounts. She accordingly prayed that the property may be attached and sold and in the meantime an injunction may be issued to the judgment-debtor immediately (p. 121). This application was supported by an affidavit (p. 123) stating that he was contemplating a transfer of the property very soon. An xactly similar application was filed on the same date in suit No. 24 (p. 125) supported by a similar affidavit (p. 127). A third application and an accompanying affidavit are to be found on pp. 129 and 131. These applications were filed on the same date in the revenue Court where the executions of the decrees for profits were pending. The order sheet dated 7th July 1924 printed on p. 133 shows that Tahsin Ali Khan's pleader came to know of these applications on that date and put in an appearance, or perhaps was called by the Court, but he stated that he had had no previous intimation and was not prepared to rebut these applications. The Court ordered that the case should be put up on 17th July and the parties be informed to appear again with their documentary evidence. We think there is no ground for supposing that Tahsih Ali Khan's pleader did not take any steps to inform his client specially as the date fixed was 17th July 1924 and documentary evidence had to be produced on that date, and accordingly it would have taken time to procure such evidence.

On 15th July 1924 Bismillah Begam made another attempt to ask the Court to issue an injunction to the defendant restraining him from trausferring his property in any way, stating that he was heavily encumbered and was intending to transfer his property. The application is printed on p. 135 and the affidavit in support of it is on p. 137. This was done in a pending suit. It is a great pity that the Court on neither of these occasions thought it fit to issue an injunction which seems to have been fully called for. Had such an injunction been issued the protracted litigation which followed would have been avoided. On 16th July 1924, i. e., one day before the date fixed for the appearance of Tahsin Ali Khan in the execution Court to show cause why the injunction should not be issued, he proceeded to purchase a stamp paper of the value of Rs. 500, got a deed of wakf engrossed upon it, duly executed it and got it attested by a number of witnesses and managed to present it for registration between 4 and 5 p. m. on that very day.

Armed with this deed of his own creation he boldly appeared in Court on 17th July 1924 and filed objections (p. 145) under S. 47, Civil P. C., stating that the property had been given away in wakf to his children and although mutation of names had not been effected (indeed there had been no time to get it done). the property had become dedicated property and could not be seized by the decree holder. As can be expected the objections of Tahsin Ali Khan were disallowed by the Court on 21st November 1924, the Court holding that the wakf was invalid as the judgment-debtor had executed it in order to defraud his creditors (p. 171). Another

objections raised by the sons of Tahsin Ali Khan, the alleged beneficiaries under the wakf were also disallowed on the same ground. The sons have not thought fit to institute any suit for a declaration in order to establish their rights. It may also be mentioned that the actual order for mutation of names on the basis of the deed of wakf was in some cases not made till 28th July 1925: vide p. 211. This is a summary of the documentary evidence which has been entirely ignored by the former Subordinate Judge, and has been considered by the second learned Subordinate Judge.

The plaintiff comes to Court to seek a declaration after an order has been passed against him by the execution Court. Both on the ground that there is a previous order against him as well as on the ground that he is a plaintiff coming to Court for a declaration, the burden lies on him to satisfy the Court that he is the trustee of the property in suit. It has been contended on behalf of the plaintiff that S. 53, T. P. Act, which is in Chap. 2 cannot apply to the case of Mahomedan wakfs, because S. 2 expressly leaves intact rules of Mahomedan Law. A passage from Mr. Amir Ali's book on Mahomedan Law Vol. 1. p. 207 (Edn. 4) is cited in order to show that according to the Fatawai Kazi Khan and some other authorities the creditors cannot ask the wakf made by a debtor to be cancelled because they have no claim on the property of the debtor whilst in health. Mr. Amir Ali himself on p. 206 has remarked that on this point the authorities to some extent differ. The Durrulmukhtar states that the wakf of an insolvent mortgagor is void. There is another authority quoted on the same page to the effect that if a person was heavily involved in debt so as to be absolutely insolvent and with the object of defrauding consecrates his property, the Kazi has the power of not recognizing the wakf and compelling him to sell the property to pay his debts. The Raddulmukhtar. a comprehensive work of great authority, lays down that if the wakif has no means to discharge his debt, then the Kazi would declare the wakf cancelled and the property would be sold for the payment of the debt. Mr. Amir Ali has noted on p. 210 that Tanwirulabsar has reconciled these authorities by saying that the wakf of a person whose debts surround his assests should be maintained either by giving him time to pay off his debts or appointing a manager to realise the rents and profits and to pay the debts therewith. If it be wholly impossible to discharge the debts by that process the Judge has the option of directing the sale of the property consecrated. Mr Amir Ali therefore concludes (p. 211):

"it follows from this that the wakf of a person involved in debt is not ipso facto void: it is only voidable if he acts fraudulently to defeat his creditors."

It seems to us in the first place that there is no rule of Mahomedan Law which allows an indebted person to make a wakf of his property with intent to defraud his creditors. In the second place under the Mahomedan Law the Kazi had the power to make the debtor pay all his debts before he maintained the wakf. In the third place the rule under which a manager can be appointed by the Judge to realise the rents and profits and to pay the debts is a mere rule of procedure and not of substantive law, and therefore is not as such enforceable. Thus the provisions of S. 53 in no way offend against any rule of Mahomedan Law and is not inoperative by virtue of S. 2. This was the view expressed by one of us in *Ahamad Husain* v. *Kallu Mian* (1). With that view we fully agree. The findings on both the issues returned by the learned Additional Subordinate Judge are against the plaintiff-respondent. They are challenged before us on his behalf.

It is now common ground that the debts of Tahsin Ali Khan amount to "two lakhs of rupees at least, if not more" and the parties also agreed that the value of the zamindari property should be calculated at the rate of 6 annas per cent per mensam on the net profits. The learned Additional Subordinate Judge has come to the conclusion that the total value of the assets available to the creditors would be Rs. 1,57,000. On behalf of the respondent it is suggested that there are several discrepancies in the figures which make up this total. It is suggested that the value of the *sir* land which is shown to be worth Rs. 2,170 really amounts to

(1) A. I. R. 1929 All. 277.

Rs. 21,070 and that the Court below has wrongly excluded the consideration of Rs. 21,232-2-4 as the amount of arrears due from various tenants. It is also stated that in calculating the total the learned Additional Subordinate Judge has arrived at the figure of Rs. 1,04,815-15-10 wrongly, the correct amount being Rs. 1,19,979. These are the only mistakes which are pointed out on behalf of the plaintiff-respondent.

We fully agree with the Court below that the alleged arrears of rent from the various tenants in the estate cannot be taken into account. In the first place the plaintiff is the lambardar of these villages and has not chosen to produce his own account-books and siyahas which would have shown the actual collections he realised. The entries in the patwari's siyahas cannot be reliable inasmuch as those entries are filed in at the dictation of the plaintiff's karindas and very often are neither exhaustive nor complete and correct. In the next place the creditors will have considerable difficulty in realizing these rents from tenants by attaching them and there can never be any possibility of the whole amount being actually realised. Such arrears do not stand on the same footing as immovable property which can be easily attached and sold.

We may for the sake of argument assume in favour of the plaintiff respondent that the learned Additional Subordinate Judge has committed the other two mistakes in making his calculations but even then, on the plaintiff's own showing the total amount of his assets falls short of two lakhs of rupees by several thousands provided, of course, we exclude the alleged arrears of rent. It is well known that, if the property were sold at auction, it would have fetched far less a value. Under these circumstances it is impossible to hold that the learned Additional Subordinate Judge is not right in finding that the liabilities of the respondent exceeded his assets, at the time when he made the wakf. The previous history and the circumstances under which the wakfnama was executed have already been set forth by us in the opening portion of the judgment. There can be not the least doubt that the main purpose of the execution of this deed was to defeat and delay creditors and that, if this document were to be upheld, the plaintiff's creditors would, without doubt, be not only delayed but also defeated. The document is therefore voidable under S. 53, T. P. Act, as against defendants 1 to 3. Holding that the deed of wakf is not binding on the creditors, we allow this appeal and setting aside the decree of the Courts below dismiss the suit with costs in both the Courts. No decree will be prepared so long as the deficiency in the amount of the costs of translation and printing money has not been made good by the appellant.

P.N./R.K. *Appeal allowed.*

✻ A. I. R. 1930 Allahabad 466

MUKERJI AND BENNET, JJ.

Mt. Kaniz Sughra Bibi — Defendant Appellant.

v.

Mt. Fidai Begam and *another*—Plaintiffs—Respondents.

Second Appeal No. 14 of 1929, Decided on 11th Jan. 1930, from order of Dist. Judge, Allahabad, D/- 4th July 1929.

✻ Specific Relief Act, S. 42—Suit to set aside decree for partition on ground of fraud —Possession of joint property in possession of other party —Injunction not to execute decree need not be asked.

Where a decree for partition of a joint property is sought to be set aside by a separate suit on grounds of fraud, it is not necessary for the plaintiff in the suit to ask for possession of joint property that may be in possession of the other party, nor is it necessary to ask for an injunction that the decree obtained by the opposite party should not be executed.

[P 467 C 1]

Mukhtar Ahmad—for Appellant.

Mukerji, J.—This is an appeal against an order of remand passed by the learned District Judge. The facts very briefly are as follows: The appellant Kaniz Sughra brought a suit for partition of certain joint property against the plaintiff-respondents, who are two minors, and against others. That suit has culminated in a final decree, and it also appears that in execution of that decree Mt. Kaniz Sughra has taken possession over one of the joint houses, being house No. 67. The respondents brought the suit, out of which this appeal has arisen, to obtain a declaration that the earlier decree was not binding on them for the reason that the person, who was appointed their guardian for the suit, did not look after their interest and, in fact, was guilty of fraud.

The first Court dismissed the suit on the ground that the plaintiffs were bound to ask for possession over house No. 67. The learned District Judge on appeal held that the suit was not barred by S. 42, Specific Relief Act. He was of opinion that the possession which was given to the plaintiffs could be obtained back by the plaintiffs by an application under S. 144. Civil P. C. He also repudiated the plea of Kaniz Sughra that the plaintiffs were also bound to ask for injunction that the decree obtained by the appellant should not be executed.

We are of opinion that the order of remand is correct and for the following reasons. The possession which Kaniz Sughera has obtained is possession of what was undoubtedly joint property. If the decree for partition be declared to be null and void, the possession of Sughra would become possession by one co-owner on behalf of all the co-owners. The plaintiffs need not necessarily feel hurt if instead of themselves or any other co-owner, Sughra Bibi, a co-owner, should keep possession over a portion of the joint property.

As to asking for injunction, it was not necessary that any harm that has not already been done should be anticipated against and a prayer should be made for a grant of injunction. Indeed, there is no question of any permanent injunction. A temporary injunction may be asked for in the suit, and if granted that may suffice for the purpose.

The appeal is dismissed under O. 41, R. 11.

V.B./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Allahabad 467

SULAIMAN AND KENDALL, JJ.

(*Babu*) *Raj Narain Rao* and *another*—Plaintiffs—Appellants.

v.

Lala Ram Sarup—Defendant — Respondent.

Second Appeal No. 32 of 1927, Decided on 10th December 1929, against decree of Addl. Dist. Judge, Aligarh, D/- 17th May 1926.

*** (a) Limitation Act, S. 20—Addition of interest to principal by creditor or debtor though in pursuance of agreement originally made does not amount to payment of interest to extend period of limitation.**

In cases where both parties agree to wipe out the previous balance and add the amount of interest to the principal so as to make it a new debt, it may be conceded that such an act may amount to payment of interest within the meaning of S. 20. But such addition of interest to principal must be the result of an agreement between the parties on the date of such payment. If either the creditor or the debtor by himself goes on adding interest to principal in his own books, even the same may be in pursuance of an agreement originally made between parties, there would not be each time this is done a fresh payment to the creditor so as to extend the period of limitation under S. 20: 24 *Bom.* 493; 13 *B. L. R.* 482; 9 *O. C.* 221; *Ref.* [P 468 C 2, P 469 C 1]

(b) Contract Act, S. 25—Express promise to pay is necessary.

To bring a case within S. 25 it is necessary to show an express promise to pay. A mere acknowledgment of liability, even if it implies promise, is not sufficient: 30 *All.* 268; 33 *Cal.* 1047 (*P. C.*); *A. I. R.* 1921 *Pat.* 29, *Rel. on.* [P 469 C 1]

(c) Practice—New plea of limitation can be allowed if no fresh finding is necessary.

The point of limitation though raised for the first time in the High Court can be so allowed to be raised if it does not require any fresh findings. [P 468 C 1]

Panna Lal—for Appellants.

S. K. Dar, *Shiva Prasad Sinha* and *S. B. Johari*—for Respondent.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for recovery of money based on a statement of account dated 17th June 1922, in the handwriting of the defendant. In the plaint the plaintiff alleged that the defendant approached the plaintiffs in 1927 and requested him to advance him money in order to run his business, on the understanding that interest at the rate of 1 per cent per mensem would be paid continually with yearly rests, and that if the defendant failed to pay the annual interest the same would be added to the principal and interest charged on the whole amount at the said rate; that the defendant used to borrow money from 1907 to 1921 and made entries in his account books, and having squared the account he used to credit year after year the amount of interest in the account of the plaintiffs, that a balance was struck on 17th June 1921, and finally on 17th June 1922, the defendant copied out the entire account from his account-books and entrusted the same to the plaintiffs and that the accounts were taken between the parties for the last time on this date, viz: 17th June 1922, when a sum of Rs. 2,000 and odd was struck by the defendant as the balance due by him to

the plaintiffs. The defendant in his defence denied the existence of any loan transactions between the parties at all and pleaded that there was a memorandum book in which he kept an account of dealings with his own father which was stolen by the plaintiff and was produced as evidence in this case. He not only denied the existence of liability but also pleaded that the claim in any event was barred by time.

On 21st August 1924, the Court ordered that the first two issues viz :

(1) Whether the suit was barred by time ? and

(2) Whether the entry as to the striking of a balance relied upon by the plaintiffs required a stamp and whether it was admissible in evidence? which involved legal points, should be decided first. On that date the plaintiffs' pleader Babu Sohan Lal made the following statement :

"The plaintiffs' claim is solely based on S. 19, Limitation Act. In other words, the said section saves the plaintiffs' claim from limitation."

Evidence was accordingly confined to these two issues and the main questions of fact involved in issue 3, viz: whether the defendant borrowed money from the plaintiffs ? If so, how much ? were not gone into at all. Both the Courts below have dismissed the claim as being barred by limitation. In spite of the statement of Babu Sohan Lal, an argument based on S. 20, Limitation Act, was also advanced before the lower appellate Court and disposed of by it. The learned advocate for the appellants has, in addition to relying on Ss. 19 and 20, Lim. Act, also relied on Art. 64, Lim.. Act and S. 25, Contract Act and has urged that his clients are not bound by the admission on a point of law made by their pleader in the trial Court. If the question raised in appeal were a pure question of law which would not require any fresh findings, we would have no hesitation in allowing the point of limitation to be raised before us, even though it were for the first time.

It is quite clear to us that S. 19, Lim. Act, cannot help the plaintiffs. The writing dated 17th June 1922, if treated as a clear acknowledgment of liability, would be an acknowledgment on that date. But according to the account filed, the last advance made by the creditor was on 17th October 1917, and the last payment made by the debtor was on 18th August 1918. Both these items were well over three years previous to the said acknowledgment. The lower appellate Court has distinctly found that this acknowledgment was made after the expiration of the usual period of limitation and could therefore not be relied on by the plaintiffs. We agree with that view.

Section 20, Lim. Act, was pressed before the lower appellate Court, but as appears from its judgment no authority was cited in support of the contention, The case of *G. N. Lakshminarasimham Pantulu* v. *Bharata Mahanty* (1) relied upon by the defendant was not directly in point. But a number of authorities have been produced before us to the effect that for purposes of S. 20 it is not necessary that there should be an actual payment in cash, but that even the addition of interest to the principal may amount to a payment within the meaning of that section. The Court below has assumed, athough the fact was denied in the written statement, that there might have been an agreement to charge compound interest, that is to say, to add interest annually to the principal in case it was not paid. But even if there had been such an initial agreement between the parties, the mere fact that the debtor in pursuance of such an agreement went on adding in his books interest to the principal year after year would not amount to actual payments within the meaning of S. 20, unless the creditor each time agreed to it. The learned advocate for the appellants relied on the cases of *Kasiyappa* v. *Rachappa*, (2) *In re, Tricumdas Mills Co. Ltd.* (3) and *Mohan Lal* v. *Lachman Das* (4). In cases where both parties agreed to wipe out the previous balance and added the amount of interest to the principal so as to make it a new debt due, one may concede that such an act may amount to payment of interest within the meaning of S. 20. But in our opinion such addition of interest to principal must be the result of an agreement between the parties on the date of

(1) [1910] 9 M. L. T. 216=8 I. C. 349.
(2) [1900] 24 Bom. 493=2 Bom. L. R. 378.
(3) [1911] 13 Bom. L. R. 482=11 I. C. 552.
(4) [1906] O. C. 221.

such payment. We are not prepared to hold that if either the creditor or the debtor by himself goes on adding interest to principal in his own books, even though the same may be in pursuance of the original agreement, there would be each time that this is done a fresh payment by the judgment-debtor to the creditor so as to extend the period of limitation under S. 20 of the Act.

In the present case the view taken by the learned Additional District Judge was that it was never the plaintiffs' case that any of the said balances (other than that of 17th June 1922) was struck in his presence and that there is no allegation that there was any settlement of accounts between the parties before that date. There is certainly no evidence on the record to show that the addition of interest to the principal in 1919, 1920 or 1921 was with mutual consent given at the time. We are therefore of opinion that S. 20 cannot help the plaintiffs.

The present claim cannot be considered to be one based on S. 25, Contract Act. Under that section an agreement which is a promise to pay a time-barred debt is good if it is in writing signed by the person to be charged therewith. But to bring the case within that section it is necessary to show an express promise to pay. A mere acknowledgment of liability, even if it implies a promise, would not be sufficient for purposes of this section. There is plenty of authority in support of this view. In the case of *Gobind Das* v. *Sarju Das* (5) the observations of their Lordships of the Privy Council in the case of *Maniram Seth* v. *Seth Rupchand* (6) were fully explained and it was pointed out that an express promise was necessary. The same view has been expressed in the recent case of *Ram Bahadur Singh* v. *Damodhar Prasad Singh* (7). We agree with that view and hold that S. 25 does not apply to this case as there is no express promise to pay contained in Ex. 1.

The last point urged on behalf of the appellants was that this Ex. 1 amounted to a statement of account which gave to the plaintiffs a fresh cause of action and a fresh period of three years. The circumstances under which the plaintiffs obtained this book have not been determined by the Court below and the case has proceeded on the assumption that it is a copy made of the entries in a memorandum of accounts kept by the defendant and handed over to the plaintiffs. But there is no evidence on the record, nor is there any finding that the plaintiffs and the defendant sat down together and went into the whole account, and on an adjustment of the account arrived at the conclusion or agreement that the amount due on 17th of June 1922, was Rs. 2,153-2-0 neither more nor less. The ordinary meaning of the expression "account stated" is given in Wharton's Law Lexicon as:

"the admission of a balance due from one party to another, and that balance being due there is a debt; the statement of the account and the admission of the balance implies a promise to pay it."

But there is undoubtedly, as observed by Blackburn J. in *Leycock* v. *Pckles* (8) a technical meaning attached to this expression, viz:

"the real account stated is when several items of cross-claims are brought into account on either side, and being set against one another, a balance is struck, and the consideration for the payment of the balance is to discharge on either side; each party resigns his own rights on the sums he can claim in consideration of a similar abandonment on the other side, and of an agreement to pay and to receive in discharge the balance found due."

There are numerous cases of the Indian High Courts where this phraseology has been borrowed, and stress has been laid on the restricted meaning of the expression. We may only give references to a few of such cases, viz.: *Nahanibai* v. *Nathu Bhau* (9), *Jamun* v. *Nand Lal* (10) and *Suraj Prasad* v. *W. W. Burke* (11). On the other hand there are undubtedly some observations to the contrary in *Dukhi Sahu* v. *Mahomed Sikhu* (12) and a clear expression of opinion in *Manjunatha Kamti* v. *Devamma* (13), and a reference to such

(5) [1908] 30 All. 268=5 A. L. J. 274=(1908) A. W. N 129.
(6) [1906] 33 Cal. 1047=2 N. L. R. 130=33 I. A. 165 (P. C.).
(7) A. I. R. 1921 Pat. 29=6 Pat. L. J. 121.
(8) [1864] 33 L. J. Q. B. 43.
(9) [1883] 7 Bom. 414.
(10) [1892] 15 All. 1=(1892) A. W. N. 215.
(11) [1920] 5 Pat. L. J. 311=56 I. C. 376=1 Pat. L. J. 190.
(12) [1884] 10 Cal. 884 (F. B.).
(13) [1903] 26 Mad. 186.

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contrary opinion in *Sarifun Mandal in* v. *Feradoul Khatun*, *A. I. R.* 1923 *Cal.*, 578 *at p.* 579. It may be pointed out that the case of *Gaya Prasad* v. *Ram Dayal* (14) was explained in *Bhola Nath* v. *Net Ram* (15), where it was pointed out that the facts of the case make it one of a very restricted application. The learned advocate for the respondent has strongly urged before us that in a purely loan transaction, even though there may be payments by the debtor from time to time, inasmuch as there can be no adjustment of reciprocal claims or demands, the final balance struck even though with mutual consent can never amount to an account stated. On the other hand the learned advocate for the appellants has strenuously urged before us that it is not necessary that there should be mutual demands of claims, but if there are credit and debit entries in an account, though indicating only the advances made by one side and payments made by the other, the final settlement of accounts between the parties may amount to an account stated within the meaning of Art. 64.

There is no doubt that even though no case may be directly in point and exactly similar to the case on facts, there is a preponderance of observations in favour of the contention advanced on behalf of the respondent though there are also express views to the contrary. It seems to us that the principal distinctions between S. 19, Art. 64, and S. 25 are, that acknowledgments under S. 19 may be a purely one-sided and unilateral statement not even addressed to the creditor, whereas the statement of account under Art. 64 must be the result of mutual agreement, and even though it may imply a promise to pay need not be an express promise to pay, but under S. 25, Contract Act, there must of necessity be an express promise to pay. In the present case, however, we do not think it necessary to express a final opinion of this vexed question, inasmuch as in view of the statement of the pleader for the plaintiffs no attempt was made on behalf of the plaintiffs to lead any evidence to show the circumstances under which the copy was made on 17th June 1922. In the absence of such evidence the learned Judge has remarked as follows:

"There is nothing to show what the nature of the original bahi was. In all probability it was just like the bahi produced by the plaintiff. If so, it was a mere memo of account and not an account book regularly kept in the course of the business, as a perusal of it will at once show. There is nothing to show when it was written. It may be that it was all written in a single day. No presumption can be made that the balance referred to in the account book were struck on the particular dates given in the bahi. The plaintiff does not say that any of the said balance (excepting that of 17th June 1922) was struck in his presence."

There is thus nothing to show that the final striking of the balance was a result of a mutual settlement of account between the parties. For aught one knows it might be a mere copy made by the defendant. This is one difficulty in the way of applying Art. 64. In the second place, the article requires that the account stated must have been signed by the defendant. Ex. 1 relied upon by the plaintiffs states at the beginning that this is an account of the defendant. It does not mention with whom. The name of Ram Sarup only appears in this heading which describes the nature of the account. It does not appear at any other place in the book as one would expect a signature to be. Nor does the book contain anywhere the words such as "baqalam khud" or "likhtam khud." But it is admitted that the whole of it is in the handwriting of the defendant.

The learned advocate for the appellants relies strongly on the cases of *Andarji Kalyanji* v. *Dulabh Jeevan* (16), *Jekisan Bapuji* v. *Bhowsar Bhog Jetha* (17), *Sadasook Agarwala* v. *Baikanto Nath* (18), *Mathura Das* v. *Babu Lal* (19) and *Uma Shankar* v. *Gobind Narain* (20) and urges that it is not necessary that a signature as understood in common parlance should appear on the document, but that it is merely necessary that there should be something which would show that the document was intended to have been duly authenticated by the executant. The cases relied upon by him are to some extent similar though not exactly on all fours with the case before us. But having

(14) [1901] 23 All. 502=(1901) A, W. N. 150.
(15) [1906] 3 A. L. J. 800=(1906) A. W. N. 185.
(16) [1880] 5 Bom. 88.
(17) [1880] 5 Bom. 89.
(18) [1904] 31 Cal. 1043=9 C. W. N. 83.
(19) [1876] 1 All. 683.
(20) A. I. R. 1924 All. 855=49 All. 892.

regard to the fact that the book itself in no way suggests that it contained the plaintiffs' account or was an account stated between the parties, we would hold that Art. 64 cannot be made applicable to this case. The result, therefore, is that this appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

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*. A. I. R. 1930 Allahabad 471 (1)

MUKERJI AND BENNET, JJ.

Munna Lal—Plaintiff.

v.

Ram Chandra and *others* — Defendants.

Misc. Ref. No. 836 of 1929, Decided on 2nd January 1930, made by Sub-Judge, Mainpuri.

*** Civil P.C., S. 151—Refund of court-fees paid in excess by inadvertence.**

Under S. 151 the subordinate Courts have power to issue certificates directing the refund of court-fees paid in excess by inadvertence : 14 *W. R.* 1870, 47; 40 *Cal.* 365; 46 *I. C.* 271 and 3 *P. L. J.* 452, *Rel. on.* [P 471, C 2]

U. S. Bajpai—for the Crown.

Bennet, J.—This is a reference under O. 46, R. 1, Civil P. C., made by the learned Subordinate Judge of Mainpuri in regard to an application made to him for a refund of Rs. 10 court-fee excess paid by inadvertence. The applicant had paid Rs. 195 court-fee on a plaint, by an arithmetical error, apparently, for Rs. 185. The learned Subordinate Judge was in doubt as to whether he could issue a certificate under Chap. 17, R. 28, General Rules (Civil) for Courts subordinate to the High Court. His doubt arose because of a letter No. 2541/ *V.S.* 2738 dated 18th December 1926, from the Registrar of the Board of Revenue U. P. to the Collector of Mainpuri, stating in a similar case that the refund was not allowable unless there was a special hardship which might be referred to Government, and returning a certificate of the Subordinate Judge of Mainpuri.

We have heard the learned Government advocate on behalf of the revenue authorities. The applicant has not been represented. It is clear that there is no specific section of the Court-fees Act, or any specific rule under which such a refund can be ordered by a civil Court. The question is whether the civil Court should resort to its inherent power under S. 151, Civil P. C., treating this as an order necessary for the ends of justice. We consider that the applicant ought in justice to receive Rs. 10 excees which he has paid by inadvertence. If the applicant had paid too small an amount, the Court would have recovered the necessary deficiency from him. This subject has come before the Courts for a number of years and the earliest case is reported in *In the matter of G. H. Grant* (1) in which a refund of excess duty paid by inadvertence on an appeal was ordered by the High Court. In *Harihar Guru* v. *Ananda Mahanty* (2) the High Court directed the taxing officer to issue a certificate to enable an applicant to obtain a refund of excess court fee paid. Similarly in *Chandradhari Singh* v. *Tippan Prasad Singh* (3), the Patna High Court acting under S. 151, Civil P. C., held that the Courts have inherent power to pass orders directing the refund of excess court-fee paid by mistake.

We agree with the view held by the Calcutta High Court and the Patna High Court and accordingly we hold that under S. 151, Civil P. C., the Subordinate Courts have power to issue certificates directing the refund of court-fees paid in excess by inadvertence.

Accordingly we return this reference to the learned Subordinate Judge with the direction that he should issue the necessary certificate. No order is required as to costs.

V.B./R.K. *Reference answered.*

(1) [1870] 14 W R. 47.
(2) [1912] 40 Cal. 865=21 I. C. 404.
(3) [1918] P.H.C.C. 273=46 I. C. 271=3 Pat. L. J. 452.

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* A. I. R. 1930 Allahabad 471 (2)

MUKERJI AND KING, JJ.

Mul Chand and *another*—Insolvents.

v.

Official Receiver, Aligarh and *others* —Opposite Parties.

First Appeal No. 132 of 1928, Decided on 15th November 1929, against order of Dist. Judge, Aligarh, D/- 30th March 1928.

*** (a) Provincial Insolvency Act, Ss. 41 and 27**—(Per *Mukerji, J.*)—**Application for discharge under S. 41 refused—Second application is precluded**—(*King, J.*, contra.)

Per *Mukerji, J.*—Ordinarily no second application for discharge by an insolvent is contemplated by law, the first application being sufficient. [P 473, C 1]

Per *King, J.*—When an insolvent applies for discharge within the period specified in order of adjudication under S 27 (1) and his application has been refused, he is not precluded from making a further application for discharge and so remain undischarged insolvent for life: *A. I. R.* 1925 *Mad.* 915 (*F.B.*); *A. I. R.* 1928 *Mad.* 609; *A. I. R.* 1928 *Rang.* 109, *Ref.* [P 473 C 2]

(b) Provincial Insolvency Act, Ss. 41 and 27—Principle on which Ss. 41 and 27 are based.

The overriding intention of legislature in enacting Ss. 41 and 27 is that the debtor on giving up the whole of his property shall be free man again, able to earn his livelihood and having the ordinary inducemsnt to industry. Sometimes it is not right that bankrupt should be free immediately; he must pass through a period of probation and theoretically there may be cases in which he ought not to be freed at all, but prima facie, he is to give up everything he has and on doing that he is to be made a free man: *In re. Gaskell*, (1904); 21 *K. B.* 478, *Ref.* [P 472 C 2]

Gopi Nath Kunzru—for Insolvents.

Panna Lal—for Opposite Parties.

Mukerji, J.—This is an appeal in an insolvency matter, by the insolvents Mul Chand and Jagannath, who are brothers.

It appears that the appellants were declared insolvents and they were directed to apply for discharge within one year of their adjudication. They accordingly applied and the learned Judge has rejected that application. Hence the appeal.

The judgment of the learned District Judge, who is the insolvency Judge in this case, is rather short and runs as follows:

"This is an application for discharge. Not an anna has been paid. The debts are Rs. 6,000 or 7,000. The applicants had apparently a large business. They have produced no books. They had some zamindari property and some houses which were sold in execution of decrees but only after the amounts due had been expended by delay and unavailing litigation. The applicants are not entitled to a discharge. The application is rejected.

It appears to me that the learned Judge has not taken into consideration whether the appellants were not entitled to a conditioual discharge. The Official Receiver reported that under circumstances detailed in his report dated 28th March 1928, "a clear discharge cannot be recommended." Evidently, even the Official Receiver was not prepared to say that the appellants were not entitled to even a conditional discharge or a discharge, the operation of which may be suspended for some specified time, or whether an order suspending the operation of the order and also attaching conditions might not serve the interests of justice.

A consideration of the principles on which the law has been framed will enable us to arrive at proper conclusions having regard to the facts of a particular case. As pointed out by the Court of appeal in the judgment of Vaughun Williams, L. J., *In re, Gaskell* (1) (to which two other learned Lord Justices concurred.)

"After all, the overriding intention of the legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be free man again, able to earn his livelihood and having the ordinary inducements to industry. Sometimes, it is not right that the bankrupt should be free immediately; he must pass through a period of probation; and theoretically there may be cases in which he ought not to be free at all, but prima facie, he is to give up everything he has and on doing that he is to be made a free man."

That being the true principle of bankruptcy laws it would be only in extreme cases that an insolvent will be refused a discharge either absolute or conditional or of any kind whatsoever.

Section 41 read with S. 27, Provincial Insolvency Act, 1920, in my opinion, contemplates the same rule as has been pointed out by Vaughan Williams, L. J. S. 41 of the Act says:

"A debtor may at any time after the order of adjudication and shall within the period specified by the Court apply to the Court for an order of discharge . . . ."

This, when read with the provisions of S. 27 viz., that when an order of adjudication is made, the Court must specify a period within which the debtor shall apply for his discharge and the further provision that on sufficient cause being shown, the 'period within which the debtor shall apply for a discharge may be extended, lead me to the conclusion that there can ordinarily, at least be only one application for discharge. The interpretation that a debtor may apply for a second or third time, so long as he has complied with the rule of applying once within the period specified by the Court is not a valid one. The old law did not require an insolvent to apply for discharge and therefore so long as he did not apply, the Court had no hold over him. Now, the insolvent is

(1) [1904] 2 K. B. 478=73 L. J. K. B. 656=20 T. L. R. 469=91 L. T. 221=11 Manson 125.

under the obligation of applying for a discharge and then all his previous behaviour will come under the scrutiny of the Court, including a review of what he has done since he was adjudicated insolvent, to assist the receiver or the Court in paying up his debts. If he fail to make an application within the period limited by the Court, the adjudication may be annulled with the result that the insolvent may be again arrested in execution of the decree and be subjected to all the other worries of execution. If more than one application had been in contemplation there would be no object in saying in sub-S. 2, S. 27 that the Court might on sufficient cause being shown, extend the period within which the debtor should apply. Further, the language of the words in para. 2, S. 41 indicates that ordinarily a discharge shall be granted, but what would be the nature of the discharge is left to the discretion of the Judge.

I am not deciding—the question does not arise in this case—that where an insolvent's application for discharge has been totally refused, he may not, under any circumstances, come in again and apply for a discharge. He may for example, have been able to pay his creditors in full, long after his first application was totally refused, and he may be allowed to have a full discharge. What I do decide is that, ordinarily, no second application by the insolvent is contemplated by the law, the first application being sufficient.

An order like the one passed by the learned insolvency Judge can be interpreted only as an order refusing to grant any sort of discharge to the applicants and this is not what is, ordinarily, contemplated by the legislature. It may be that the appellants' is an extreme case of dishonest behaviour so as to merit that they shall continue to be undischarged insolvents for the rest of their days. I am not sure whether the learned insolvency Judge contemplated making any such order of far reaching consequence. If he had meant to pass such an order, he would surely have written a longer order explaining all that appears against the applicants. On the report of the Official Receiver and on the facts mentioned in the learned Judge's order, no case has been made out for branding the applicants with the ignominy of undischarged insolvents and burdening them with the disabilities of such persons, for their whole life. In my opinion, the order of the learned insolvency Judge should be discharged and the case sent back to him with the direction that he should reconsider the application and having regard to the remarks contained in the judgment, he should approach the case with a fresh mind and pass proper orders. I would make the applicants pay their own costs in this Court and in the Court below.

King, J.—I concur in the proposed order, but am not prepared to endorse the view that when an insolvent has applied for discharge within the period specified in the order of adjudication under S. 27 (1), and his application has been refused, then it is not open to him to make a further application for discharge and he must remain an undischarged insolvent for life.

I interpret the order under appeal as refusing to grant an absolute order of discharge on the ground specified in S. 42 (1) (b). The Court had jurisdiction to pass such an order, since under S. 41 (2) (a) the Court is expressly empowered to refuse an absolute order of discharge.

In my opinion such an order does not prevent the insolvent from making a fresh application for discharge in case such an application were justified by fresh incumbrances. The refusal of an absolute order of discharge is distinct from the absolute refusal of an order of discharge. The language of S. 41 (1) seems to me sufficiently wide to cover a fresh application made after the refusal of an application made within the period specified.

Moreover, this view appears to have been consistently taken by the High Courts i. e., it has been taken in every reported case which has come to my notice.

In *M. Gopalan Nair* v. *K. Gopalan Nair* (2) a Full Bench of the Madras High Court held that there is nothing in S. 44, Provincial Insolvency Act, 1907, to warrant the suggestion that an application for discharge when refused is refused for ever, and that no later application on renewal of the former application can be made.

Section 44 of the Act, 1907, corresponds to Ss. 41 and 42 of the Act, 1920,

(2) A. I. R. 1925 Mad. 915 (F.B.).

and the slight amendment of the old section does not seem to have the effect of rendering the Full Bench ruling absolute, or of less authority.

In *Velayutha Nadar* v. *Subramania Pillai* (3) a single Judge of the Madras High Court held that the dismissal of the application for discharge (under S. 41 (2) (a) of the Act, 1920) will not prevent the insolvent from presenting further applications for discharge at any later time.

In *Tan Seik Ke* v. *C. A. M. C. T. Firm* (4) a Division Bench of the Rangoon High Court held that the refusal of an application for discharge does not prevent the insolvent from renewing his application for discharge in case fresh circumstances might justify him in doing so.

In view of this consensus of judicial opinion, which seems to me correct, I cannot endorse the contrary opinion expressed by my learned brother.

I do, however, agree with him that the Court's order is not altogether satisfactory. The learned District Judge did not expressly state that he was only refusing an absolute order of discharge, and it is not clear whether he considered the advisibility of granting a conditional discharge, or of suspending the operation of the order for a specified time. On these grounds I agree to the order proposed.

V.B./R.K. *Order accordingly.*

(3) A. I. R. 1925 Mad. 609.
(4) A. I. R. 1928 Rang. 103=6 Rang. 27.

A. I. R. 1930 Allahabad 474

SULAIMAN AND KENDALL, JJ.

Inayatulla—Plaintiff—Appellant,

v.

Madari and *others*—Defendants—Respondents.

Second Appeal No. 174 of 1928, Decided on 7th March 1930, from decree of Dist. Judge, Moradabad, D/- 29th November 1927.

Civil P. C., O. 6, R. 17—Pre-emption suit by cosharer claiming pre-emption on ground of jointness as also by virtue of right under Act—No case of preferential right made out—Mistake discovered after written statement whereupon plaintiff applied to amend plaint as to give cause of action—Facts of case clearly implied what was required to be amended—Plaint was allowed to be amended.

In the plaint in a pre-emption suit the plaintiff alleged that he was a cosharer and was joint in the property transferred with the vendor and that he claimed pre-emption. He also stated "The plaintiff has a right of pre-emption according to the Act in force." He no where alleged that the defendants were strangers to the mahal, nor did he in express terms say that he had a preferential right as against the defendants, though this might be implied from the fact that he was suing to pre-empt them. When the written statement was filed, no plea was taken that the plaint did not disclose any cause of action. Later it was noticed that the plaint was silent as regards the exact status of the defendants. The plaintiff then applied to the Court of first instance for an amendment of the plaint in order to make it clear that the defendants were perfect strangers and the plaintiff had a preferential right as against them. The Munsif thought that he had no jurisdiction to grant this application because the provisions of O. 7, R. 11 were mandatory and no leave to amend the plaint could under the circumstances be granted.

Held: that this was a fit case where application for amendment could be allowed: 44 *Cal.* 352, *Dist.* [P 475 C 2]

Mustaq Ahmad—for Appellant.

Iqbal Ahmad—for Respondents.

Kendall, J.—This is a plaintiff's appeal arising out of a suit for pre-emption. In the plaint the plaintiff alleged that he was a cosharer and was joint in the property transferred with the vendor and that he claimed pre-emption. He also stated:

"The plaintiff has a right of pre-emption according to the Act in force."

He nowhere alleged that the defendants were strangers to the mahal, nor did he in express terms say that he had a preferential right as against the defendants, though this might be implied from the fact that he was suing to pre-empt them. When the written statement was filed, no plea was taken that the plaint did not disclose any cause of action. Later it was noticed that the plaint was silent as regards the exact status of the defendants. The plaintiff then applied to the Court of first instance for an amendment of the plaint in order to make it clear that the defendants were perfect strangers and the plaintiff had a preferential right as against them. The learned Munsif thought that he had no jurisdiction to grant this application because the provisions of O. 7, R. 11 were mandatory and no leave to amend the plaint could under the circumstances be granted. He relied on the case of the *Midnapore Zamindrai Co. Ltd.*, v. *Secy. of State*(1).

(1) [1917] 44 Cal. 352 = 40 I. C. 96 = 21 C. W. N. 834.

He dismissed the application for amendment and rejected the plaint as it disclosed no cause of action. The plaintiff went up in appeal to the District Judge and urged that the plaint did disclose a sufficient cause of action and that in any event the amendment should have been allowed. The learned District Judge is of the same opinion as the first Court and has held that the principle of the Calcutta ruling applied and that the Munsif had no other course open to him but to reject the plaint.

There is no doubt that the plaint was not clear and it may be assumed that the Courts below were right in thinking that it contained no clear allegation which would show that the plaintiff had a preferential right as against the defendants, but the plaintiff wanted to cure this defect by getting his plaint amended. His application for amendment has not been considered on its merits, but has been dismissed on the sole ground that the Courts below had no jurisdiction to entertain it because the provisions of O. 7, R. 11 were imperative and left no choice.

There can be no doubt a second appeal lies because under S. 2 (2), Civil P. C., the order rejecting a plaint was a decree.

It is not necessary to consider the Calcutta case referred to above as the facts are different, inasmuch as in that case the plaint was rejected on the ground that the plaintiff on having been required to supply the requisite stamp paper within the time fixed had failed to do so and also because the prayer to amend the plaint by striking out the paragraph was apparently made only in the High Court.

It seems to us that the Courts below had jurisdiction to entertain the application for amendment. O. 6, R. 17 gives ample power to the Court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as it may seem just. There can be no doubt that on the pleadings both the parties had understood what the plaintiff wanted to establish, and if there was any ambiguity he might well have been allowed to cure it on payment of costs. The plaint when filed was not rejected in the first place, but was actually admitted presumably on the ground that it did disclose a cause of action. Summonses were issued to the defendants and were duly served, and they had actually filed a written statement without raising the point that the plaint disclosed no cause of action. We therefore think that this was a fit case in which the application for amendment should have been allowed.

We accordingly allow the appeal and setting aside the orders of the Courts below send the case back to the Court of first instance through the lower appellate Court with directions to restore it to its original number on the file, and after allowing the amendment on such terms as it thinks fit to proceed to try it in the ordinary course. We direct that the plaintiff should have his costs in this Court and in the lower appellate Court from the defendants who should bear their own costs in those Courts. The costs of the first Court will abide the result.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 475

MUKERJI AND BENNET, JJ.

Ahmad Husain and *others*—Plaintiffs—Appellants.

v.

Tahir Husain and *others*—Defendants—Respondents.

Letters Patent Appeal No. 19 of 1928, Decided on 10th January 1930, from judgment of Dalal, J., D/- 25th November 1927.

Deed—Construction—Surety bond—Entire property made security for periodical payments—Every bit held to be liable for payment of whole.

Where the entire property is made security for the periodical claims that are to accrue from time to time, the presumption is that from time to time a portion of the security would be sold to enable realization of the periodical claim. Every bit of the secured property becomes liable for payment of the whole, and there is no reason for claim to abate in proportion to the extent of the property previously sold. [P 476 C 1]

Mushtaq Ahmad—for Appellants.

Mukerji, J.—The sole question for determination in this appeal is whether the property against which a decree for sale is asked for is liable to pay the entire amount claimed or whether it is liable for only seven-eighths of the amount claimed.

It appears that by a decree based on an award passed in 1901, a certain property was held liable by way of a charge

for the payment of certain profits. The suit is for realization of the said profits. In execution of a previous decree passed in a similar suit, a one-eighth share of the property charged was sold. It was purchased not by the plaintiff as stated in the judgment of the learned single Judge of this Court, but by certain other persons, some of whom are parties to the suit and others are not. The plaintiffs claim a right to bring to sale the remaining seven-eighths share for payment of their entire claim. The learned Munsif was of opinion that a deduction should be made of an eighth portion of the claim, because the property that remained liable was seven-eighths of the entire property.

The learned District Judge has upheld the decree of the Munsif and the decrees of the Courts below have been upheld by a learned single Judge of this Court.

We are of opinion that the remaining mortgage property is liable for the entire claim.

From the nature of the original transaction itself, the entire property was made security for the periodical claims that were to accrue from time to time. It must have been contemplated that, from time to time, a portion of the security would be sold to enable the plaintiff to realise the money then due to him. Every bit of the secured property is liable for the payment of the whole and there is no reason to abate the claim of the plaintiff in proportion to the extent of the property previously sold.

In the result, we allow the appeal, modify the decrees of the Courts below and direct that the entire claim of the plaintiff do stand decreed and that the property mentioned in the plaint be sold in default of payment. The usual decree for sale will be prepared in this Court with six months' time for payment. The plaintiffs will get their entire costs throughout.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 476

BANERJI AND YOUNG, JJ.

Ali Asmat Shakur—Plaintiff—Appellant.

v.

G. I. P. Ry. and *another*—Defendants—Respondents.

Second Appeal No. 1484 of 1927, Decided on 12th March 1930.

Civil P. C., S. 80—Railways Act, S. 77.

A notice under S. 77 would not dispense with the necessity of a notice under S. 80, Civil P. C.: *A. I. R.* 1928 *Bom.* 421, *Foll.* [P 477 C 1]

K. N. Katju—for Appellant.

B. Malik—for Respondents.

Banerji, J.—This is a plaintiff's appeal under the following circumstances. Firm Ishwar Das and Company, sent to the firm Ali Asmat Shakur in the district of Azamgarh certain artificial silk goods which was carried over the G. I. P. Ry., E. I. R. and B. and N. W. Railways. The goods were not delivered and the plaintiff instituted a suit for recovery of the price of the goods on the ground of "non-delivery."

Various defences were raised on behalf of the three railways, but we are now concerned only with the defence of the Secretary of State for India in Council, as admittedly the G. I. P. Railway and the E. I. Railway are owned by the Secretary of State for India in Council. The suit was dismissed by the trial Court on the ground that the plaintiff not having served a notice which complied with the provisions of S. 80, Civil P. C., the suit was not maintainable. The decree of the trial Court was confirmed by the Additional Subordinate Judge on appeal. The plaintiff has come up in appeal to this Court.

The learned advocate for the plaintiff has submitted that no not-ce under S. 80, Civil P. C., was necessary in this case, and even if such a notice was necessary the fact that the plaintiff had made a claim to the Agent of the G. I. P. Railway within six months as provided by S. 77, Railways Act, that notice must be deemed to be one as under S. 80, Civil P. C.

The contention of the learned advocate is that under S. 4, Civil P. C., it is laid down that where there is a specific provision to the contrary the Code shall be deemed to be so limited, and inasmuch as the Railways Act provides by S. 77 that no person shall be entitled to a refund of an overcharge or compensation for loss unless his claim has been preferred in writing to the railway administration, which had been done by his client, it was unnecessary; in fact the law did not require another notice before actually filing the suit. The learned advocate contends that the word "claim" must be treated as an equivalent

to the word "suit." We are unable to accept that contention. It appears to us clear that what was provided for by S. 77 was that a person would not be entitled to claim anything unless he brought to the notice of the railway authorities that there has been loss or destruction or deterioration of goods delivery to be carried by the railway. That does not appear to us in any way to indicate to have anything to do with the institution of a suit by a party against the Secretary of State.

The words of S. 80, Civil P. C., in our opinion are imperative and it prescribes the mode in which notice is to be delivered and the person to whom or at whose office notice is to be delivered, and the notice has also to furnish certain particulars. This in our opinion is a different procedure and was intended for a different purpose than S. 77, Railways Act. We agree with the view expressed in the case of *Hirachand Succaram* v. *G. I. P. Ry. Co.* (1) that a notice under S. 77 would not dispense with the necessity of a notice under S. 80, Civil P. C.

We are therefore of opinion that there is no force in this appeal and we dismiss it with costs.

V.B./R.K. *Appeal dismissed.*

(1) A.I.R. 1923 Bom. 421=52 Bom. 548.

A. I. R. 1930 Allahabad 477

SEN AND NIAMATULLAH, JJ.

Mohammad Tahsin Khan—Defendant—Applicant.

v.

Seth Basant Rai and *others*—Plaintiffs—Opposite Parties.

Civil Revns. Nos. 7 and 26 of 1929, Decided on 11th March 1930, from order of Sub-Judge, Agra D/- 4th August 1928.

(a) Limitation Act, Art. 158—Direction to issue notice is not equivalent to issuing or giving notice.

The direction to issue a notice is not equivalent either to the issue of the notice or of giving of the notice to the parties concerned. [P 478 C 1]

(b) Limitation Act, Art. 158 — "Given" whether means received by party or merely issued: (*Quaere*).

Whether the word "given" in Col. 3, Art. 158, Lim. Act, is to be interpreted as actually received by the party for whom the notice was intended or is to be treated merely as the issue of the notice? [P 478 C 1]

(c) Civil P. C., S. 115—Court refusing to entertain application on erroneous assumption of want of jurisdiction—High Court can interfere in revision.

The Court cannot be permitted to deprive itself of the jurisdiction, which belongs to it, by fastening an erroneous construction upon the words of statute. Where therefore a Court having jurisdiction to entertain an application refuses to look upon it upon an erroneous assumption which is not warranted by facts, a revision lies. [P 478 C 1]

Iqbal Ahmad, *Mukhtar Ahmad* and *Mansur Alam*—for Applicant.

N. P. Asthana, *Baleshwari Prasad* and *Baijnath Sahai* — for Opposite Parties.

Sen, J.—This and the connected application for revision hang and fall together. Seth Jaswant Rai had instituted a suit against Nawabzada Mohammad Ejaz Ali Khan and others. This suit was referred to the arbitration of Khan Bahadur Syed Abdul Hasan, a retired Judge of these provinces. He pronounced an award in favour of the plaintiff and the said award was filed in Court on 13th July 1928.

Article 158, Lim. Act, provides that an application to set aside an award should be made within ten days from the time

"when the award is filed in Court and notice of the filing has been given to the parties."

On 13th July 1928 the learned Subordinate Judge directed that notice of the award should be given to the opposite party. The direction to issue a notice, however, is not equivalent either to the issue of the notice or of giving of the notice to the parties concerned. A registered post card intimating that an award has been filed on 13th July 1928 appears to have been received by Nawabzada Mohammad Ejaz Ali Khan and his pleader on 16th July 1928. The pleader for Mohammad Tahsin Ali Khan signed the order-sheet on 14th July 1928 in acknowledgment of the fact that he had received a notice that the award had been filed on 13th July 1928.

Certain objections were filed to the award on 24th July 1928. These objections were not heard and determined on the merits. The learned Subordinate Judge threw out the objections upon the ground that they were barred under Art. 158, Lim. Act. He gave a decree in accordance with the award.

A preliminary objection was raised by the learned advocate for Seth Jaswant Rai that no application for revision lay to this Court. His objection was that

the Subordinate Judge was competent to go into the question as to whether or not the objections preferred by the defendants were within or beyond limitation. Even on the assumption that the Subordinate Judge decided the point of limitation erroneously, his order in passing a decree in accordance with the award was not open to revision by this Court.

Ex facie the objections dated 24th July 1928 were within time. The objections were filed within ten days of the giving of the notice. We pronounce no opinion upon the point whether the word "given" in Col. 3, Lim. Act, Art. 158, is to be interpreted as actually received by the party for whom the notice was intended or is to be treated merely as the issue of the notice. On the facts, as disclosed by the record, no notice was given to the defendants on 13th July 1928. No notice was issued to the defendants on that date. The Court had only directed the notice to issue. Under these circumstances the objections filed by the defendants on 24th July 1928 were clearly within time.

The Court cannot be permitted to deprive itself of the jurisdiction which belongs to it by fastening an erroneous construction upon the words of the statute. This is not a case of a wrong assumption or non-exercise of jurisdiction but it appears to us clearly a case in which the learned Subordinate Judge having jurisdiction to entertain the application has refused to look at it upon an erroneous assumption which was not warranted by facts that on the date when the application was preferred it was beyond limitation. Under these circumstances the application for revision filed by the defendants in this Court amply satisfies the conditions of S. 115, Civil P. C. We accordingly allow this application, set aside the order of the Court below and send back the case to that Court for trial of the objections on the merits. Costs here and heretofore shall abide the result.

V.B./R.K. *Application allowed.*

A. I. R. 1930 Allahabad 478

DALAL, J.

Mt. Khairunnissa Bibi—Defendant—Appellant.

v.

Mt. Khairunnissa Bibi and *others*—Plaintiffs and Defendants — Respondents.

Second Appeal No. 470 of 1927, Decided on 12th March 1930, from decree of Sub-Judge, Ghazipur, D/- 15th November 1926.

U. P. Land Revenue Act (3 of 1901), S. 233-K—Provisions of S. 233-K apply only to recorded cosharers and are parties to partition proceedings.

The provisions of S. 233-K apply only to the case of recorded cosharers who are parties to the partition proceedings or who should have been made parties thereto and whose claim could be heard under Ss. 111 and 112 of the Act and not to those who were not parties and so could not have objected to the proceedings : 12 *A. L. J.* 1017; 28 *All.* 432; 15 *I. C.* 685; and *A. I. R.* 1924 *All.* 427, *Ref.* [P 479C 1]

Mukhtar Ahmad and *Haidar Mehdi*—for Appellant.

M. Waliullah—for Respondents.

Judgment.—The plaintiffs are four daughters of one Khatun Bibi who died during partition proceedings in a revenue Court. Defendant 1 to this suit, Mt. Khairunnissa, was the applicant for partition and on the death of Khatun Bibi the name of her son Shamsul-Huda was substituted on the record. He being a minor his uncle Hafizullah was appointed guardian. The names of the plaintiffs, daughters of Khatun, were not substituted. The partition was completed and the defendant Khairunnissa obtained separate possession of her 13½ annas share and also separate possession of a plot 989. The plaintiffs brought the present suit for recovery of their shares of three pies in the zamindari property and four sihams out of 16 in plot 989. Their suit was decreed and hence defendant 1 Khairunnissa has appealed. The lower appellate Court unnecessarily varied the decree of the trial Court and gave the father and brother of the plaintiffs also a share in plot 989. This, however, does not in any way prejudice further than was done by the trial Court's decree the rights of defendant 1, appellant here, so it is not necessary to note that the interference of the lower appellate Court was unjustified.

The main argument in appeal was that the plaintiffs' suit was barred by S. 233-K, Land Revenue Act. The argument does not appear to be sound because the provisions of Ss. 111 and 112 are confined to recorded cosharers and the plaintiffs not being recorded cosharers at the time of the partition could not have objected in the revenue Court. The matter is explained at some length in Dr. Agarwala's Commentary on the Land Revenue Act at p. 290. It was held in the case of *Shambhu* v. *Chetram* (1), by a single Judge of this Court that the provisions of S. 233-K, Land Revenue Act, apply only to the case of recorded cosharers who are parties to the partition proceedings or who should have been made parties thereto and whose claims could be heard under Ss. 111 and 112 of the Act. This pronouncement follows an old Bench ruling of this Court of 1906 in *Khasay* v. *Jugla* (2), where a wider principle was laid down that the prohibition contained in S. 233-K, North Western Provinces and Oudh Land Revenue Act of 1901, applies only to suits with respect to partitions in which the plaintiff has had an opportunity of having his objections considered under S. 111 and has not availed himself of it. Subsequently a learned Judge of this Court in 1912 in *Tarifan* v. *Fateh Din* (3), distinguished this ruling in a case which ought really to have been covered by this ruling. The case of *Tarifan* was similar to the present case where the plaintiffs were not recorded cosharers and could not, therefore, take advantage of the provisions of Ss. 111 and 112, Revenue Act. The learned Judge took the Bench ruling in a narrow sense that some failure of the Assistant Collector to follow the procedure prescribed should have been proved. The learned Judge further went on to say that if the plaintiffs were not recorded it was their business to get their names recorded. Such an argument, however, would narrow the period of limitation for recovery of property by heirs deprived of succession. The plaintiffs in the present case could come within 12 years of the death of their mother to recover their share in property, but in case a partition took place they would be deprived of this period of limitation and their rights would be barred thereby. When the provisions of Ss. 111 and 112 are confined to recorded cosharers it is difficult to understand how a person who is not recorded and yet has a right in the property could be deprived thereof within the period of limitation by reason of a partition of the property between the recorded cosharers. Of course, there may be a bar by way of representation as was pointed out by Mukerji, J. in *Karim Bakhsh* v. *Wahajuddin* (4).

In that case the brother was an adult and the sisters lived with him. The brother had every opportunity of putting forward the claim for himself and on behalf of his sisters. Under the circumstances it was held that the brother fully represented the sisters and the sisters were, therefore, prevented from attacking a partition to which the brother was a party. In the present case, however, the brother was a minor at the date of the partition and the lower appellate Court has held as a finding of fact that it was due to collusion between defendant 1, the appellant here, who was the applicant for partition in the partition suit in the revenue Court, and the guardian of the minor that only the minor's name was substituted on the death of his mother and not the names of the plaintiffs. The view taken by the Subordinate Courts is well supported by authority and I do not think that the case reported in the Indian Cases lays down any new principle.

The appeal, therefore, fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1914] 12 A. L. J. 1017=26 I. C. 119.
(2) [1906] 28 All. 432=(1906) A.W.N. 79.
(3) [1912] 15 I. C. 685.
(4) A. I. R. 1924 All. 427=46 All. 214.

A. I. R. 1930 Allahabad 479

SULAIMAN AND KENDALL, JJ.

Ramji Lal and *others*—Defendants—Appellants.

v.

Lala Shib Charan Das—Plaintiff—Respondent.

Second Appeal No. 510 of 1927, Decided on 17th December 1929, from decree of Addl. Dist. Judge, Meerut, D/- 25th January 1927.

Transfer of Property Act, S. 111 (g) (2)—Permanent lease — Forfeiture accrues on

denial of lease and merely allowing previous decree for ejectment to lapse cannot save tenant from his liability.

In the absence of any contract to the contrary under S. 111 (g) (2), a lease of immovable property, even though it may be a permanent lease, determines by forfeiture in case the lessee renounces his character as such by claiming title in himself, (in written statement to rent suit) provided that the lessor does some act showing his intention to determine the lease and since forfeiture accrues even on a denial of lease by a permanent tenant, such tenant cannot escape from such liability merely because a former decree for ejectment against him was allowed to lapse: 24 *Cal.* 440; 36 *Cal.* 1003 *(P.C.)*, *Ref.* [P 481 C 1]

Panna Lal—for Appellants.

P. L. Banerji and *P. C. Mital*—for Respondent.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for ejectment brought by the plaintiff on the ground of denial of title by the defendants who were alleged to be the plaintiff's tenants. Both the Courts below have decreed the claim. In order to appreciate the points which have been pressed before us in appeal it is necessary to give the previous history of the dispute between the parties.

In 1911 the present plaintiff instituted a suit for ejectment against these defendants on the ground that they were tenants at will liable to be ejected at the wish of the plaintiff. This suit was contested by the defendants, who pleaded that under an old contract they had taken land from the plaintiff's predecessor on an agreement to pay a fixed rent of annas 2 per month without any right in the landlord to eject them. The Court of first intance decreed the claim holding that the defendants had failed to prove their permanent rights. On appeal the District Judge reversed the decree, but he was overruled by the High Court which remanded the case. This time the District Judge affirmed the decree of the first Court and his own decree was affirmed by the High Court in 1917. The result was that the plaintiff obtained a decree for ejectment of the defendants on payment of the price of the materials of the house in dispute.

In spite of having obtained a decree for ejectment the plaintiff failed to execute it within the time allowed by law and to obtain delivery of possession through the execution department. His remedy to execute the decree became barred in the middle of June 1920.

Subsequently the plaintiff brought a suit for recovery of rent or compensation for use and occupation, which was ultimately decreed by the High Court in 1925. In the course of this rent suit the defendants had distinctly denied the plaintiff's title to the property. The plaintiff served a notice upon the defendants to vacate the land' and after the expiry of the time fixed therein instituted the present suit for possession by the removal of the constructions. It is this which has been dismissed by the Courts below.

The learned advocate for the appellants contends before us that the present suit is barred by the principle of res judicata as well as by the provisions of S. 47, Civil P. C. For this contention he relies strongly on the case of *Ramanand* v. *Jai Ram* (1) which has been followed in *Ramasami* v. *Muthayya Chetty* (2) and *Shyam Charan Das* v. *Satya Prasad Chaudhuri* (3). The learned advocate for the respondent, however, contends that the principle underlying those cases cannot apply to a suit by a landlord against a person alleged to be his tenant, even though the latter may set up his adverse possession. It seems to us that in the present case it is not necessary to decide that question of law.

We have already remarked that in the suit of 1911 the defendants were admitting their position as tenants, that is, as occupiers of sites on monthly payments of rent without liability to ejectment. They were in substance pleading that they held the land as permanent tenants or lessees and could not be ejected so long as they paid their rents regularly. On the other hand the plaintiff was asserting that they were mere tenants at will, liable to ejectment whenever he wished it. The relation of landlord and tenant was not in dispute between the parties at all, but the only point that was in issue was the nature of the tenancy, whether it was at will or permanent. Even if the suit had been dismissed the relation of landlord and tenant would not have been put an end to but the defendants would still have continued as the tenants of the plaintiff. We are of opinion that the position of the plaintiff cannot be

(1) A. I. R. 1921 All. 369=43 All. 170.
(2) A. I. R. 1925 Mad. 279=48 Mad. 482.
(3) A. I. R. 1923 Cal. 252.

worse if he succeeded in obtaining a decree for ejectment and failed to execute it. In spite of this omission to obtain ejectment through the execution department the relation of landlord and tenant between the parties continued, and the defendants' status was no higher than that of permanent tenants which they had set up. The defendants in that litigation had never set up their adverse title or absolute proprietary interest in the land occupied by them.

Then again the subsequent litigation which resulted in a decree for rent or compensation for use and occupation in favour of the plaintiff re-affirmed the relation of landlord and tenant between the parties and further strengthened the plaintiff's position. The result of that decree was that the plaintiff's right to recover rent from the defendants was distinctly affirmed.

If the position of the defendants was that of tenants, even though they may be assumed to have been permanent tenants, they were subject to the liabilities of such tenants. In the absence of any contract to the contrary, under S. 111 (g) (2), T. P. Act, a lease of immovable property, even though it may be a permanent lease, determines by forfeiture in case the lessee renounces his character as such by claiming title in himself, provided that the lessor does some act showing his intention to determine the lease. That that forfeiture accrues even on a denial of lease by a permannt tenant, is clear from the cases of *Kali Das* v. *Monmohini Dassee* (4) which was approved by their Lordships of the Privy Council and *Abhiram Goswami* v. *Shyama Charan Nandi* (5) at p. 1915. The defendants undoubtedly denied the lease in their written statement filed in the rent suit which made their lease liable to forfeiture. By serving notice on the defendants the plaintiff clearly showed his intention to determine the lease. We do not think that the defendants can escape from such liability merely because a former decree for ejectment against them was allowed to lapse. The denial of the lease was a subsequent act which caused forfeiture and the present suit is based on this fresh cause of action.

(4) [1897] 24 Cal. 440=1 C. W. N. 321.
(5) [1909] 36 Cal. 1003=4 I. C. 449=36 I. A. 148 (P.C.).

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The cases relied upon on behalf of the defendants do not in any way help them. We accordingly dismiss the appeal with costs including in this Court-fees on the higher scale.

V.B /R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 481

BOYS AND YOUNG, JJ.

Emperor

v.

Kanhaiya—Respondent.

Criminal Appeal No. 979 of 1929, Decided on 6th February 1930, against order of Addl. Sess Judge, Moradabad, D/- 22nd June 1929.

(a) Criminal Trial—Acquittal on charge under trial—Court finding accused guilty of another offence but being unable to convict putting him on another trial—Opinion of Court in prior trial cannot be allowed any weight in subsequent trial.

Where a person is acquitted of the offence of which he is charged but the Court finds him guilty of another offence and puts him on trial for that other offence, as it could not convict him of that offence in that trial, the opinion of that Court in prior trial cannot be allowed any weight in the subsequent trial. [P 482 C 1]

(b) Criminal P. C., S. 236—S. 236 applies only in case of doubt.

Section 236 is only applicable where there is doubt as to which of several offences has been committed. [P 482 C 2]

(c) Evidence Act, S. 114—Person carrying in his cart dacoits, one of whom being injured and having blood-stains on clothes soon after dacoity—Unless he explains circumstances presumption is that he knew of part taken by those persons in dacoity and that one injured was injured in dacoity.

Where a man is found taking along in a cart persons one of whom has blood-stained clothes and a broken head, and these persons are subsequently found to have taken part in a dacoity recently before being taken away in the cart, the burden lies upon the cart-man so found in the circumstances to disclose what he knows about the circumstances in which he was found. Failure to discharge the burden will lead the Court to the irresistible conclusion that he must have known that those persons had taken part in the dacoity and that one of them was injured in that dacoity. [P 482 C 2]

U. S. Bajpai—for the Crown.

Binod Behari Lal—for Respondent.

Boys, J.—This is an appeal on behalf of the Local Government. A dacoity was committed on 25th October 1928, as a result of which 7 men were put on trial on charges of dacoity and convicted and they have been sentenced to long terms of imprisonment. The present accused Kanhaiya, against whose acquittal the Local Government have ap-

pealed in this case, was put on trial in the prior case on a charge of abetment and acquitted. The learned Judge was of opinion that the charge of abetme nt must fail, that charge being founded on evidence of acts prior to the dacoity. He was of opinion, however, that Kanhaiya was undoubtedly guilty of the charge of harbouring, but held, and we think in view of the facts, rightly, that he could not in that trial convict Kanhaiya under S. 216-A, I. P. C. Subsequently Kanhaiya has been put on trial under S. 216-A, has been acquitted, and the Local Government have appealed. There can, of course, be no question but that the opinion of the learned Judge who tried the original case cannot be allowed any weight on the merits of the present case. We have only had to refer to it because counsel for Kanhaiya in the present case was anxious that the judgment in the first case should be considered in support of his argument that the second trial was illegal.

On the merits we have no hesitation in saying that the learned Government advocate on behalf of the Local Government has made out his case. The facts are that Kanhaiya was caught on the road very shortly after the dacoity driving a bullock-cart in which were two men, one of whom was sitting, the other lying down, the latter with blood-stained clothes and a broken head. While the Sub-Inspector and his syce, who had stopped the cart, were engaged in arresting the two men in the cart, Kanhaiya succeeded in releasing the bullocks and himself bolting. The bullocks also disappeared. Another man, who was walking alongside the cart, similarly bolted and we hear nothing further of him. Subsequently the ownership of the cart was traced to Kanhaiya and his uncles, and the bullocks which had been in the cart were found at Kanhaiya's house, and Kanhaiya has been identified. The mukhia of his village further gives evidence that Kanhaiya weas making false statements as to an allged theft of his cart and bullocks clearlyin order to account for how his cart could have been found on the highroad. It is not necessary to detail this evidence more precisely, for in fact it is so clear that counsel for Kanhaiya has been unable to challenge it in this Court and has felt constrained to accept the facts alleged by the prosecution. On the merits the only argument that was possible before us is as to whether Kanhaiya had knowledge or not that the two men he was taking along in the cart had committed a decoity. We should have mentioned that these two men were among the dacoits subsequently convicted. When we find a man driving a cart along the road containing two persons, one of whom has blood-stained clothes and a broken head, and that those two persons are persons who have in fact recently taken part in a dacoity, it is manifest that the burden lies heavily upon that person to disclose what he knows about the circumstances in which he was found. Kanhaiya, instead of saying anything whatever to excuse himself, if anything could be said, bolted and even up to the last has not attempted to explain how he was there with the cart, but has simply contented himself with denying everything.

The conclusion is irresistible that Kanhaiya must have known that the two men had been taking part in the dacoity and that one of them had been injured in that dacoity. The only other point urged is that the second trial was barred by the terms of S. 403, and an endeavour is made to bring this case within the terms of S. 236, Criminal P. C. Whatever the true interpretation of S. 236 may be, whether it applies only to cases where all the facts are known and only the application of the law is doubtful, or whether it applies only to cases where, while some of the necessary facts can be proved, pointing to one or another of several offences alternatively, one or more facts cannot be proved, which, if proved, would make it clear which of the offences had been committed, or whether it applies to both types of case, it is not necessary for us in this case to determine. It is clear on the words of the section itself that it is only applicable where there is a doubt as to which offence has been committed. Here counsel for the appellant is constrained to admit that in the previous trial there was no question of any doubt at all as to which of several offences had been committed. The Judge was clear

that the offence of abetment had not been established. He was equally clear that the offence of harbouring had been established, and if there had been any provision of the law permitting him to alter the charge or to add a charge at the last moment, he would have done so. There was no question whatever of doubt whether on the law or on the facts, as to which offence had been committed. No other section but S. 236 could possibly, in the circumstances of the present case, bring it within S. 403, Criminal P. C. That failing, there was nothing illegal in the present trial. We allow the appeal and convict Kanhaiya under S.216-A, I. P. C. and sentence him to three years' rigorous imprisonment.

V.B./R.K. *Appeal allowed.*

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* A. I. R. 1930 Allahabad 483

SULAIMAN, J.

S. A. Dange and *others*—Applicants.

v.

S. T. Sheppard and *another*—Opposite Party.

Criminal Misc. Case No. 96 of 1930, Decided on 20th March 1930.

(a) Allahabad High Court Rules, Chap. 1, R. 1 (14)—Single Judge has jurisdiction to dispose of an application for notice to printer and publisher of newspaper to show cause why they should not be convicted for contempt of Court and if such application come through jail authorities Judge can dispose it of in chambers.

Under Chap. 1, R. 1 (14), sub-Cl. (b), a single Judge has jurisdiction to dispose of an application praying for a notice to be issued to printer or publisher of a newspaper to show cause why they should not be convicted for contempt of Court, when there is no rule expressly. requiring it to be made by a Bench of two or more Judges. Further when such an application is sent through the Superintendent of Jail the Judge can dispose of the matter in chambers without fixing any date for its hearing. [P 483 C 2]

(b) Penal Code, S. 228—Test to see whether publication comes within scope, is, whether publication is likely to interfere with due course of justice.

If the scope of the inquiry or defence is very wide, it cannot be expected that, while the trial is going on, public criticism on all the various subjects involved in the inquiry should be entirely withheld. General comment on these various matters or historical events, so long as they do not directly refer to the part played by the accused, cannot be seriously objected to. Such criticism would not be a comment on pending proceedings at all nor would the publications of such comments ordinarily tend to interfere with the course of justice. The test to be applied is whether the publication is likely to prejudice mankind in favour of or against a party before the case is finally heard or whether it is likely to interfere with the due course of justice. [P 484 C 1]

*** (c) Penal Code, S. 228—Matter relating to antecedent character of accused particularly if suggesting similar offence is contempt.**

Matter published in a newspaper relating to the past life of an accused or to his antecedent character, particularly if it suggests an offence similar to that with which he is charged, is contempt of Court, as it must tend to interfere with the fair trial of that charge. [P 485 C 1]

(d) Penal Code, S. 228—Contempt is matter of substance and not technicality and Court may not interfere if comments are not likely to prejudice fair trial.

The contempt of Court is not a matter of mere form or technicality but of substance, and the jurisdiction to punish for contempt has to be very carefully and cautiously exercised. It is well settled that when the offence is technical or of a slight or trivial nature the Court may condone it. Even if the observation on the subject matter of a proceeding may be likely to interfere with the course of justice and may technically amount to contempt, the Court may not interfere, if it is not satisfied that such comments were calculated to prejudice the fair trial; *In re, New Gold Coast Exploration*, (1901) 1 *Ch.* 860, *Ref.* [P 485 C 1]

Judgment.—This is an application by six of the accused in the Meerut Conspiracy Case drawing the attention of the High Court to the issue of the Times of India dated 25th February 1930, pp. 11 and 17 and praying that a notice be issued to the Editor and the Printer and Publisher, of the said newspaper to show cause why they should not be convicted for contempt of Court.

If I had thought it a fit case for issuing notice to show cause, I would have directed this matter to be laid before the Hon'ble Chief Justice for the constitution of a Bench of three Judges, as has been done in the past in regard to contempt of Court cases. But as I do not propose to take such a step, I think I have jurisdiction as a single Judge under Chap. 1, R. 1 (14) sub-Cl. (b), High Court Rules, to dispose of this application when there is no rule expressly requiring it to be made by a Bench of two or more Judges. Also as the application has been sent through the Superintendent of Jail, I can according to the practice of this Court dispose of the matter in chambers without fixing any date for its hearing. The inherent jurisdiction formerly exercised is now expressly conferred by the Contempt of Courts Act 12 of 1926.

The issue referred to above reproduced a note issued by the Government of Bombay on the labour position in Bombay City. Objection is taken by the applicants not to any comments made by the Editor on that note but on three specific passages in the note itself which has been printed in extenso in the paper. The accused persons are being tried for an offence under S. 121-A, I. P. C., and their grievance is that the publication of this note is likely to prejudice their trial. In para. 6 of their application it is admitted that the subject matter in the trial embraces many subjects and the movements in which the accused took part have become part of history, and:

"It is impossible for anybody to write about or comment on any labour or allied subjects without in some manner or other, directly or indirectly referring to the issues in this case;"

and that:

"the case of the petitioners covers the origin and growth of modern capital going back for centuries, revolutions in all parts of the world, social science, the whole field of sociology and state, the constitutions of several modern forms of state and several countries, including all the historical development of India and its off shoots for the last ten years."

If the scope of the inquiry or defence is so wide, it cannot be expected that, while the trial is going on, public criticizm on all the subjects mentioned above should be entirely withheld. General comment on these various matters or historical events, so long as they do not directly refer to the part played by the accused, cannot be seriously objected to. Such criticizm would not be a comment on pending proceedings at all nor would the publications of such comments ordinarily tend to interfere with the course of justice. The test to be applied is whether the publication is likely to prejudice mankind in favour of or against a party before the case is finally heard or whether it is likely to interfere with the due course of justice. Passage marked A-3 deals with the infusion of communism into the labour movement. No doubt the note refers to the starting of a paper called the "Kranti" (revolution), of which one of the accused is stated in the application to have been the Editor, refers to the formation of a new Girni Kamgar Union, of which some of the accused are stated in the application to have been officebearers and also refers to efforts to bring about strikes with the object of destroying capital and establishing a labour raj: but it does not otherwise refer directly to the accused or any specific activities of theirs which would have a bearing on their alleged offence under S. 121-A. The passage refers to the position in general and is by no means a comment on the pending proceedings or any writing likely to influence the result of that trial. I, therefore, do not think that this amounted to a contempt of the Subordinate Sessions Court.

Paragraph marked A-2 is as follows:

"It is unfortunate that certain individuals are fastening upon the workers, deluding them with promises incapable of fulfilment and endeavouring to use the cloak of trade unionism as a mark for revolution. Such exploitation is disastrous to the working classes themselves and the Government desire to do everything possible to check it."

If the context of the note had shown definitely that any of the accused in the conspiracy trial are meant by the words "certain individuals" who are aiming at revolution, it would undoubtedly be a writing prejudicing the public against the accused concerned during the pendency of the proceedings and its publication would have amounted to a contempt. But even when the whole note is read, it remains doubtful whether the individuals referred to therein are necessarily the accused in the Meerut trial. They are certainly not mentioned by name at or about the place where this passage occurs. It would not be fair to connect this passage with the passage at another place in this long note to be mentioned hereafter. On the whole, I think that this is an ambiguous expression of opinion which cannot be considered to relate necessarily to any of the accused in the Meerut trial. It is, therefore, unnecessary to take cognizance of it.

The passage marked A-1 is slightly more definite and is in the following words:

"The abstention of the Bombay Textile Labour Union threw into relief the activities of the Girni Kamgar Union, more particularly as several of the leaders of that union had been arrested in connexion with the Meerut case, while the public itself felt that the communal riots in the early part of the year had been fomented by the activities of those same leaders in stirring up animosity against the Pathans who helped to break the oil workers' strike."

The reference in the note to the leaders of the union who were arrested

in connexion with the Meerut case as having fomented the riots was not proper, as the Meerut case is still proceeding. It unquestionably implies the suggestion that these persons have fomented the communal riots. Matter published in a newspaper relating to the past life of an accused or to his antecedent character, particularly if it suggests an offence similar to that with which he is charged, is contempt of Court as it must tend to interfere with the fair trial of that charge. Publishing such matters in reference to the parties of a pending prosecution is likely to exercise a prejudice against them in the minds of the public, and it is incumbent on Courts of justice to preserve the minds of the public from being prejudiced against the accused before the trial is concluded. The reproduction of this passage therefore, amounts to a contempt of Court.

But the contempt of Court is not a matter of mere form or technicality but substance, and the jurisdiction to punish for contempt has to be very carefully and cautiously exercised. It is well settled that when the offence is technical or of a slight or trivial nature the Court may condone it. Even if the observations on the subject matter of a proceeding may be likely to interfere with the course of justice and may technically amount to contempt, the Court may not interfere, if it is not satisfied that such comments were calculated to prejudice the fair trial. In *In re, Clemens*, Jessel, M. R. remarked :

"In my opinion although as I say there is here that which is technically a contempt, and may be such a contempt as to be of a serious nature, I cannot think there is any such interferenee or any such fear of any such interference with the due conduct of this action, or any such prejudice to the defendant who is applying here as to justify the Court in interfering by this summary and arbitrary process: *In re, New Gold Exploration Co.* (1)."

There is no affidavit in support of the application, but as I do not propose to issue any notice to show cause, I do not think it necessary to call for affidavits. The proprietors might or might not have been actually aware of the publication of the note, but the Editor and the Printer and Publisher must be presumed to have knowledge of it. The note, however, is not any editorial comment, but is apparently a faithful and bona fide reproduction of a communication issued by the Government of Bombay. There is no reason to imagine that in reproducing it the Editor and the Printer and Publisher of the Times of India had themselves any intention of prejudicing the trial. Such communications are usually printed and published in the ordinary course of business. There cannot be any reasonable apprehension that the Sessions Judge in trying the case or the assessors would be in any way prejudiced by what the Government of Bombay has thought or what the Times of India has published. Nor is there any reasonable apprehension that witnesses who have to depose as to facts would be influenced by the opinions held by others. It is not suggested in the petition that the Editor and the Printer and Publisher of the Times of India themselves were actuated by any malicious motives against the accused in reproducing it.

Having regard to all these circumstances, I do not think that this is a fit case in which notice to show cause should be issued; but at the same time it is necessary that the Editor and the Printer and Publisher should be warned so as not to comment in future on the proceedings of the criminal trial or the antecedent history or character of the accused in any way likely to prejudice the minds of the public in favour of or against the prosecution or any of the accused.

In case either the Editor or the Printer and Publisher named in the application desire to dispute their connexion with the said paper or challenge my conclusion, it would be open to them to apply for a re-hearing, as I am disposing of this matter only ex parte.

I accordingly order that only the warning referred to above should be sent to them by the Registrar.

V.B./R.K. *Order accordingly.*

(1) [1901] 1 Ch. 860=70 L. J. Ch. 355=8 Manson 296=17 T. L. R. 312.

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MUKERJI AND NIAMATULLAH, JJ.

Nannu Mal—for Appellant.

v.

Ram Charan Lal and *others*—Respondents.

Second Appeal No. 1490 of 1926, Decided on 8th November 1929, against decree of Second Addl. Sub-Judge, Aligarh, D/- 13th July 1926.

(a) **Civil P. C., O. 34 R. 1 — Suit for sale without impleading subsequent mortgagee—Subsequent mortgagee can redeem on payment of loan with contractual interest and not decretal amount—Prior mortgagee purchaser is entitled to further interest till his taking possession.**

The fact that the subsequent mortgagee was not made a party to the prior mortgagee's suit, gives the subsequent mortgagee the right to redeem the prior mortgagee, and the amount of money to which the prior mortgagee is entitled is the amount of the mortgage loan with interest at the stipulated rate of interest and not the amount of decree passed on the prior mortgagee's suit. Further if the prior mortgagee himself purchases the property he is entitled to further interest at contractual rate till the date of his taking possession : 41 *Mad.* 513, *Ref. A. I. R.* 1921 *All.* 339, *A. I. R.* 1922 *P.C.* 11, *Dist.* [P 486 C 2, P 487 C 1]

Per Niamatullah, J.—In the absence of any justification for the auction-purchaser for delaying taking delivery of possession he should be saddled with the consequences of the mortgagor being allowed to retain possession of the mortgaged property after confirmation of sale. [P 488 C 2]

(b) **Transfer of Property Act, S. 67—Mortgagee with means to appropriate profits as return on his investment failing to avail them should be debited with that amount as against person who would not prevent wrong party appropriating them.**

Per *Niamatullah, J.*—If a mortgagee having the means to appropriate profits as a return on his investment, fails to avail of such means and allows another to appropriate them, he should be debited with that amount, as against a person who would not prevent a wrong party appropriating these profits. [P 488 C 2]

Shambhu Nath Seth—for Appellant.

S. K. Dar—for Respondents.

Mukerji, J.—The appellant before us was the plaintiff in the Court of first instance : There was an additional plaintiff in the person of Kundan Lal who was originally in the array of defendants but was made a co-plaintiff with Nannu Mal, because the mortgage deed stands in the name of Kundan Lal, while the real owner is Nannu Mal. It being agreed that Nannu Mal is the real mortgagee, Kundan Lal may be left out of account.

The facts so far as this appeal is concerned are these. There were two mortgages. The prior one was in favour of the defendants Ram Charan and Ganga Sahai and the second one was in favour of Nannu Mal, although, as stated, the deed stood in the name of Kundan Lal. Ram Charan and Ganga Sahai brought a suit for recovery of their money on foot of their mortgage, but did not implead either Nannu Mal or Kundan Lal as a party to the suit. The result was that after the usual decree for sale, the property was sold in execution of the decree and was purchased by the mortgagees themselves. After all this had happened, Nannu Mal had brought a suit for recovery of his money. He impleaded Ram Charan and Ganga Sahai as subsequent purchasers of the property. They pleaded that they were also prior mortgagees and they should be allowed to hold their prior mortgage as a shield against Nannu Mal's suit. Thereupon Nannu Mal offered to redeem the prior mortgage in favour of Ram Charan and Ganga Sahai. The question that has arisen for our decision is : What is the amount which Ram Charan and Ganga Sahai should get in order to effect redemption ?

The Court below has held that Ram Charan and Ganga Sahai are entitled to their principal amount and interest at the stipulated rate up to the date of the auction purchase. The contention of the appellant before us is that the prior mortgagees are not entitled to interest on the mortgage money on the stipulated rate, but that they should get only what was decreed to them in the prior suit. In other words, the appellant's contention is that the appellant should have the advantage of the reduction of interest made by the decree after the date of the institution of the suit.

On behalf of Ram Charan and Ganga Sahai a cross-objection has been filed and the contention on their behalf is that they should have been allowed interest up to the taking over possession of the property purchased by them.

The points that we have to determine in this appeal and cross-objection therefore, are as follows :

1. What is the amount of the mortgage money to which a prior mortgagee is entitled in the circumstances of the case, that is to say, whether he is entitled to the stipulated rate of interest or only to the interest which has been allowed by the prior decree ?

2. Whether the prior mortgagee is entitled to interest up to the date of delivery of possession to him or only to the date of the sale ?

On the first point, on principle, there can be no doubt that the prior mortgagee is entitled to the principal amount and the interest at the stipulated rate up to the date of redemption. The fact

that the subsequent mortgagee was not made a party to the prior mortgagee's suit gives the subsequent mortgagee the right to redeem the prior mortgage. As the second mortgagee was not a party to the prior suit, his right of redemption cannot be taken away. But Mr. Seth has contended that on the authorities of this Court the subsequent mortgagee is entitled to take advantage of the decree passed in the prior suit, if that decree is advantageous to him. In the course of the argument he had to admit that if the decree awarded a higher interest owing to some error, he would be entitled to impeach that decree and to contend that the interest awarded should be reduced.

We are of opinion that the subsequent mortgagee cannot blow both hot and cold in the same breath. The authorities on which Mr. Seth has relied are said to be *Hukum Singh* v. *Lallanjee* (1) and *Sukhi* v. *Ghulam Safdar Khan* (2) decided by the Privy Council. In none of the cases do their Lordships discuss this principle. They content themselves with saying that the subsequent transferee who was not made a party to the earlier suit should be in the same position in which he would have been if he had been made a party to the decree. We take it that their Lordships simply meant to say that the right of redemption which belonged to the subsequent mortgagee cannot be taken away by the proceedings in the previous suit. In none of the two cases there is any express finding that the subsequent mortgagee is entitled to take advantage of the reduction of interest in the prior decree and is also entitled to throw away that decree and to claim a reduction of interest if that decree by some error, has made larger interest payable. In *Hukum Singh* v. *Lallanjee* (1) their Lordships did direct payment of the amount due on the prior decree. But as we have pointed out, this may have been done by the consent of the parties or for some reason which has not been disclosed. Unless the point was actually raised and considered, we cannot take what the learned Judges did in that case, as expressing a definite opinion as to what should be done as a matter of principle. Similar remarks apply to the other case in *Sukhi* v. *Ghulam Safdar* (2). Their Lordships of the Privy Council do not anywhere lay down that although a second mortgagee is to be allowed to disregard the decree on the ground that he was not a party to it, he can take advantage of the decree if it suits him and disregard it if it does not suit him.

In the result, the appeal should be dismissed.

Coming to the cross-objection, the question is whether the accrual of interest in favour of the prior mortgagees should cease at the date of the sale as the Court below has ordered or at the date of taking possession.

I am of opinion that the prior mortgagees are entitled to interest at the contractual rate till the date of their actual taking possession. My reasons are these. On logical grounds the mortgagees are entitled to the interest up to the date of redemption. But if any portion of their mortgage money happens to have been paid up by the mortgagor, the prior mortgagees would not be entitled to claim the portion that has been paid to them. The payment to the prior mortgagees does not commence till they obtain possession of the property. It may be said that the mortgagees, in their capacity as auction-purchasers, could take possession as soon as the sale took place. In the same way it may be said, that it was the duty of the mortgagee, whose property has been sold, to hand over to the auction-purchaser, the prior mortgagee, the property as soon as the sale took place. But neither argument takes note of the fact that the interest payable to the prior mortgagee ceases only because he begins to receive payment from the mortgagor. The mortgagor pays up the mortgage money (although not voluntarily) by the fact that his property has gone to the mortgagees in satisfaction of the mortgage decree. That is the principle and that is the only principle, in my opinion, on which the mortgagee has not been allowed any interest at the stipulated rate after the date of his taking possession. Strictly speaking, the rule should be, as was held in the Madras case in *Muthammal* v. *Razu*

(1) A. I. R. 1921 All. 339=43 All. 204 (F.B.).
(2) A. I. R. 1922 P. C. 11 = 48 All. 469 = 48 I. A. 465 (P.C.).

Pillai (3), that the prior mortgagee would receive his interest at the contractual rate till the date of redemption and would account for the profits of the property which he has purchased at auction. It is only for the sake of convenience that the interest is allowed to cease from the date of the mortgagee's taking possession.

In my view, therefore, the cross-objection should succeed and respondents 1 and 2 should be awarded the additional amount of Rs. 239-12-3 as claimed by them in their cross-objection as a part of their mortgage money.

I would, therefore, dismiss the appeal with costs and allow the cross-objection also with costs.

Niamatullah, J.—I agree with my learned colleague in dismissing the appeal. As regards the cross-objection, I am of opinion that the view taken by the lower appellate Court is equitable and also in consonance with law. It is true that under the circumstances of the present case the usual and right course would be to allow, principal and interest up to date, to the prior mortgagee who should account for the rents and profits during the time that he has been in possession of the mortgaged property as auction-purchaser in execution of a decree passed on foot of his own mortgage. But having regard to the attitude of the parties before this Court, this course is to be dispensed with. It has been contended on behalf of the respondents before us that the usufruct of the mortgaged property from the date the prior mortgagee, auction-purchaser, obtained possession, should be considered as taken by him in satisfaction of the interest due on his prior mortgage. The appellant agrees so far with the respondent that the method of adjusting equities between the parties should be by allowing the prior mortgagee, auction-purchaser, to appropriate the usufruct in lieu of his interest, but that the usufruct, from the date he could have taken possession, should be taken into account and not merely from the date that he actually chose to take possession. This being the principle on which the rights and obligations of the parties ought to be adjusted, the question narrows itself down to this : whether profits from the date when the prior mortgagee, auction-purchaser could have taken possession, but for reasons best known to himself, failed to take possession, should be considered to have been appropriated by him in lieu of interest ? I am inclined to agree with the lower appellate Court that in the absence of any justification for the auction-purchaser for delaying taking delivery of possession, we must saddle him with the consequences of the mortgagor being allowed to retain possession of the mortgaged property after confirmation of sale. The respondents are the representatives of the mortgagor and of the prior mortgagee. If it was in consequence of their action that the profits were taken by their predecessor-in-title, the mortgagor, they must bear the consequences and the puisne mortgagee should not be made to pay the interest for that period. If a party having the means to appropriate profits as a return on his investment, fails to avail of such means and allows another to appropriate them, he should be debited with that amount as against a person who could not prevent a wrong party appropriating those profits. For these reasons I would dismiss the cross objection also.

By the Court —The appeal is dismissed with costs. As there is no majority allowing the cross-objection the cross-objection is also dismissed with costs.

We extend the period of payment to be made by defendants 2 to 7 by six months from this date. In the case of failure on the part of defendants 2 to 7 to redeem plaintiff 1, plaintiff 1 will have six months' time from the expiry of six months allowed to the defendants, within which to pay the prior mortgage money, as found by the lower appellate Court, to defendants 2 to 7. In case the plaintiffs fail to pay defendants 2 to 7 the suit will stand dismissed with costs. In case of payment, plaintiff 1 will be entitled to add the two sums of money, viz., the amount decreed to him and the amount paid by him to defendants 2 to 7 and recover the entire amount by sale of the mortgaged property. A fresh decree in terms of O. 34, R. 4, Civil P.C., will be prepared.

V.B./R.K. *Appeal dismissed.*

(3) [1918] 41 Mad. 513=7 M. L. W. 420=44 I. C. 753=(1918) M. W. N. 251.

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BOYS AND NIAMATULLAH, JJ.

Emperor

v.

Nawal Behari Lal—Accused.

Criminal Ref. No. 803 of 1929, Decided on 26th March 1930, made by Assist. Sess. Judge, Allahabad, D/- 22nd November 1929.

Criminal P. C., S. 307—When case is referred, it should be referred as a whole.

When a Sessions Judge refers a case by virtue of the powers given by S. 307 he must refer the whole of the case against the particular accused, and not merely those charges on which there happens to be a finding with which he disagrees. [P 489 C 1]

M. Walliullah—for the Crown.

K. D. Malaviya and *D. P. Malaviya*—for Accused.

Boys, J.—Nawal Behari Lal was put on trial upon charges under Ss. 193, 471 and 467/109, I. P. C. The jury convicted him under S. 193, I. P. C., but acquitted him by a majority of three to two on the other two charges. The learned Judge proceeded to accept the finding of guilty as regards S. 193, and to convict and sentence him to five years' rigorous imprisonment and a fine of Rs. 100. Disagreeing with the jury's verdict on the other two charges he has referred the matter to this Court under S. 307. In the first place we must point out an error into which the learned Judge has fallen. When he refers a case by virtue of the powers given by S. 307, Criminal P. C., he must refer the whole of the case against the particular accused, and not merely those charges on which there happens to be a finding with which he disagrees. In this particular case he should have referred the whole of the case against Nawal Behari Lal instead of merely referring the case so far as the charges under Ss. 471 and 467/109 are concerned, and he should not have proceeded to a conviction and sentence upon the charge under S. 193, I. P. C. Holding as we do this view we shall have, after dealing with the rest of the case, to set aside the conviction and sentence under S. 193 and pass an appropriate order ourselves. The facts against Nawal Behari Lal are very clear. There are four persons concerned in this case Raghunath Lal and Johri Lal, who are uncle and nephew. One Sham Behari Lal was working in partnership with Raghunath Lal and Johri Lal, and it is the case for the accused, and is also admitted by the Crown, that the accused Nawal Behari Lal was acting in certain matters relating to the sale and purchase of coal as an agent on behalf of the firm. Raghunath Lal appears to have taken little or no part in the conduct of the business. Similarly Johri Lal was also practically a sleeping partner, the main conduct of the business being left to Sham Behari Lal. As Johri Lal was leaving Allahabad to arrange for a wedding and there was litigation in contemplation or proceedings, it was desirable to give Sham Behari Lal full authority to act. As Johri Lal was busy and had not time to see to the writing out of a complete mukhtarnamah, he therefore bought a stamp and signed it at the end on behalf of himself and on behalf of his uncle Raghunath, adding, in order to guard against the document being improperly used, the words "*mukhtarnamah likha so sahi.*" The stamp was bought on 23rd February 1925, and according to Johri Lal, was handed over to Sham Behari Lal. Later this stamp appears as the document upon which a suit was filed by Nawal Behari Lal against Johri Lal. In that suit a claim was made for commission on certain coal sales, and the document as filed purported to be an agreement by Johri Lal to pay such commission. The document was manifestly a forgery and it is not now and cannot be denied on behalf of Nawal Behari Lal that it is a forgery. In the civil suit Johri Lal asked that the document might be photographed, and the suit was promptly withdrawn. The criminal proceedings followed.

We have heard Mr. K. D. Malaviya on behalf of the accused. It is quite unnecessary to enter into detailed argument about the case or the charges that were framed in the criminal proceedings. We entirely agree with the order referring the case to this Court which we might amplify, but which it is not necessary to amplify, that the verdict of the jury in reference to the charges under Ss. 467/109 and 471 was ludicrous, if not actually perverse. We have not the shadow of a doubt that Nawal Behari deliberately got the document fabricated and that he used it knowing, of course, that it was farbricated.

We set aside the conviction and sentence under S. 193 arrived at and passed by the Sessions Judge, and for it we substitute a conviction by this Court under S. 193, I. P. C., and further convict Nawal Behari Lal under S. 467/109 and S. 471, I. P. C. In the matter of sentence we have been asked to deal leniently. But arriving at the finding at which we have, there is no shadow of an excuse for dealing with him leniently. The fraud was as deliberate and gross as it could be. We sentence Nawal Behari Lal to five (5) years' rigorous imprisonment under each of the Ss. 193, 471 and 467/109, the sentences to run concurrently; and we further sentence him to a fine of Rs. 100 under S. 467/109. In default of payment of the fine a further three months' rigorous imprisonment will be undergone. The sentence will run as from the date of his conviction by the learned Sessions Judge as the accused has been in jail since that date. A copy of this order will be sent to the learned Sessions Judge in answer to his reference.

V.B./R.K. *Reference answered.*

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BOYS AND YOUNG, JJ.

Emperor

v.

Padam Singh—Respondent.

Criminal Appeal No. 1178 of 1928, Decided on 18th March 1930, against order of Sess. Judge, Saharanpur, D/- 28th September 1929.

*** Penal Code, S. 193—Making false verification to written statement of defendant, with knowledge of its falsehood is offence within meaning of S. 193.**

Since under O. 6, R. 15, Civil P. C., there is an express provision of law requiring the defendant to confirm the truth of the statement made by him in the preceding clauses of his written statement, if he does so knowing that that verification is false, he is declared by legislature in S. 191 as giving false evidence there' by making him liable under S. 193 : 6 *All.* 626 ; *A. I. R.* 1927 *All.* 333 ; 27 *P. R.* 1894 *Cr.* ; 25 *C. W. N.* 886 ; 43 *Cal.* 1001 and *A.I.R.* 1927 *All.* 383, *Ref.* [P 492 C 2]

U. S. Bajpai—for the Crown.

Iqbal Ahmad—for Respondent.

Boys, J.—This is an appeal on behalf of the Local Government from the acquittal of Padam Singh, son of Mohan Singh, who had been found guilty by the trial Court under S. 193, I. P. C., and sentenced to nine months' rigorous imprisonment, but who had been acquitted by the learned Sessions Judge on the ground that the facts did not come, at any rate did not clearly come, within Ss. 191 and 193, I. P. C. Before us two questions have been fully argued, one of law and the other of the merits, and it is incumbent on us to deal with both. The plaintiff in a civil suit was Sher Mohammad Khan. The defendant was the present opposite party, Padam Singh. The suit was brought on the basis of a promissory note said to have been executed by Padam Singh on 15th January 1926, supported by a receipt stated to have been taken from Padam Singh on the same date.

The suit was brought on 11th August 1928 and was decreed ex parte on 25th September 1928. An application for restoration made on 15th October 1928 was allowed on 1st December 1928, and on the same date the defendant, Padam Singh, was directed to file a written statement. He filed the written statement and in it denied execution of the promissory note, denied owing any sum at all and at the end of the written statement he verified these denials stating that the paragraphs in which the denials were made were true to his personal knowledge. No question has been raised before us that the verification was not in the ordinary form called for by O. 6, R. 15.

Having filed this written statement on 1st December 1928, Padam Singh three weeks later, on 20th December 1928, applied that the thumb-impressions on the promissory note and the receipt alleged to be his might be sent for examination.

Police Inspector Gorton of the Finger Print Bureau of the Criminal Investigation Department reported that the finger prints on the promissory note and receipt, which were the basis of the suit, were the finger prints of Padam Singh, the defendant. Padam Singh, having heard that the report was against him, again allowed the suit to be decreed in default. The learned Judge of the Court of Small Causes issued notice under S. 476, Criminal P. C., to Padam Singh to show cause why he should not be prosecuted under S. 193, I. P. C. Padam Singh appeared in response to the notice and threw himself on the mercy of the Court. We have not had his answer

placed before us in detail, but it is common ground between the learned Government Advocate and the counsel for Padam Singh that he did not on that occasion do more than throw himself on the mercy of the Court, more especially he did not set up any defence of any sort that his finger impressions must have been taken from him while he was in a state of intoxication, which was his line of defence at the criminal trial which followed.

As we have said above, Padam Singh was convicted by the Magistrate and has been acquitted by the learned Judge. The Magistrate considered that the only question which he really had to determine was whether the thumb impressions of the accused had been obtained by fraud while the accused was drunk or whether the accused had deliberately perjured himself in the civil Court in order to evade the satisfaction of the loan. Rejecting the accused's defence, he held that Padam Singh was clearly guilty under S. 193, I. P. C., and there is nothing to show that any question was raised before him that if the alleged facts were found against the accused, S. 193, I. P. C., was not applicable. The grounds of appeal to the learned Sessions Judge do not appear to have raised any question but one of fact. But the question of the applicability of S. 193 or, in the alternative, S. 199, I. P. C., was clearly raised before the learned Sessions Judge who was further referred to the decisions in *Queen 'Empress* v. *Meharban Singh* (1) and *Emperor* v. *Janki Rai* (2). After mentioning these cases the learned Judge says :

"In the present case the written statement of Padam Singh is merely a general denial of the claim of the plaintiff, Sher Mohammad Khan, and there is no specific denial of a specific and material fact constituting the plaintiff's claim."

We are unable to attribute any meaning to this statement in view of the actual written statement. The defendant, Padam Singh, began by not admitting the allegations in the plaint, but in his additional pleas he expressly denied that he had executed any pro-note in favour of the plaintiff or that any amount was due to the plaintiff. What more specific denial of a substantial and material fact constituting the plaintiff's claim there could possibly be, it is impossible to conceive. Again the learned Sessions Judge says :

"On general grounds I am of the opinion that statements in the pleadings by themselves should not form the subject of a criminal prosecution."

Again it would seem to us that if "general grounds' are entitled to any weight at all, it would prima facie be most desirable that if a party makes deliberately false statements to a Court intending the Court to be influenced thereby, he should be liable to a criminal prosecution. But it is not on any "general grounds" that a judgment should be based in a matter of this description. It is the province of the legislature to declare in what circumstances a person shall be liable to punishment and it is the duty of the Court merely to determine whether the circumstances in the particular case come within the provisions enacted by the legislature. The learned Sessions Judge next says :

"It is true that the Law Commissioners who drafted the Penal Code were anxious to depart from the rule of the English law on this subject."

The learned Judge has, therefore, quite rightly recognized that any practice that may be current in England can be of no weight in applying the law in this country, if the legislature in this country has in fact carried out its intention of declaring different laws. The learned Sessions Judge next says :

"It is doubtful if the law as actually enacted provides for the punishment of a party making a false allegation in a pleading filed in a civil Court in India."

This is a conclusion to which he was entitled to come and, coming to that conclusion, he was bound to acquit the accused.

The Local Government asks us in this appeal to determine whether on this point the learned Judge was right. This question of law was the first to be argued at length by both sides. We are confident that it can be disposed of briefly. In addition to the two cases to which we have above referred the learned Government Advocate brought to our attention the case of *Lakhu Shah* v. *Queen Empress* (3), the case of *Trailokya Nath Banerji* v. *Rodaranjan* (4), the case of *J. B. Ross & Co.* v. *C. R. Scriven* (5) and the case of *Emperor* v.

(1) [1884] 6 All. 626=(1884) A.W.N. 253.
(2) A.I.R. 1927 All. 388=49 All. 482.
(3) [1894] 27 P.R. 1894 Cr.
(4) [1921] 25 C.W.N. 886.
(5) [1916] 43 Cal. 101=34 I.C. 235=20 C.W.N. 1192.

Janki Rai (2). No other case than these was referred to by counsel for Padam Singh. We do not propose to consider in detail the cases to which we have referred, and though there was on both sides frequent reference to the scope of S. 199, I. P. C., we do not feel that it is incumbent upon us in this case to say anything whatever as to what may be the scope of that section. We propose to confine ourselves to declaring our view of the meaning of S. 191, I. P. C. Its interpretation, in our view, gives no rise to serious difficulty. In the case before us we are not concerned with any affidavit or any statement taken from the parties or any oral evidence given by Padam Singh. We are concerned with the written statement, in which of course must be included the verification, and with that only. S. 191 says :

"Whoever being legally bound by an oath or by express provision of law to state the truth ..... makes any statement which is false and which he either knows or believes to be false or does not believe to be true, is said to give false evidence."

We are invited to rely, and we do rely, on the words :

"bound ..... by express provision of law to state the truth."

It is contended by counsel for the opposite party that a defendant is not legally bound either by any express provision of law or in any other way to file a written statement at all. That of course must at once be conceded. But if he does desire to file a written answer to the plaint, he is by express provision of law bound to do something further. He is bound to attach the verification which is called for by O. 6, R. 15, and his written statement is not, until that verification is attached, a written statement in law at all and could not be received for any purpose whatever. When, therefore, filing a written statement he is bound by express provision of law to verify the facts alleged in that written statement as being true either to his own knowledge or to the best of his belief. It is contended that when the law requires a defendant to verify his written statement it does not necessarily require him to tell the truth. This contention, in our view, is manifestly untenable. Words have a certain meaning and we have only to give them their plain and ordinary meaning, in the absence of any circumstances indicating that that meaning is not permissible. The ordinary dictionary meaning of the word 'verify' used in the present circumstances is : "to confirm the truth or truthfulness of." It was further contended on behalf of the opposite party that the mere fact that in cases under the Income-tax Act and possibly other such Acts a false verification was expressly to be declared to be punishable under S, 177, I. P. C., or some other such section and the absence of any such enactment in connexion with O. 6, R. 15, was sufficient to show that a false verification in accordance with O. 6, R. 15 could be made with impunity.

In other words, we were asked to hold that the legislature orders a defendant to declare that his statements are true and, since it is further emphasised that the same legislature passed all the Acts, in the same breath says that it does not care whether the statements are true or not and that no penalty shall follow the making of a false verification. It is manifest that such an argument would be extremely dangerous. It is not possible for one moment to know what was in the minds of particular individuals when they were considering whether it was necessary or whether it was merely desirable or whether it was undesirable to add a clause declaring under what section of the penal law a person infringing the law should be punishable. We confine ourselves, therefore, to the simple question whether the facts of the case come within S. 191. Here we find that there is an express provision of law requiring the defendant to confirm the truth of the statements made by him in the preceding clauses of his written statement, and if he does so, knowing that that verification is false, he is declared by the legislature in S. 191 itself to be giving false evidence. Whatever may or may not be connoted by the word 'evidence' in other sections, there can be no doubt about the meaning in S. 191 and there can equally be no doubt that the words 'gives false evidence' in S. 193 are used in the same sense as the same words in S. 191, and it has not of course been contended that if S. 191 is applicable to the present case, S. 193 is not applicable. We are, therefore, of opinion that so far as the legal point is concerned the trial Court was right in

holding that an offence had been committed under S. 193, I. P. C.

The next and only other question concerns the merits. The present being an appeal from an acquittal, it was open to counsel on behalf of Padam Singh to contend that on the merits his client should not have been convicted. The trial Court held that there could be no doubt that Padam Singh's defence that the thumb impressions taken from him were taken in a state of intoxication was false. The lower appellate Court, though it has not expressed its opinion so clearly, would at least seem to have been of the opinion that Padam Singh had not substantiated his defence. We have had to hear counsel on both sides on the merits. It is manifest that although the acquittal of Padam Singh by the appellate Court was not an acquittal on merits, it is for the Crown here in appeal to establish that the conviction of the accused on the merits ought to have been sustained, and it is for the Crown to establish that beyond any reasonable doubt. It would serve no useful purpose to enter into the details of the evidence, but we have no hesitation in saying that we are not satisfied beyond reasonable doubt that the conviction of Padam Singh was right. We need only mention one or two outstanding features of the case. When Padam Singh got the suit restored after the first occasion on which it had been decreed in default, he forthwith applied for expert examination of his finger prints. We are informed, and it is not denied, that such expert examination is always carried out by an official of the Criminal Investigation Department, there being no private experts in finger prints. So far then there is no reason for supposing that the accused's application was not bona fide, and this at any rate must stand to his credit. Next we have the fact that the particular promissory note and receipt in question are the only two documents which either side produced before the Court in which Padam Singh signed by means of a thumb impression rather than by his full signature in the Hindi script.

Obviously it might have been difficult for the plaintiff to produce documents on which the defendant had put his thumb impression, but the fact remains that we have several documents of a similar nature on all of which Padam Singh signed his full signature and there is no evidence of his ever having signed any similar document or any other document at all by affixing his thumb impression. Thirdly, there is evidence, which has been believed by the Court below, to the effect that Padam Singh was what may be described as a habitual drunkard. It is, therefore, at least not impossible that advantage might have been taken of him when he was in a state of intoxication. We do not of course suggest for one moment that he has established this, but he has established circumstances rendering his assertion at least not wholly improbable. Finally, there is no satisfactory reason suggested by the man who was plaintiff in the civil suit and is the principal witness for the Crown in the trial why Padam Singh should have on this one occasion signed by means of his thumb impression. In view of these facts we cannot hold it to be satisfactorily established that Padam Singh knew at the time that he filed his written statement that his denial of execution of the document was false denial. The result is that we are of opinion that the Local Government must succeed in its contention that Ss. 191 and 193 are applicable to the case of deliberately false allegations in a written statement and false verification, but that in the particular case the appeal must fail on merits, and it is dismissed.

V.B /R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 493

DALAL, J.

Kashi Ram—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 25 of 1930, Decided on 27th March 1930, against order of Sess. Judge, Saharanpur, D/- 2nd December 1929.

Penal Code, S. 500 — Giving out that woman had miscarriage without knowledge of her marriage is defamation and such statement made in witness-box without such question by Court and when character of woman was not fact in issue is not protected by S. 132, Evidence Act—Evidence Act. S. 132.

To give out that a woman had miscarriage without any knowledge whether she was married or not would amount to defamation because the person who makes the statement would have reasonable belief that such inputa-

tion would harm the reputation of the woman in case she was not married and if such statement is made in a witness-box and especially so in examination-in-chief when the character of the woman is not a fact in issue, the witness is not protected by S. 132, Evidence Act, unless the Judge himself asked the question : 32 *Cal.* 756: 18 *A.L.J.* and 112, *Ref.*

[P 494 C 2, P 495 C 1]

P. L. Banerji and *Shabd Saran*—for Applicant.

M. Waliullah—for the Crown.

Saila Nath Mukerji — for Opposite Party.

Judgment.—Kashi Ram has come here in revision from his conviction by a Magistrate of the First Class for an offence under S. 500, I. P. C. The conviction was upheld by the Sessions Judge. Kashi Ram was a plaintiff in a civil suit where the basis of his claim was that Sheoraj was not the daughter's son of Prithi Singh but was the child of some other woman and Prithi Singh's daughter Mt. Bishan Devi pretended that Sheoraj was her own child. The plaintiff was examined as a witness on 18th March and in his statement he elaborated a long story of inquiries made by Mt. Bishan Devi of a likely boy to be smuggled in as her own and finally, the choice falling on a son of Mt. Jamna of Amritsar. He stated that three women were approached, one was Bal Mukand's wife another Mt. Jamna of Amritsar and a third Mt. Jaggo's husband's sister. This was in examination-in-chief when his own counsel was examining him. He further elaborated how Mt. Jamna's boy had to be smuggled in. He said that Bal Makund's wife gave birth to a female child which could not be taken, and Mt. Jaggo's husband's sister had a miscarriage (the word used in the record of the evidence is abortion), so Mt. Jamna's child who happened to be a boy was the one taken advantage of. The defamation alleged against the applicant Kashi Ram is with reference to his statement that Mt. Jaggo's husband's sister had a miscarriage. It turned out that the girl, the daughter of one Ram Karan Das, was only a child of 12 and not married. Kashi Ram was thereupon prosecuted for defaming the girl. In this Court it was argued:

(1) that the statement did not come within the definition of defamation given in S. 499, I. P. C., and (2) that the statement was privileged under S. 132, Evidence Act.

It was admitted, as it could not be otherwise after the decision of the Full Bench of this Court in *Emperor* v. *Ganga Prasad* (*I. L. R.* 29 *All.* 685), that a witness did not have complete privilege when he made a statement in the witness-box. It was sought to keep the statement out of the definition of defamation on the ground that Kashi Ram himself knew nothing at all about the matter of this woman, that he had received information from one Kishori and that he merely made statements at random without any intention of harming the reputation of any person. I have not examined the record myself, but I was told by Mr. Saila Nath that Kishori denied having given any information to Kashi Ram. The statement, therefore, of Kashi Ram was merely imaginary. A long story was invented by him in order to bolster up his allegation that Sheoraj was not the son of Mt. Bishan Devi. In the definition intending is not the only circumstance of mind of the offender that is included. It is further stated that it will be enough if the offender had knowledge or reasonable belief that such imputation would harm the reputation of any person. To give out that a woman had miscarriage without any knowledge whether she was married or not would amount to defamation because the person who makes the statement would have reasonable belief that such imputation would harm the reputation of the woman in case she was not married. In cross-examination Kashi Ram went to the length of making a reckless statement that he had no knowledge whether Mt. Jaggo's husband's sister was married or not. Obviously what he desired to detail was not an ordinary instance of a miscarriage by a married woman. He was prepared to give out that even if the woman was not married there was certainly a miscarriage. The statement would come within the definition because Kashi Ram being presumably a man of ordinary sense would know that such an imputation about a woman would harm her reputation.

Next we come to the provisions of S. 132, Evidence Act. Two matters are to be kept in mind:

(1) That the matter about which the witness makes a statement is relevant to the matter in issue in any suit; and (2) that the witness was compelled to make the statement which is held to be defamatory.

In my opinion the statement is not protected under either ground. The character of Mt. Jaggo's husband's sister was in no way relevant to the question whether Sheoraj was a son or not a son of Mt. Bishan Devi. There was no allegation that Sheoraj was really the son of Mt. Jaggo's husband's sister. This woman was dragged in merely to give verisimilitude to Kashi Ram's false details of an elaborate story. Even if Sheoraj was really the son of Mt. Jamna, there was no necessity for him to drag in two other women as being ready to offer their children to Mt. Bishan Devi. Kashi Ram's statement was a tissue of lies as regards Mt. Jaggo's husband's sister and lies were in no way relevant. In *Haidar Ali* v. *Abru Mia* (1), two learned Judges of the Calcutta High Court dwelt on the relevancy of the matter in determining whether a particular statement was protected under S. 132 or not. The question there was whether one Haidar Ali was in possession of false weights or not, and a witness stated during the trial that Haidar admitted in the panchayat that Kannu beat him with a wooden shoe. The learned Judges pointed out that this statement had no relevancy whatsoever to the possession of false weights and did not make the possession of false weights more or less probable because of the shoe beating. They, therefore, held that the statement was not covered by the provisions of S. 132. In the present case also I have given reasons why I do not consider the statement or even the mention of Mt. Jaggo's husband's sister in the suit as in any way relevant. Secondly, the statement was made in examination-in-chief when there could be no compulsion for Kashi Ram to make any particular statement. His counsel must have examined him on instructions given by him to counsel. Counsel himself presumably did not invent the story of Mt. Jaggo's husband's sister. There may be cases where questions by one's own counsel may also be taken to be questions to which a witness is compelled to give answers. The present is not such a case. I hold the statement to have been a voluntary statement. Reference was made to the case of *Ganga Sahai* v. *King Emperor* (2). That was a case where the Court itself put a question to the witness. The Judge himself asked the witness why he was suing for his money. The witness replied that he did not desire to leave it with the defendant who was a badmash and a thief. In such a case where the Court itself asked a question the presumption would be that the witness was compelled to answer it. Such a presumption would not exist when the client himself had given instructions to his counsel and the counsel put questions in accordance with those instructions. The statement in such a case would be considered to be voluntary. I dismiss this application.

V.B./R.K. *Application dismissed.*

(1) [1905] 32 Cal. 756=2 C.L.J. 105=9 C.W.N. 911.

(2) [1920] 42 All. 257=54 I.C. 830=18 A.L.J. 112.

A. I. R. 1930 Allahabad 495

DALAL, J.

Baqridee and *another*—Applicants.

v.

Emperor

Criminal Misc. Case No. 3 of 1930, Decided on 23rd January 1930.

(a) Criminal P. C., S. 256—Word 'recall' does not mean re-summon.

The word 'recall' in S. 256 does not mean re-summon. After the examination and cross-examination of the prosecution witnesses, a charge was framed and the Magistrate for reasons recorded in writing required the accused to state forthwith whether they would cross-examine any and what witnesses for prosecution. He further said that the counsel would have opportunity of cross-examining then or never.

Held: that the procedure adopted by the Magistrate was correct: 8 *A.L.J.* 707, *Rel. on.*

[P 496 C 1]

(b) Criminal Trial—Administrative officer cannot merely by reason of his knowledge of important men and their characters, be deprived of jurisdiction as Magistrate.

So long as executive and judicial powers are combined in the same officer, he cannot but have extra-judicial information about men of importance and position in his sub-division and their characters. Merely by reason of such knowledge an administrative officer cannot be deprived of jurisdiction as Magistrate.

[P 496 C 2]

(c) Criminal P. C., S. 526—Magistrate growing angry with accused in one case—

Accused's state of mind while deciding upon transfer application by him in another case will be considered if he is ignorant villager who believes that Magistrate's mind is prejudiced against him for such reason and not where he is well versed in litigation.

The state of mind of the accused with whom the Magistrate had grown angry in a case will be taken into consideration while deciding upon an application for transfer made by him in another case if he is an ignorant villager who would be freightened by the Magistrate being angry with him in one case and would believe that in another case the Magistrate would be for that reason prejudiced against him and not where he is well experienced in the art of litigation. [P 496 C 2]

Zahur Ahmad and *M. A. Aziz*—for Applicants.

U. S. Bajpai—for the Crown.

Judgment.—The main point desired to be made out for this transfer was that the Magistrate hearing the case acted in conflict with the provisions of S. 256, Criminal P. C. After the examination and cross-examination of the prosecution witnesses a charge was framed and the Magistrate for reasons recorded in writing required the accused to state forthwith whether they would cross-examine any, and, if so, which, of the witnesses for the prosecution. The counsel did not desire to do so. The Magistrate said that counsel would have an opportunity of cross-examining then or never. It is suggested in this Court that the provisions of S. 256, Criminal P. C., imply that the question as to re-examination should not be put to an accused person until the next date of hearing. There is a very good answer to this argument given by one of the most experienced Judges of this Court. The learned Judge observed in the case of *Mula* v. *Sheoraj Singh* (1):

"The word "re-call" is very significant and does not mean re-summon. The grace given of two days for cross-examination was a distinct mistake on the part of the Magistrate and should be avoided in future. If the pleader for the defence who had heard the evidence-in-chief is not prepared to cross-examine then and there after the charge sheet had been drawn up, he hardly deserves the name and rank of pleader. Cross-examination is intended for testing the accuracy and credibility of the witnesses, not for building up a case for the defence."

After such specific instructions to subordinate Magistrates I am afraid that the eloquence of the learned counsel Mr. Zahur Ahmad has not produced much effect on me.

(1) [1911] 8 A.L.J. 707=11 I.C. 1007=12 Cr. L.J. 471.

The next point made was that the Magistrate had some extra-judicial information about Baqridi. So long as executive and judicial powers are combined in the same officer this could not be prevented. Some Magistrates are honest enough to disclose their knowledge; others, more experienced, would take the precaution of not disclosing it. But as an officer in an administrative charge of a subdivision he has by the nature of his office to know men of importance and position in his subdivision and their characters. Merely by reason of such knowledge, an administrative officer cannot be deprived of jurisdiction as Magistrate.

The third point was that the Magistrate had in one case told the applicant Baqridee to go out of his sight. The reasons given by the Magistrate for making such a verbal order are satisfactory. Baqridee tried to interfere with some settlement at which the parties to a litigation had arrived in the Magistrate's Court. Baqridee desired to stir up mischief and prevent accommodation, and the Magistrate naturally was not best pleased with the sight of him. It is finally argued that the state of the mind of Baqridee should be considered. This would have been considered if Baqridee had been an ignorant villager who would be frightened by the Magistrate being angry with him in one case and would believe that in another case the Magistrate would be for that reason prejudiced against him. Baqridee is not a man of that type. When the Magistrate turned him out he presented to the Magistrate a petition inquiring of him why he had been angry. A man who does that must be a man well experienced in the art of litigation and not a simpleton. I am perfectly certain that Baqridee does believe that he will get justice in this Court. His desire for transfer appears to me to be due to the hope that by the change of Court his point of view may have a greater chance of success. This application is dismissed.

P.N./R.K. *Application dismissed.*

A. I. R. 1930 Allahabad 497

DALAL, J.

Ram Saran and *others*—Appellants.

v.

Emperor

Criminal Appeal No. 1109 of 1929, Decided on 27th March 1930.

(a) Penal Code, S. 366-A—Father taking away his unhappy daughter from her husband's house and giving her as wife to another commits offence under S. 366-A.

When a married girl is unhappy with her husband and the father takes her from the husband's house and gives her as a wife to somebody else, that can hardly be called trafficking in women but having regard to the provisions of S. 366-A, the act of the father would come within those provisions. [P 497 C 2]

(b) Penal Code, S. 366-A — "Induce".

The word "induce," is used in its ordinary meaning of any words of inducement flowing from one person to the girl. [P 497 C 2]

(c) Penal Code, S. 366-A—Inducement to leave must have for its object seduction by another person.

The inducement to leave must have for its object seduction by another person and not by the person who himself induces the woman to leave. [P 497 C 2]

K. D. Malaviya—for Appellants.

Sankar Saran—for the Crown.

Judgment.—The facts proved to the satisfaction of the Sessions Judge and all the assessors are that Ram Saran, father of a married woman, Suraj Bali and Jagardeo, went to the house of the woman's husband, took the woman away from the house and left her at Jagardeo's house in the position of the wife of Jagardeo. These facts have been conclusively proved. The only question is whether the acts of the appellants amount to an offence. The principal question from the decision is whether the young woman is under 18 or over 18. The burden of proving that she was over 18 lay on the prosecution. I have gone through the evidence. It is of an exceedingly slight nature. The medical witness was of opinion that the girl was under 18 years of age on the date of the occurrence. He, however, gave his opinion in a very hesitating manner to the effect that there might be a difference in the estimate of a year or so. One year is of great importance when the doctor thinks that she is 17 and it is asserted on behalf of the appellants that she is 18. On the side of the appellant Ram Saran the evidence is produced to the effect that the girl is about 22. The girl appeared in Court yesterday and from her appearance she did not appear that she was under 19. All these are mere opinions and there is no definite evidence. Under the circumstances the benefit of the doubt must be given to the appellants, particularly in a case like this, where the father himself has taken the girl from her husband.

The next argument is that the act would not be covered by the provisions of S. 366-A. It is true that those provisions were enacted to give effect to the International Convention for the Suppression of Traffic in Women and Children signed at Geneva in 1922. When a married girl is unhappy with her husband and the father takes her from the husband's house and gives her as a wife to somebody else that can hardly be called trafficking in women. At the same time, having regard to the provisions of the section, I am of opinion that the act of the father would come within these provisions. The provisions will apply to Ram Saran and Suraj Bali. The girl was seduced to illicit intercourse and induced to leave her husband's house for the purpcse. It was objected that there was no evidence of inducement. The word "induce," however, is used in its ordinary meaning of any words of inducement flowing from one person to the girl. The father's telling the girl to come away with him from a house where she was unhappy would amount to an inducement. If the girl had been held by me to be under 18 years of age, I am of opinion, that Ram Saran and Suraj Bali would have been guilty under S. 366-A. As regards Jagardeo, the principal offender, who had kept the girl as his wife, the provisions would not apply as the inducement to leave must have for its object seduction by another person and not by the person who himself induces the woman to leave. Very likely the wording of the section makes the offence much wider than may have been intended by the legislature, but the business of a Court is to interpret the words as they stand and not to make an attempt to discover what offence is particularly meant and what kind of offenders the legislature desired to include in the definition.

In the result I set aside the conviction and sentence and order the release of the appellants. If any of them is on bail his bail bonds shall be cancelled.

V.B./R.K. *Conviction set aside.*

* A. I. R. 1930 Allahabad 498 (1)

MUKERJI AND KING, JJ.

Kali Charan—Appellant.

v.

Mohammad Jamil and *others*—Respondents.

First Appeal No. 99 of 1928, Decided on 23rd October 1929, from an order of Dist. Judge, Shahjahanpur, D/- 25th February 1928.

*** Mahomedan Law — Will — Whole property bequeathed to sons of insolvent heirs with their consent—Will operates only with respect to one-third and receiver can attach two-thirds.**

Where a Mahomedan testator wills away whole of his property in favour of the sons of his heirs, who are declared insolvents, and who consent to its being so willed away presumably to save property from going in the hands of the receiver, the will operates only as to one-third, the two-thirds vesting in the receiver in insolvency. [P 498 C 2]

Shiva Prasad Sinha—for Appellant.

S. Majid Ali—for Respondents.

Mukerji, J.—This appeal raises an interesting point and the facts are these : Two brothers, Matin Khan and Amin Khan, were declared insolvents during the lifetime of their father Wilayat Ali Khan. Wilayat Ali Khan made a gift of his property, the property in question, in favour of his daughter Amina Begam. We take it that Wilayat Khan did not want that his property should go to the creditors of his insolvent sons. Amina Begam died on 15th December 1926. Five days before her death, it is said, Amina Begam executed a will in favour of the respondents who are the sons of her two insolvent brothers Matin Khan and Amin Khan. On the death of Amina Begam the receiver proceeded to attach the property which belonged to Amina Begam under the gift of her father. The two legatees, the respondents, came forward with an objection to the attachment. They said that they alone were the owners of the property under the will of their aunt. The receiver opposed the petition, his contention being that the will was a forgery. The learned District Judge found in favour of the will and released the property from attachment. Hence the appeal.

A preliminary point has been taken on behalf of the respondent that no appeal lies. We are of opinion that having regard to the provisions of S. 75 (2) read with Sch. 1 an appeal is competent. The decision of the learned Judge is a decision on a question of title and an appeal is maintainable.

Before us the decision of the learned District Judge, as to the validity of the will, has not been contested. We must take it, therefore, that the will was actually executed by Amina Begam and attested by her brothers, the two insolvents, Matin Khan and Amin Khan. Amin Khan has since died. The question now is, whether the entire property should be released from attachment or whether only a third share, which alone Amina Begam could give away by means of a will if the two brothers had not been consenting parties. S. 53, T. P. Act, has no application. No rule of law which can be directly applicable has been quoted before us. We have therefore to proceed according to rules of justice, equity and good conscience.

It appears to us that the consent given by Matin Khan and Amin Khan amounts, in the circumstances of the case, only to this: They agreed to the will by which the property went to their sons because they knew that if they did not consent to the will the two-thirds share that they would otherwise get out of their sister's property would go to their creditors. The consent, in the circumstances, should not operate as a valid consent. We hold that two-thirds of the property should be available to the receiver for payment to the creditors. We allow the appeal in part, modify the decree of the Court below and direct that only a one-third share of the property be released from attachment. The parties will pay and receive their costs in proportion to their respective failure and success.

V.B./R.K. *Appeal partly allowed.*

A. I. R. 1930 Allahabad 498 (2)

SEN AND NIAMATULLAH, JJ.

Raghubir Datt Pande and *others*—Plaintiffs—Appellants.

v.

Narain Datt Pande and *others*—Defendants—Respondents.

Second Appeal No. 1160 of 1927, Decided on 21st February 1930, from decree of 2nd Addl, Sub-Judge, Gorakhpur, D/- 22nd April 1927.

(a) Hindu Law—Reversioner—Alienation.

A Hindu reversioner cannot bind his expectant interest or his future rights. 21 *All.* 71 (*P.C.*); 24 *All.* 94 (*P.C.*); *A. I. R.* 1915 *P. C.* 124 and *A. I. R.* 1916 *P. C.* 117, *Ref.*

[P 500 C 2]

(b) Transfer of Property Act, S. 6 (a)—Family arrangement is not transfer.

A family arrangement is in no sense a transfer of property, for no right, vested or contingent, is conveyed by one party to another. The arrangement proceeds upon the assumption that one or other of the claimants has an antecedent title to the property in whole or in part or in unequal proportions, and the entire scheme rests not upon the transfer of a right but upon the recognition of a claim. The true character of the transaction appears to have been a settlement between the several members of the family of their dispute each one relinquishing all claim in respect of the property in dispute other than that falling to his share and recognizing the right of the others allotted to them respectively. The acknowledgment of the claim of one party necessarily involves the abandonment of the claim by another, but this is not equivalent or tantamount to a transfer: 1 *I.A.* 157 (166) (1); 1868 *N. W. P. H. C. R. p.* 82 (84), *Rel. on.*

[P 502 C 1]

(c) Family Arrangement—Family arrangement in substance purporting to be transfer or partition must comply with rules as to stamp and registration.

Where the transaction is intended to operate as a transfer, the formalities enjoined by the Stamp, Registration and Transfer of Property Acts have to be complied with. The imperative requirements of these statutes cannot be evaded or displaced by the parties choosing to describe the document embodying the transaction as a family settlement when, in truth and substance, it is either a transfer of property or a deed of partition. [P 502 C 1]

(d) Family Arrangement — Existence of dispute in praesenti is not necessary but doubtful claim is essential.

The existence of a doubtful claim is essential for a family settlement but the existence of a dispute or controversy in praesenti is not, and a family settlement may be supported on the ground of maintaining peace and goodwill amongst the members of the family, for the preservation of the family honour or of the family property and for the avoidance of disputes and litigation in future. [P 502 C 2]

(e) Estoppel—Reversioner agreeing not to lay claim to reversion on its opening out is estopped from claiming when succession opens out.

Where a reversioner for good consideration agrees not to lay claim to a property when the succession opens out, he must in equity be held bound by that agreement: *A. I. R.* 1918 *P. C.* 70; *A. I. R.* 1926 *All.* 715, *Rel. on.* and *A. I. R.* 1923 *All.* 387 (*F.B.*), *Dist.* [P 502 C 2]

Shankar Saran—for Appellants.

R. K. Malaviya—for Respondents.

Sen, J.—The suit which has given cise to this appeal was for a declaration that certain property situate in mouza Belwa was owned and possessed by the plaintiffs and that the defendants had no title to the same. The plaintiffs alternatively claimed possession.

Bhagwan Dat Pande had three sons: Narayan Dat Pande, Shankar Dat Pande and Nageshar Dat Pande. Plaintiffs 1 to 3 are the sons of Nageshwar Dat Pande and plaintiff 4 is the widow of a predeceased son. Defendants 2 to 5 are the daughters' sons and son-in-law of Narayan Dat Pande in whose favour the latter executed a deed of gift of either the entire property in dispute or of a substantial portion thereof.

Bhagwan Dat Pande was the member of a joint family with his three sons. After his death a disruption ensued. Narayan Dat Pande undoubtedly separated from his brothers, but it is not clear whether any separation took place between Nageshar Dat Pande and Shankar Dat Pande. It is not improbable that Shankar Dat Pande lived in commensality with Nageshar Dat Pande upon the death of Shankar Dat Pande although the name of his widow Mt. Lakhpati was recorded against his share in the revenue papers. It is not improbable that she continued to live jointly with Nageshar Dat Pande and his sons.

On Shankar Dat Pande's death dissension arose between Nageshar Pande and Mt. Lakhpati Parain on the one side, and Narayan Dat Pande on the other. An ejectment suit was instituted by Narayan Dat Pande, defendant 1, against Nageshar Dat Pande and Mt. Lakhpati Parain in the Court of revenue. Narayan Dat Pande claimed to be the exclusive owner of certain *sir* plots and sought to eject Nageshar Dat Pande and Mt. Lakhpati Parain on the allegation that they were merely his tenants-at-will. The defendants to that suit contended that they were co-owners of the property with Narayan Dat Pande and were not tenants at all. By way of relation Nageshar Dat Pande and Mt. Lakhpati Parain instituted a regular suit in the Court of the Munsiff of Deoria against Narain Dat Pande for a declaration that they were the owners in possession of the two-thirds of *sir* and khudkast lands detailed at the foot of the plaint appertaining to a 9 annas 17 gandas odd of zamindari share in mouza Belwa and

that the share of the defendants was no more than one-third. The parties settled their differences by a compromise dated 27th March 1923, the material terms of which as incorporated in the decree were as follows:

"In the above suit the parties have entered into a compromise, under which it has been settled that the plaintiffs' claim shall be decreed in respect of two shares, and that one share shall be allotted to Narain Dat Pande defendant. But Narayan Dat Pande shall get all the *sir* lands in his lot. A detail of it has been given below. If there is any deficiency in the *sir* land, it shall be made good from the *sir* land of the plaintiffs. Entry will be made in the khewat in the same way i. e., two sharer will be recorded in the name of the plaintiffs and one share in the name of the defendant as per detail given below. The papers in the Collectorate will be prepared accordingly. Detail of the lands of the parties is attached to this compromise."

Separate lots were formed. The plots assigned to Narayan Dat Pande with their areas were set out separately from those given to Nageshar Dat Pande. No separate lot was formed of the plots assigned to Mt. Lakhpati Parain and it was probably intended that her share in the property should be included in the lot of Narayan Dat Pande.

The petition of compromise was signed by the four sons of Nageshar Dat Pande and was duly verified by Mt. Lakhpati Parain. Nageshar Dat Pande appears to have died before the compromise. The compromise was also signed by Narayan Dat Pande. He stated in writing that he agreed to the phat bandi and also agreed to Raghubir Dat Pande and others being given two shares in the khewat. It was further stipulated between the parties that after the death of Mt. Lakhpati Parain the property would continue to remain in possession of Raghubir Dat Pande and others and that Narayan Dat Pande would have nothing to do with it.

The immediate effect of the compromise was that Narayan Dat Pande got the bulk of the *sir* plots appertaining to 9 annas and odd share of mouza Belwa which was far in excess of his legitimate share.

Mt. Lakhpati Parain died in December 1923, Narayan Dat Pande in breach of the agreement referred to above applied to the revenue Court for entry of his name against half of the zamindari share, *sir* and khudkasht, etc., which stood recorded in the revenue papers in the name of Mt. Lakhpati Parain. Raghubir Dat Pande and others protested, but the revenue Court overruled their objections and ordered mutation of names in favour of Narayan Dat Pande on 27th March 1927. Following upon this event, Narayan Dat Pande executed a deed of gift in favour of defendants 2 to 5.

These are the facts which led to the present suit. The plaintiffs' claim is founded upon the compromise dated 27th March 1923, the terms of which have been set out above.

The defendants contested the suit upon the ground that the compromise was vitiated by fraud, that it offended against S. 6, T. P. Act, being an agreement to transfer merely a naked possibility of succession to the estate of Nageshar Dat Pande and that the said compromise could not prevail against the rights of Narayan Dat Pande which had come into existence by the death of Mt. Lakhpati Parain.

Neither of the Courts below has recorded a finding on the question as to whether Shankar Dat Pande was separate from his brothers or was joint with Nageshar Dat Pande. If Shankar Dat Pande was separate, his estate devolved upon his widow and during her lifetime, Narayan Dat Pande had only a right of expectancy in the said property. Under the Transfer of Property Act:

"the chance of an heir apparent to succeed to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other near possibility of a like nature,"

is not property as can be validly transferred. The possibility of a Hindu reversioner to succeed to the estate of the last male holder on the cessation of the limited estate of an intermediate female holder is inalienable under S. 6-A, T. P. Act. It is settled law that a Hindu reversioner cannot bind his expectant interest or his future rights: *Sham Sundar* v. *Achham Kumar* (1); *Bahadur Singh* v. *Mohur Singh* (2); *Venkata Naraina* v. *Subbammal* (3) and *Janaki Ammal* v. *Narayana Swami* (4).

(1) [1899] 21 All. 71=25 I. A. 183=7 Sar. 417 (P.C.).
(2) [1902] 24 All. 94=29 I. A. 1=8 Sar. 152 (P.C.).
(3) A. I. R. 1915 P. C. 124=38 Mad. 406=42 I. A. 125 (P.C.).
(4) A. I. R. 1916 P. C. 117=39 Mad. 634=43 I. A. 207 (P.C.).

The Court of first instance did not examine the nature and scope of the compromise. It did not deal with the question whether the compromise directly or indirectly amounted to an alienation of a mere naked possibility of succession. It did not try the larger question whether the compromise operated as, and was intended to be, the record of a family arrangement. There was still another aspect of the case which was not considered by the trial Court. Was not Narayan Dat Pande precluded by his conduct from questioning the legality and validity of the compromise ?

The trial Court held on the evidence that the question of the compromise by Narayan Dat Pande was proved by evidence of unimpeachable character. Narayan Dat Pande had pleaded fraud but had failed to make it out. Upon these grounds the trial Court gave the plaintiffs a decree.

The lower appellate Court has not traversed the finding of the trial Court but has reversed the decision upon three grounds: (1) In the lifetime of Mt. Lakhpati Parain, Nageshar Dat Pande had a mere chance of succession. The compromise created no rights in favour of the plaintiffs inasmuch as it amounted to a contract, surrender or disposal with reference to such a chance; (2) the compromise in question was not of the nature of a family settlement:

"There was no dispute with respect to proprietary rights of Shankar and there was nothing to be settled about it."

The dispute which terminated in the compromise related to certain *sir* and khudkasht lands and not to proprietary rights of Shankar. (3) There was no estoppel against the defendants.

The judgment of the lower appellate Court is clearly wrong and cannot be upheld.

The compromise did not purport to be and was not intended to operate as a transfer of spes successionis. There appears to have been a cloud of uncertainty as regards the legal position of Mt. Lakhpati Parain. It was not clear whether her husband was joint with Nageshar Dat Pande or was separate from him. Unless her husband at the time of his death was separate from his brother, she could not be said to be in possession of his estate as a limited owner and the brothers could not be said to have a right in expectancy in his estate. Indeed, the compromise does not purport to alienate any right in expectancy. In *Joydurga Dasi* v. *Saroj Ranjan Sinha* (5), which was decided on 11th June 1929, their Lordships of the Judicial Committee made the following observation:

"But it was contended that the ekrarnama was not binding upon the appellant at all: it was, in the event which had happened, no more than a grant in favour of the respondants, and while still a mere expectancy, of the interest in Sarat Kumari's moiety to which under the will the appellant, by the operation of the jus accrescendi, might become entitled on her sister's death in her own lifetime; it was accordingly void on the principle enunciated in the decisions of the Board in *Harnath Kuar* v. *Indar Bahadur Singh* (6) and *Annada Mohan Roy* v. *Gour Mohan* (7), with reference to the attempted disposition of his expectancy by a presumptive reversioner during the lifetime of a Hindu widow. Their Lordships were not impressed by this contention of the appellant in support of which, as was admitted, no authority could be found."

"Property" has not been defined in the Transfer of Property Act. Assuming that the interest of the Hindu reversioner is property, its transfer is clearly interdicted by the imperative provision of S. 6-A, T. P. Act. But no such transfer was intended to be made or has been made under the compromise before us. Indeed, the compromise does not imply a definite change of legal relation to any property in praesenti or in future. In *Barati Lal* v. *Salig Ram* (8), a claim was put forward by Barati Lal to the property of one Bhagga Mal as the person entitled to it upon the death of Bhagga Mal's daughter-in-law. That claim was denied by Mt. Mohan Dai, daughter of Bhagga Mal, who asserted that her father was separate and that she was entitled to succeed to the property. The dispute resulted in the execution of a document by Barati Lal for a consideration of Rs. 5,000 by which he abandoned all his claim to the estate of Bhagga Mal and recognized the title of Mt. Mohan Dei as absolute owner. It was held that the transaction was not a transfer of reversionary rights within the meaning of S. 6, T. P.

(5) A. I. R. 1929 P. C. 214.
(6) A. I. R. 1922 P. C. 403=45 All. 179=50 I. A. 69 (P.C.).
(7) A. I. R. 1923 P. C. 139=50 Cal. 929=50 I. A. 239 (P.C.).
(8) [1915] 38 All. 107=31 I. C. 919=13 A.L.J. 1141.

Act. In *Muhammad Hashmat Ali* v. *Kaniz Fatima* (9), it was held by Richard, C.J. and Banerji, J., that there was nothing illegal in a person for a good consideration contracting not to claim in the event of his becoming entitled on the decease of a living person.

The compromise was clearly of the character of a family settlement. The nature and scope of a family arrangement does not appear to have been properly understood or appreciated by the appellate Court. Family arrangement is founded

"on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title was *Rani Mewa Kunwar* v. *Rani Hulas Kunwar* (10). A family arrangement is in no sense a transfer of property, for no right, vested or contingent is conveyed by one party to another. As stated already the arrangement proceeds upon the assumption that one or other of the claimants has an antecedent title to the property in whole or in part or in unequal proportions and the entire scheme rests, not upon the transfer of a right but upon the recognition of a claim"

The true character of the transaction appears to us to have been a settlement between the several members of the family of their dispute, each one relinquishing all claim in respect of the property in dispute other than that falling to his share and recognizing the right of the others allotted to them respectively : *Oudh Behari Lal* v. *Rani Mewa Kunwar* (11). The acknowledgment of the claim of one party necessarily involves the abandonment of the claim by another but this is not equivalent or tantamount to a transfer.

Where the transaction was intended to operate as a transfer, the formalities enjoined by the Stamp, Registration and Transfer of Property Acts have to be complied with. The imperative requirements of these statutes cannot be evaded or displaced by the parties choosing to describe the document embodying the transaction as a family settlement when, in truth and substance, it was either a transfer of property or a deed of partition.

It may be assumed that the previous dispute between the parties did not extend to the entire estate of Shanker Dat Pande but was confined to certain *sir* and khudkasht plots relating to his share. The lower appellate Court is of opinion that in the absence of a dispute relating to the whole estate there can be no valid family settlement. The existence of a doubtful claim is essential for a family settlement but the existence of a dispute or controversy in proesenti is not. A family settlement may be supported on the ground of maintaining peace and goodwill amongst the members of the family, for the preservation of the family honour or of the family property and for the avoidance of disputes and litigation in future.

We have already noticed that Narain Dat Pande obtained as the result of the compromise a larger share in the *sir* land than what he was legitimately entitled to. He agreed, however, not to lay any claim to the property which stood recorded in the name of Mt. Lakhpati Parain upon the latter's death. Narain Dut Pande retains the benefit of the compromise and continues to be in possession of the entire *sir* land allotted to him. Now that Mt. Lakhpati Parain is dead, Narayan Dat Pande repudiates that portion of the compromise which hurts his legal rights under the Hindu Law of succession and wants to take possession of the property which he had agreed to abandon. Where a reversioner for good consideration agrees not to lay claim to a property when the succession opens out, he must in equity be held bound by that agreement. This view was supported in principle by the decision of the Privy Council in *Kanhaiya Lal* v. *Brij Lal* (12) (at 496 of 40 *All.*) which has been followed by this Court in a case similar to the present (*Moti Shah* v. *Gandharap Singh* (13). The case of *Fateh Sing* v. *Rukmani Ramanji Maharai* (14) has been cited to us by the respondent. This was a case of an alienation by a Hindu widow. It was assented to by the reversioner. The facts of this case therefore are easily distinguishable. Narayan Dat Pande had clearly agreed in consideration of his being allowed to own and enjoy the whole of the land, *sir* khudkasht land

(9) [1915] 13 A. L. J. 110=27 I. C. 701.
(10) [1873] 1 I. A. 157=13 B L. R. 312=3 Sar. 314 (P.C.)
(11) [1868] N. W. P. H. C. 82.
(12) A. I. R. 1916 P. C. 70=40 All. 497=45 I.A. 118 (P.C.).
(13) A. I. R. 1926 All. 715=48 All. 637.
(14) A. I. R. 1923 All. 367=45 All. 353 (F. B.).

appertaining to the 9 annas and odd share not to claim any share in the property of Shankar Dat Pande upon the death of Mt. Lakhpati Parain. The agreement in question was valid in law and could be specifically enforced. Narayan Dat Pande is bound by this agreement. He is estopped in law from questioning it.

The result is that we allow the appeal, reverse the decision of the lower appellate Court and restore that of the Court of first instance with costs throughout, including in this Court, fees on the higher scale.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 503

MUKERJI AND NIAMATULLAH, JJ.

People's Industrial Bank, Ltd.—Defendant—Appellant.

v.

Ram Chander Shukul and *others*—Plaintiffs—Respondents.

Second Appeal No. 1818 of 1926, Decided on 22nd November 1929, against decree of Sub-Judge, Mirzapur, D/- 12th May 1926.

(a) Companies Act, S. 160—In case of death of contributory before order, to fix estate with liability legal heirs of deceased contributory must be brought on record before order.

An order against a deceased contributory is a nullity and therefore in order to fix the contributory's estate with the liability, those persons who represent the contributory's estate should be brought on record before an effective order may be made. [P 504 C 1]

(b) Companies Act, S. 171—Leave obtained while suit pending—Leave is not nullity and suit should not be dismissed.

When leave has been granted pending the suit, the leave is not to be treated as a nullity and the suit cannot be dismissed on the ground that before it commenced no leave had been obtained. [P 504 C 1]

(c) Companies Act, S. 171—No Court except the appellate Court can object or question grant or withholding of leave under S. 171 by Company Judge.

The authority who is responsible to see whether winding up proceedings would be properly safeguarded or not by grant or withholding of leave is the Company Judge. If he thinks that leave may be granted it is not the business of anybody else (except the Court of appeal) to say that the leave should not have been granted. [P 504 C 1]

A. Sanyal—for Appellant.

K. N. Malaviya—for Respondents.

Mukerji, J.—This second appeal raises some interesting questions of law and arises out of the following circumstances. The People's Industrial Bank went into liquidation some time ago and it is being wound up under the supervision of the Court. The District Judge of Allahabad is the Court under whose supervision it is being wound up at present. An order to pay a certain amount was passed by the learned Company Judge (learned District Judge) against two persons, namely Chandra Bali Shukla and a female, Mt. Annapurna, the wife of Chandra Bali Shukla. The order was sent down to Mirzapur for being executed. The sons of Chandra Bali Shukla instituted the suit out of which this second appeal has arisen to obtain a declaration that the order of the District Judge against Chandra Bali Shukla was not binding on them, inasmuch as Chandra Bali Shukla was already dead at the date of the order. The liquidator was a party to the suit and one of the objections that he took was that the leave of the Court, under S. 171, Companies Act, had not been obtained before the institution of the suit.

The learned Munsiff found on all points in favour of the plaintiffs, but dismissed the suit on the ground that no leave had been obtained, previous to the institution of the suit, although the learned District Judge of Allahabad did grant leave, on 6th February 1925, while the suit was pending.

The plaintiffs appealed and the learned Subordinate Judge, being of opinion that the leave granted by the District Judge during the pendency of the suit was a good one, allowed the appeal and decreed the suit. The result was that the plaintiffs obtained a declaration that, so far as the order of the learned District Judge in the company proceedings purported to be against Chandra Bali Shukla, it was void and was not executable against his sons.

The liquidator has come up in second appeal and he has raised two points. The first is that the order is not a nullity simply because it was passed against a deceased person. The contention is that Chandra Bali Shukla was a contributory and it was in that capacity that the order was passed against him. We are not in a position to find out, at present, in what capacity Mr. Chandra Bali Shukla was held liable. Assuming

that he was a contributory, an order against a contributory can be valid only when it is obtained in his life-time. There can be no doubt as to the liability of his estate, but to fix it with liability those persons who represent that estate should be brought on the record before an effective order may be made.

Coming to the other point, no authority has been cited before us. We have to remember that we are not sitting in appeal against the order of the learned District Judge dated 6th February 1925. That was an appealable order, and it was open to the liqidator to come up to this Court and to have it set aside. That order was passed, we take it, after notice to the liquidator; for the learned Judge says: "The liquidator is absent." The question that we have now to answer is: "whether when a leave has been granted, pending the suit, the leave is to be treated as a nullity and the suit is to be dismissed on the ground that, before it commenced, no leave had been obtained?"

Supposing that the Court of first instance dismissed the suit on the ground that there was no leave obtained prior to the institution, of the suit, what was there to prevent the plaintiffs from filing a fresh suit? The dismissal of the suit after the leave has been granted would be a pure technicality and would serve no useful purpose to anybody. We have noted that if a fresh suit had been commenced after the grant of leave by the learned District Judge, no plea of limitation could have been successfully taken against such a suit and we also note that in this case the leave was obtained before the issues were framed.

The authority who is responsible to see whether the winding up proceedings would be properly safeguarded or not by grant or withholding of the leave is the Company Judge. If he thinks that leave may be granted, it is not the business of anybody else (except the Court of appeal) to say that the leave should not have been granted. What the learned Munsiff has done is to sit in appeal against the order of the learned District Judge and practically, to set it aside. A *Punjab* case has been cited to us: see *Amritsar Banking Co. Ltd.* v. *Mohan Lal* (1), on behalf of the appellant; but that was a case in which the Judge, being seised of the company proceedings, granted leave and the Chief Court set aside that order on the ground that, in the circumstances of that particular case, it was not expedient to grant the leave and the learned Judge in the Court below had not considered properly whether the interests of the winding up would be served by granting the leave. That case has no application here.

We are of opinion that the appeal ought not to succeed and we accordingly dismiss it. Parties must pay their own costs throughout.

V.B./R.K. *Appeal dismissed.*

(1) [1917] 13 P. R. 1917=37 I. C. 791=29 P. L. R. 1917.

A. I. R. 1930 Allahabad 504

SEN AND NIAMATULLAH, JJ

Bajrangi Misir — Defendant — Appellant.

v.

Padarath Singh and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1258 of 1927, Decided on 20th February 1930, from decision of Addl. Sub-Judge, Jaunpur, D/- 25th March 1927.

(a) Hindu Law—Alienation—Legal necessity—Two members of joint Hindu family between themselves and their sons occupying respectable positions in their society and village, borrowed Rs. 70 on mortgage of joint family property and spent the same on Gauna ceremony of daughter of their family—Money spent is warranted by legal necessity.

While considering legal necessity for a mortgage social considerations cannot be ignored. If, having regard to what is customary in the society to which the family belongs a certain expenditure is reasonable such that a prudent man similarly situated would incur or such that other members, if adult, are likely to sanction, it may well be regarded as money spent on legal necessity. The circumstances of the particular family, such as its means, social customs and sentiments, the purpose on which the sum in question is to be spent, its adequacy or otherwise are some of the considerations which will determine the propriety of the expenditure in a given case.

Where two brothers who are members of a joint Hindu family between themselves together with their sons and occupying a respectable position in the village and in their society borrow Rs. 70 on a mortgage and spend the sum on the Gauna ceremony of a daughter of their family, the money spent must be held to be warranted by legal necessity and as such binding on the sons: 37 *Cal.* 1, *Rel. on.*

[P 505 C 2, P 506 C 1]

(b) Hindu Law—Alienation — Manager—Necessity — Interest — Two brothers who were members of joint Hindu family bet-

ween themselves and their sons mortgaging property and agreeing to pay interest at one per cent per mensem—Stipulation, in default of payment of interest at end of year, for compounding interest at the end of that year is not unreasonable.

If manager mortgagor agrees to pay an abnormally high rate of interest, it is the duty of the mortgagee to satisfy the Court that the mortgagor could not have raised money at a lesser rate of interest or that the rate agreed on was otherwise justified. But if the rate of interest is prima facie reasonable it may be considered to be justified.

Where two brothers, who are members of a joint Hindu family between themselves and their sons, mortgage property agreeing to pay interest at 1 per cent per mensem and further stipulate that if interest is not paid at the end of a year it shall be added to principal, and interest at the contractual rate is to run on the aggregate amount of principal and interest, such stipulation is not unreasonable: *A. I. R.* 1919 *P. C.* 12, *Expl.* [P 506 C 2]

Harnandan Prasad—for Appellant.

U. S. Bajpai—for Respondents.

Niamatullah, J.—This is a defendants' appeal arising out of a suit brought by the plaintiffs-respondents for enforcement of a hypothecation bond dated 24th November 1914 executed by Udit Misra, defendant 1, and Lachhman Misra, defendant 2. Defendant 3 is the son of Udit Misra and defendant 4 is the son of Lachhman Misra. They were both infants when the mortgage deed was executed. The sum advanced under the deed in suit is Rs. 300. The rate of interest agreed on is 1 per cent per month. The mortgage money is payable in two years time. It is agreed that if interest is not paid at the end of a year it shall be added to the principal, and interest at the contractual rate is to run on the aggregate amount of principal and interest. No payment was made and the sum claimed by the plaintiffs-respondents came to Rs. 1,180-9-0 at the date of the suit, namely, the 30th June 1926.

The only defences to which it is necessary to refer are: (1) that there was no legal necessity for the loan contracted by defendants 1 and 2; and (2) that, at any rate, the high rate of interest which the executants agreed to pay was not justified by any family necessity.

Both the lower Courts have found that a sum of Rs. 230 out of the consideration of Rs. 300 represented an antecedent debt payable by defendants 1 and 2. The question of legal necessity can thus be raised only with regard to the sum of Rs. 70. Both the Courts are again agreed that this sum was borrowed by defendants 1 and 2 for expenses of the Gauna ceremony of the daughter of one of the executants. It should be mentioned that the first two defendants are brothers and members of a joint Hindu family between themselves together with their sons, defendants 3 and 4. The Court of first instance held that the expenditure of money on the Gauna ceremony of a daughter is not warranted by legal necessity. The lower appellate Court has taken a different view and held that a loan for meeting the expenses of Gauna ceremony is justified and should be considered to be for legal necessity and binding on other members of the joint Hindu family. As regards the rate of interest, the two lower Courts have likewise differed, the Court of first instance holding that the stipulation as to compound interest has not been shown to be justified; the lower appellate Court, on the other hand, is of opinion that the rate of interest stipulated for in the bond in suit is reasonable and should be considered to be justified by the necessities of the case.

It has been argued before us on behalf of the defendant-appellants that the Gauna ceremony is not essential according to the rules of Hindu Law. The learned advocate for the appellants has not been able to support his contention by any authority. On the other hand, the view taken by the lower appellate Court is based on *Churaman Sahu* v. *Gopi Sahu* (1) in which it was held that a Hindu widow governed by the Mitakshara Law was competent to make a gift of a reasonable portion of her husband's immovable property to her daughter on the occasion of her Gauna ceremony and that such a gift is binding upon the reversionary heirs of her husband. The principle underlying this view takes account not only of what is strictly enjoined by rules of religion but also of social considerations which cannot be altogether ignored. If, having regard to what is customary in the society to which the family belongs, a certain expenditure is reasonable, such that a prudent man similarly situated would incur or such

(1) [1910] 37 Cal. 1=10 C. L. J. 545=1 I. C. 945=13 C. W. N. 994.

that other members, if adult are likely to sanction, it may well be regarded as money spent on "legal necessity," a phrase which is not capable of an exhaustive definition. The circumstances of the particular family, such as its means, social customs and sentiments, the purpose on which the sum in question is to be spent, its adequacy or otherwise, are some of the considerations which will determine the propriety of the expenditure in a given case. The defendants are Brahmans occupying a respectable position in the village and in their own society. It was not at all unreasonable that a sum of Rs. 70 should have been spent on the Gauna ceremony of a daughter of their family. We are therefore of opinion that the expenditure was one which a prudent man would incur and which defendants 3 and 4 would have incurred if they had managed the affairs of the family.

As regards the rate of interest agreed to by the executants of the deed in suit, it has been argued before us that in the absence of evidence establishing the necessity of borrowing at compound rate of interest no more than simple interest should be allowed as was done by the Court of first instance. Reference has been made to the dictum of their Lordships of the Privy Council in *Nazir Begam* v. *Raghunath Singh* (2) that

"it is incumbent on those who support a mortgage made by the manager of a Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage that rate and those terms cannot stand."

The rate of interest agreed on in that case was Rs. 2-8-0 per cent per mensem. On failure to pay interest at the end of six months, enhanced rate of Rs. 3-2-0 per cent per mensem was payable besides the interest being added to the principal. We do not think that their Lordships intended to lay down that the creditor must invariably establish by evidence that the particular rate of interest which a member of a joint Hindu family agreed to pay, however reasonable it may appear to be on the face of it, is the lowest rate at which the borrower could have raised the money needed for the purposes of the family. We think if the rate of interest is prima facie reasonable it may be considered to be justified. If, on the other hand, the borrower agrees to pay an abnormally high rate of interest, it is the duty of the creditor to satisfy the Court that the borrower could not have raised money at a lesser rate of interest or that the rate agreed on was otherwise justified. In the case before us, it is conceded that interest at 12 per cent per mensem is itself reasonable. It is the stipulation for compounding the interest at the end of each year which is objected to. We do not think that such stipulation is, under the circumstances of this case, at all unreasonable. The creditor has a right to expect that the interest would be punctually paid at the end of the year as agreed and that if it is not paid when it falls due, he would be compensated by interest being paid on the unpaid interest. For these reasons we are of opinion that no case has been made out for interference with the rate of interest payable under the deed.

It is true that a sum of Rs. 300 originally borrowed has now swelled to over Rs. 1,100, but apart from any question of undue influence which has not been raised, it is not suggested that the Court has any power to relieve the appellants of what is largely attributable to their own default in paying interest regularly as it accrued due. In the view of the case that we have taken, we sustain the decree of the lower appellate Court and dismiss this appeal with costs including in this Court fees on the higher scale.

P.N./R.K. *Appeal dismissed.*

(2) A. I. R. 1919 P. C. 12=41 All. 571=46 I. A. 145 (P.C.).

A. I. R. 1930 Allahabad 506

SEN AND NIAMATULLAH, JJ.

Deo Narain—Plaintiff—Appellant.

v.

Bhola Singh and *others*—Defendants—Respondents.

Second Appeal No. 1348 of 1927, Decided on 21st February 1930, from decision of Dist. Judge, Allahabad, D/- 28th March 1927.

(a) Registration Act, S. 17—Redemption not allowed for 54 years under mortgage deed—Subsequent agreement between mortgagor and mortgagee allowing mortgagor to

redeem at any time on payment of Rs. 200 —Such agreement is compulsorily registrable and cannot be proved in evidence, if not registered, for redeeming before expiry of 54 years.

Under the terms of the mortgage deed redemption was not permissible for 54 years. But mortgagor sued mortgagee before the expiry of that period relying on the agreement between himself and the mortgagee, which allowed him to redeem regardless of the term of 54 years if he paid to the mortgagee Rs. 200 by a certain date. The agreement was not registered.

Held: that the covenant which the mortgagor sought to enforce was one by which the mortgagor's right to retain possession for 54 years was limited if not extinguished in so far as it became redeemable at any time after payment of the amount agreed on and as such the agreement was compulsorily registrable and not admissible in evidence for the purpose for which mortgagor desired to use it. [P 508 C 1]

(b) Contract Act, S. 39—S. 39 does not apply where mortgagee fails to pay Rs. 821 out of total consideration of Rs. 1,800.

Section 39 has no application where out of the total consideration of Rs. 1,800 the mortgagee fails to pay a sum of Rs. 82 to pay the prior incumbrances, and so he can insist on the mortgagor to perform his part of agreement, under the deed not to redeem for 54 years: 34 *All.* 659, *Dist.* [P 508 C 2]

P. L. Banerji—for Appellant.

K. N. Katju and *B. C. Gangoli*—for Respondents.

Niamatullah, J.—This appeal arises out of a suit brought by the plaintiff appellant for redemption of three mortgages: two of 3rd February 1916 and a third dated 10th August 1918, executed by defendants 10 and 11 in favour of defendant 1 for Rs. 1,100, 300 and 500, respectively. One of the conditions agreed on was that the mortgagors would not be at liberty to redeem within 54 years. The equity of redemption subsequently passed to the plaintiff by a deed dated 9th August 1919. The present suit was brought on 30th January 1925 for redemption in disregard of the terms of 54 years already referred to.

The pleas in defence, which it is necessary to mention for the purpose of this appeal, were:

(1) That the suit was premature, and (2) that the mortgagee, not having performed his part of the contract, in that he failed to pay a sum of Rs. 75 to a prior mortgagee, as he ought to have done in terms of the mortgage deed, is not entitled to insist on the term of 54 years stipulated in the mortgage deed.

Both the lower Courts have dismissed the suit, holding against the plaintiff-appellant on both the grounds referred to above.

The same two grounds have been pressed in appeal before us. The plaintiff-appellant relies upon an agreement, dated 19th February 1924, which, according to him, relieves him of the condition which prohibits redemption within 54 years. It appears that the plaintiff and the mortgagee had differences regarding certain matter in respect of the mortgage in question. They agreed inter alia that, if the plaintiff paid a sum of Rs. 200 over and above the mortgage money due under the three deeds, by 20th March 1924, he would be entitled to redeem, regardless of the term of 54 years originally stipulated for in the mortgage deed. This agreement was not registered. The plaintiff-appellant sues for redemption before the expiry of that term, relying on the condition agreed to in the document already referred to. The defendants successfully contended before the lower Courts that the agreement not having been registered is not admissible in evidence for the purpose of relieving the plaintiff against the stipulation postponing redemption for 54 years. It appears to us that the decision of this question must turn on the applicability or otherwise of S. 17, Registration Act, to the condition embodied in the agreement entitling the plaintiff to redeem at any time before the expiry of 54 years, for which term redemption was not permissible under the mortgage deed. The learned advocate for the appellant relies on S. 17, sub-S. 2 (11), and contends that the agreement is no more than a receipt as it acknowledges payment by the mortgagors of two sums of Rs. 75 and 81 and, as such, it is exempted from registration. We are unable to accede to this contention. It is true in one part of the agreement receipt of the two sums is acknowledged; but the document is relied on by the plaintiff-appellant not as a receipt but as one entitling him to enforce an agreement under which the defendant mortgagee bound himself to allow redemption at any time in case the plaintiff-appellant paid the sum of Rs. 200 before 20th March 1924. In other words, the document dated 19th February 1924 is not only a receipt, as one part of it would make it, but a good deal more, having regard to the rest of its contents. The question which we have to decide as regards the admissibi-

lity of that document is whether the condition to which reference has already been made, makes it a document which creates, declares, assigns, limits or extinguishes any right, title or interest in an immovable property of the value of Rs. 100 or upwards. We think that the covenant which the plaintiff-appellant seeks to enforce is clearly one by which the mortgagee's right to retain possession of the mortgaged property for the full term of 54 years is limited, if not extinguished altogether, in so far as the mortgage becomes redeemable at any time after the plaintiff-appellant pays Rs. 200 on 20th March 1924. This being so the agreement dated 19th February 1924 has been rightly held by the lower Courts to be compulsorily registrable and therefore not admissible in evidence for the purpose for which the plaintiff-appellant desires to use it.

Another line of argument adopted by the learned advocate for the appellant is that the mortgagee failed to pay a sum of Rs. 82 to a prior usufructuary mortgagee out of a certain sum which had been left with the defendant mortgagee for payment to prior mortgagees. That the defendant did not pay off such prior mortgagee is no longer in dispute. It has, however, been found by both the Courts below that the defendant mortgagee paid more than had been left with him for discharge of certain incumbrances which do not appear to have been clearly specified. The mortgagee did not pay the sum of Rs. 82 partly because the funds left with him for payment to prior mortgagees had been exhausted and partly because the particular mortgage under which the sum of Rs. 82 was due had not been specific. The argument, therefore, put forward on behalf of the appellant that the mortgagee, not having performed his part of the contract, is not entitled to insist on the mortgagor performing his part namely, that he should not redeem within 54 years, cannot stand. Apart from this, we are of opinion that, even if the mortgagee had been in default in that connexion, the argument put forward on behalf of the appellant could not have succeeded. It is sought to be supported by reference to *Chhatku Rai* v. *Baldeo Shukul* (1), where, out of a sum of Rs. 599-15-0, to be advanced under the mortgage deed, the mortgagee had to pay Rs. 50-15-0 in cash and the rest of the mortgage money was left with him for payment to prior incumbrancers. The mortgagee failed to pay off such incumbrances. It was held, on general equitable grounds, that the mortgagee could not insist on the long term of ten years. The judgment of the learned single Judge of this Court, which was reversed in Letters Patent appeal, make mention of Ss. 39, 55 and 73, Contract Act, which had been relied on before him. Though the judgment of the Bench hearing the Letters Patent appeal does not make any mention of S. 39, the ratio decidendi adopted by it could only be based on that section which provides that if

"a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract."

The view which commended itself to that Bench apparently is that where out of Rs. 599 the mortgagee failed to pay anything more than Rs. 50, he should be deemed to have

"refused to perform or to have disabled himself from performing, his promise"

practically in its "entirety." The circumstances before us are altogether different. Here the mortgagee, if he be considered to have been at all in default, has failed to pay Rs. 82 out of a total consideration of Rs. 1,800. Under these circumstances, we are of opinion that the terms of S. 39, Contract Act, are wholly inapplicable to the case before us. Indeed, it has been doubted whether the provisions of that section are applicable to a case of mortgage which is a transfer and beyond the domain of contracts to which alone S. 39 is applicable. It is not, however, necessary for us to express an opinion on this question. We assume that the provisions of that section are applicable in a proper case, but hold that it is quite inapplicable to the circumstances before us. Neither of the grounds urged in appeal before us can be sustained. Accordingly, we uphold the decree of the lower appellate Court and dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

(1) [1912] 34 All. 659=17 I.C. 340=10 A.L.J. 330.

A. I. R. 1930 Allahabad 509

BANERJI AND YOUNG, JJ.

Brijmohan Lal and *another*—Plaintiffs—Appellants.

v.

Mt. Mahbuban and *another*—Defendants—Respondents.

Second Appeal No. 595 of 1927, Decided on 6th January 1930, from decree of Dist. Judge, Bareilly, D/- 30th November 1926.

Partition Act (4 of 1893), S. 4—Suit by stranger—Court must find whether house is dwelling house belonging to undivided family, and if any member undertakes to buy his share must value the house in fit manner.

It is necessary for a Court when a suit is instituted by a stranger to an undivided family for partition of a house to find first whether the house in question was a dwelling house and belongs to an undivided family and further that if a member of an undivided family who was a shareholder in that dwelling house undertakes to buy his share to value the share, the valuation to be decided in a manner that the Court should think fit. [P 509 C 2]

U. S. Bajpai—for Appellants.

S. C. Das—for Respondents.

Banerji, J. — This is a plaintiff's appeal in a suit for partition of a house. The house was mortgaged and a decree was passed in favour of the plaintiffs for sale under O. 34, R. 4, Civil P. C. At the auction sale, which took place in the year 1921, the plaintiffs purchased the house for Rs. 100. Defendant 1 Mt. Mahbuban, a sister of the original judgment-debtor, obtained a decree for a one-sixth share of the house, although she had claimed the whole of the house. The suit out of which this appeal has arisen was for partition and defendant 1 applied to the Court of first instance that under S. 4, Partition Act 4, 1893, she should be allowed to purchase the whole of the house although her share was only one-sixth. The learned Munsiff acting under S. 4, Partition Act, ordered the defendants to deposit Rs. 100 and directed the plaintiffs to execute a sale deed in favour of Mt. Mahbuban.

The plaintiffs went up in appeal before the learned District Judge, and the two points urged by them were that S. 4, Partition Act, did not apply inasmuch as the house in question was not a dwelling house and for some years was uninhabitable, and that the value of 5/6ths of the house was more than Rs. 100.

The plaintiff's appeal was dismissed and they have come up in second appeal to this Court.

It has been urged by Mr. Kunzru appearing on behalf of the appellants that before an order could be passed under S. 4, Partition Act, there must be a finding by the Court that the house that was being partitioned was a dwelling house belonging to an undivided family, and secondly that the Court should make a valuation of the property which the Courts below had not done.

Section 4, Partition Act, lays down that where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder undertakes to buy the share of such transferee, make a valuation of such share. It is, therefore, necessary for a Court when a suit is instituted by a stranger to an undivided family for partition of a house to find first whether the house in question was a dwelling house and belongs to an undivided family and further that if a member of an undivided family who was a shareholder in that dwelling house undertakes to buy his share, to value the share, the valuation to be decided in any manner that the Court should think fit. This, in our opinion, clearly indicates that the Court must frame issues relating to these two matters, namely, as to whether the house was a dwelling house belonging to an undivided family, and secondly, as to what was the proper value of the share that the Court could award under S. 4 for the transfer to the defendant shareholder.

In this case, in our opinion, there has not been a proper trial of these two points. We are, therefore, of opinion that the Court below should record findings on the following issues:

(1) Whether the house in suit is a dwelling house within the meaning of S. 4, Partition Act?

(2) If it is, what is the value of the plaintiffs' share?

Parties will be entitled to adduce fresh relevant evidence. Findings are to be returned within three months. Objections, if any, should be filed within ten days of receipt of the findings.

V.B./R.K. *Case remanded.*

* A. I. R. 1930 Allahabad 510

MUKERJI AND BENNET, JJ.

Chuttan Teli — Defendant — Appellant.

v.

Mt. Razia Khatun and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 53 of 1928, Decided on 27th January 1930, from judgment of Dalal, J., D/- 15th March 1928.

*** (a) Civil P.C., S. 100—Lower Court trying to fit facts with law—Finding of fact of lower Court can be set aside in second appeal.**

Where the Judge of the lower Court proceeds by finding out what the law is in order that he might arrive at a finding of fact, it is open to the appellate Court in second appeal to set aside the finding of fact and arrive at a finding of his own. [P 511 C 2]

(b) Deed—Construction—Land let out 60 years before institution of suit and built upon—20 years after terms of tenancy altered—There is no presumption that there was no consideration for altered agreement.

Where land has been let out about 60 years back and built upon by the tenant, if subsequently new terms were obtained for the tenancy the fact that these terms were obtained about 40 years before institution of the suit does not raise any presumption that there was no consideration for altered agreement. [P 511 C 1]

A. M. Khwaja—for Appellant.

Mushtaq Ahmad—for Respondents.

Mukerji, J.—This is the defendant's appeal and arises out of a suit for ejectment and arrears of rent brought against him by the plaintiff-respondent 1.

The claim for ejectment failed in the two Courts but succeeded in this Court.

The plaintiff's case was that in a place called Serai Daim Khan, in the town of Moradabad, defendant 2, Fattu, held, as the plaintiff's tenant, four houses, that under the terms on which the defendant held, falling into arrears of rent brought about forefeiture of the tenancy, and that the original tenant, namely Fattu, defendant 2, did not pay rent, and on the other hand, without any title to do so, transferred the building to defendant 1, Chhuttan. The plaintiff accordingly claimed arrear of rent and claimed ejectment of defendants 1 and 2. The defence set up was that Fattu held under some sort of permanent tenancy, that the original tenant was given the site on which to build and on a small rent to be paid annually.

The lower appellate Court held that some 60 years prior to the institution of the suit, the site of the house had been let out to the ancestor of Fattu, that that ancestor built the house, and that in 1884 new terms were obtained for the tenancy, but that agreement of 1884 was void for want of consideration. On these findings the learned Judge of the lower appellate Court affirmed the decree of the first Court dismissing the claim for ejectment.

In second appeal the learned Judge of this Court, who heard it, came to the conclusion that the lower appellate Court had not properly read the agreement of 1884, and that if it had read it properly along with other evidence, the vague evidence, on which it relied to found a permanent lease, would not have sufficed.

In appeal it has been contended that the learned Judge of this Court has upset a finding of fact

The learned Subordinate Judge, it appears to us, tried to find facts which would would fit in with one of the two Privy Council cases which were cited before him, and one of which has been mentioned in his judgment, namely *Jagaveera Rama* v. *Alawarasa Asari* (1). The other Privy Council case is said to be *Afzalunnissa* v. *Abdul Karim* (2).

In the earlier of the two cases it was found as a fact that the tenants held on more or less a permanent lease on a fixed rent. They improved the land, and thereupon the landlord claimed a higher rate of rent. Their Lordships of the Privy Council held that there was no consideration for the agreement to pay enhanced rent. If the judgment of the Privy Council be carefully read, it will be found that there were numerous cases brought before Courts, and one of the cases was taken to be a sort of a specimen case on the decision of which all other cases were to be decided. The case that was really considered by their Lordships of the Privy Council was one in which the enhanced rent had been paid only "once or twice." There were some connected cases in which enhanced rent had been paid for not less than 40 years. Their Lordships of the

(1) A. I. R. 1918 P. C. 173=43 Mad. 174=45 I. A. 195 (P.C.).

(2) A. I. R. 1919 P. C. 11=47 Cal. 1=46 I. A. 131 (P.C.).

Privy Council were careful enough to distinguish those cases, and in the concluding portion of their judgment they observed as follows :

"If the cases had been examined separately, if distinctions had been drawn between cases where the higher rate was paid for 40 years and cases where it was only paid once or twice, if the possibility of presuming a lost patta at eight fanams or lost proof of consideration had been mooted, if the origin of these tenancies had been investigated and the terms of the original contracts fully discussed, other questions might possibly have arisen : (see p. 140 of the report.")

The case before their Lordships of the Privy Council, as we have already stated, was decided on consideration of the fact that only 'once or twice' the enhanced rent had been paid. In this particular case before us we have the agreement of 1884 entered into not less than 40 years before the institution of the suit. At the expiry of 40 years it is difficult to say for anybody how the agreement came to be executed by the defendant's predecessor-in-title. We must presume in the circumstances, that there was a good consideration for the altered agreement, although at this distant date the nature of the consideration is not available for proof. The other case on which the learned Judge of the lower appellate Court has relied lays down that where there is a completed contract for payment of rent of a permanent lease, there can be no consideration for enhancement of the rent.

The learned Judge of this Court was in our opinion quite justified in treating the judgment of the lower appellate Court as materially defective inasmuch as it omitted to consider the effect of the document of 1884. How the learned Judge of the lower appellate Court proceeded to look at the evidence was this. He took into consideration the vague oral evidence which was supposed to establish the commencement of the lease 60 years ago, and then came to the finding that a permanent lease did exist on a fixed rent. In coming to this conclusion he totally ignored the document of 1884. If it be a fact that in 1884 the predecessor-in-title of defendant 1 agreed and admitted that the houses belonged to the landlord, and that he would hold them on rent and would vacate them in case of failure to pay the rent, surely the learned Judge of the lower appellate Court would not have come to the conclusion that the person who was making that contract in 1884 was holding on a permanent lease. It appears to us that the learned Subordinate Judge wanted to find facts which would fit in with the Privy Council cases which were cited before him. He really proceeded by finding out what the law is in order that he might arrive at a finding of fact.

In our opinion the learned Judge of this Court was fully justified in setting aside the finding of fact of the lower appellate Court and coming to a finding of his own.

In the result the appeal fails and is hereby dismissed with costs.

M.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 511

SEN AND NIAMATULLAH, JJ.

Abdul Muwali—Defendant — Appellant.

v.

Tahsildar of Kashipur—Plaintiff — Respondent.

First Appeal No. 12 of 1929, Decided on 19th February 1930, from order of Sub-Judge, Nainital, D/- 26th July 1928.

Provincial Insolvency Act, S. 53, read with Kumaun Rules 11, 12 and 24, Notification No. 543/7-421, published in U. P. Gazette of 3rd April 1926—Annulment of alienation.

Annulment of an alienation under S. 53, Insolvency Act, is invariably "in pursuance" of the order of adjudication. If, therefore, the order of adjudication was made before the notification, the application for annulment of a transfer made by the insolvent would be subject to the Kumaun rules and not to the arrangement introduced by the notification.

[P 512 C 2]

A. Sanyal—for Appellant.

K. N. Katju and *M. N. Raina*—for Respondent.

Niamatullah, J.—A preliminary objection has been taken to the hearing of this appeal on the ground that no appeal lies to this Court from the order of Mr. G. L. Vivian, the Deputy Commissioner of Kumaun, dated 26th July 1928, passed in insolvency proceedings.

One Mubarak Husain was adjudged insolvent on 8th December 1925 on application presented by his creditor Sukhdeo on 28th March 1924 and the 13th May 1925. He had executed a mortgage deed, dated 30th December 1922 in favour of Abdul Muwali, the

appellant. The Tahsildar of Kashipur who was appointed receiver made an application for annulment of the mortgage aforesaid on 10th January 1928. The Deputy Commissioner, Naini Tal, who exercised the powers of a civil Court under the Insolvency Act, annulled the mortgage impugned by the receiver, under S. 53, Insolvency Act. The present appeal was filed by the mortgagee Abdul Muwali impugning the correctness of the order of the Deputy Commissioner referred to.

It has been argued for the respondent that the forum of appeal from the order of the Deputy Commissioner exercising jurisdiction of a civil Court under the Provincial Insolvency Act is the Court of the Commissioner, Kumaun Division, and not this Court. The contention is based on Rr.11, 12 and 24 of the Kumaun rules which, it is alleged, are applicable to the present case. Assuming for the present, that the rules are applicable we have no hesitation in holding that the appeal lay to the Commissioner, Kumaun Division, and not to this Court. R. 11 provides that:

"the Commissioner shall exercise the powers and perform the duties of a High Court for the Kumaun Division for the purposes of all Acts other than the Succession Act, 1865, the Companies Act, 1882 and the Railways Act, 1890."

Rule 12 (2) authorizes the Deputy Commissioner to exercise the powers and perform the duties of a District Judge for the purpose of all Acts other than the Succession Act, 1865. R. 24 makes decrees and orders passed by the Deputy Commissioner to be appealable to the Commissioner. It is clear from these provisions that the Deputy Commissioner, Kumaun Division, is a District Court within the meaning of S. 3, Provincial Insolvency Act, and the Commissioner of Kumaun Division is the High Court for the purposes of S. 75 of the same Act and therefore an appeal from order setting aside an alienation which lies under S. 75 to the High Court must lie to the Court of the Commissioner, Kumaun Division, who has the power of a High Court in that respect. If therefore the Kumaun rules are applicable to the case, the preliminary objection raised by the learned advocate for the respondent is irresistible.

As to whether the Kumaun rules are applicable, a reference to notification No. 543/7-421 published in the U. P. Gazette of 3rd April 1926 leaves no room for doubt that the Kumaun rules continue to apply, though the notification has transferred the jurisdiction of the Deputy Commissioner in certain civil matters including insolvency proceedings to the District Judge of Pilibhit. If the arrangement introduced by the notification applies to the present case the jurisdiction of this Court cannot be questioned. But a certain "qualification," which has been superadded to the notification. runs as follows:

"Nothing in this notification . . . . . shall operate to affect the disposal of: (a) any suit or proceeding instituted before the first day of April 1926, in any Court or before any officer of the Kumaun Division; or (b) any application, appeal, review, revision, proceedings in execution, or other proceeding filed or taken, whether before, on or after the said day in any such Court or before any such officer, in continuation or pursuance of any suit or proceeding defined in para. (a), but all such applications, suits and proceedings shall be heard and decided as if this notification had not been issued."

Though the application for annulment was made after the date of this notification, the order of adjudication and the applications for adjudication were made before the date of the aforesaid notification. We are of opinion that the application, dated 10th January 1928 for annulment of the mortgage deed executed by the insolvent, was "in pursuance of" the insolvency proceeding. We think that annulment of an alienation under S. 53, Insolvency Act, is invariably "in pursuance" of the order of adjudication. If, therefore, the order of adjudication was made before the notification, as is the case here, the application for annulment of a transfer made by the insolvent would be subject to the Kumaun rules and not to the arrangement introduced by the notification referred to above.

For these reasons we uphold the preliminary objection and return the memorandum of appeal to the appellant for presentation to the proper Court, if so advised. The respondent will have his costs of this Court.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 513

DALAL, J.

Kuar Lakshmiraj Singh and *others*—Decree-holders—Appellants.

v.

Shankar and *others*—Judgment-debtors—Respondents.

Execution Second Appeal No. 339 of 1929, Decided on 5th February 1930, from decree of Addl. Dist. Judge, Aligarh, D/- 19th June 1928.

(a) Civil P. C., S. 151 and O. 21, R. 78—Sale of moveable property—Absence of notice to judgment-debtor resulting in injustice to judgment-debtor—Still Court has no inherent power to set aside sale.

There is no inherent power under S. 151 to set aside a sale of moveable property in contravention to a definite direction enjoined by statute and this is so even in the case of omission to issue notice to the judgment-debtor and although such wrong procedure may cause injustice to the judgment-debtor. [P 513 C 2]

(b) Civil P. C., O. 21, Rr. 90 and 78—Decree directing possession of land by removal of material of house—House not detached—House attached in execution of decree for costs and not in decree for possession of land and sold—House held to be immovable property under O. 21, R. 90.

A decree directed possession of a plot of land by removal of the material of the house standing on it. This decree was appealed against and finally affirmed adding costs to the original decree for possession. The decree-holder executed the decree for costs and attached the house which was not detached. The house was sold.

Held: that the house was immovable property within the meaning of R. 90 as it was not detached from the plot of land at the time of attachment and the decree for recovery of possession of the plot of land by removal of the house had not been executed. [P 513 C 2]

K. N. Katju—for Appellants.

H. P. Sen—for Respondents.

Judgment.—In my opinion it is important to determine in this case whether the property sold was moveable or immovable. The decree-holders had sued for recovery of possession of a certain plot of land by removal of the materials of the house of the defendants standing thereon. During the pendency of the appeal here the defendants judgment-debtors deposited costs and rent which had been decreed against them. This Court decided in favour of the plaintiffs whereupon the plaintiffs decree-holders applied at one and the same time for possession of the land for attachment of the house of the defendants in order to recover costs of the first two Courts. No notice was issued as the High Court decree was passed within one year of the application for execution and attachment of the house was ordered. The house was attached on 14th September 1927, and on the same day the decree-holders applied for sale of the house. When this application was filed it was the duty of the Court to take action under R. 66, O. 21 and issue notice to the judgment-debtors. No such notice was issued and sale was promptly ordered and took place on 19th October 1927.

Kanhaiya Lal purchased the house, and if the house were moveable property the same became absolute under R. 78, R. 21. The lower appellate Court has set aside the sale on some inherent power which he says he had under S. 151, Civil P. C. In my opinion no such inherent power exists in contravention to a definite direction enjoined by statute. If the house were really moveable property the sale would be absolute and no Court could set it aside in spite of any injustice that may be done to the judgment-debtors by wrong procedure adopted by the Court in omitting to issue notice to the judgment-debtors. I hold, however, that the house was immovable property because it had not been detached at that time and the plaintiffs had not executed this decree for recovery of possession of the land by removal of the house. If that decree had been executed and materials of the house had been lying on the ground those materials would have been moveable property and could have been sold as such. In the condition in which the house was at the time of the attachment and sale it was immovable property and under R. 90, O. 21, the sale would not become absolute automatically. If no objection is filed and an objection is filed and disallowed, the Court has to confirm the sale and the sale becomes absolute only on confirmation under R. 92 in the case of immovable property. The subordinate Courts have therefore acted under R. 90 in setting aside the sale. They have held that there was material irregularity and fraud in publishing and conducting the sale. They also held that the judgment-debtors have sustained substantial injury by reason of such irregularity and fraud.

I agree with their opinion. They had not noticed the irregularity of omission

of the issue of a notice to the judgment-debtors under R 66. That is an additional cause why the sale should be held to be invalid by reason of material irregularity in publishing and conducting the sale. The decrees of the two subordinate Courts are correct without the necessity of the exercise of any powers under S. 151, Civil P. C.

I dismiss both the appeals and the application for revision with costs.

M.N./R.K. *Appeals dismissed.*

A. I. R. 1930 Allahabad 514

YOUNG, J.

Bhagwat Prasad Shukul—Plaintiff—Appellant.

v.

Nabi Mohammad and *others*—Defendants—Respondents.

Second Appeal No. 1499 of 1928, Decided on 11th February 1930, from decree of Addl. Sub-Judge, Basti, D/- 19th April 1928.

Landlord and Tenant—Abadi—Presumption is that tenant occupies site in abadi as appurtenant to his tenancy and cannot retain it on ceasing to be tenant.

With regard to a tenant of an agricultural village, who occupies a house in the abadi, there is a legal presumption that he holds the site as appurtenant to his tenancy and has no right to retain it against the wish of the landlord on ceasing to be a tenant in the village. Of course, like any other presumption, this presumption is open to rebuttal: 13 *A. L. J.* 745 and 48 *I. C.* 420, *Foll.*

[P 514 C 2, P 515 C 1]

A. P. Pandey—for Appellant.

M. Waliullah—for Respondents.

Judgment.—This is a plaintiff's appeal. The suit was brought by the plaintiff, who is the sole zamindar of village Imilha, against the defendants, praying that he may eject the defendants from their houses with permission that they could remove the materials thereof.

It is admitted that the plaintiff is the zamindar and owner of the site of the houses in question. The defendants occupied the site of the houses and they also held fairly large agricultural holdings in the village, and in 1923, as they had failed to pay rent for some considerable time, they were ejected in proceedings under S. 429, old Tenancy Act. The question which arises for decision in this case is whether the fact that the defendants have now ceased to be tenants of the village entitled the zamindar to eject them from the houses which they occupy.

The village in question is an ordinary Indian agricultural village. The ordinary position, as I understand it, in Indian villages is this, that a zamindar generally grants sites for houses in the abadi of the village to such persons as are useful to him from the point of view of the village life. The grant of sites in the abadi would generally be made to people who were carrying on agriculture. He would also grant sites to people who were useful to the village from the agricultural point of view, such as, carpenters and smiths and persons of that sort. Officials in the village would, of course, also require to have premises in which to live in the abadi, and the condition of the licence to live in the abadi would necessarily be that the tenant did carry on these particular works for which he was granted the right to live in the abadi. It has been held by a Judge of this Court, and a very experienced Judge, in the well-known case of *Shohrat Singh* v. *Jhagru* (1), that there is a legal presumption that the occupier of any house in the abadi of an agricultural village, occupies that house as an appurtenance to his agricultural holding and that, if he abandons or is ejected from the tenancy, unless there be some special custom to the contrary, the site reverts to the zamindar, and the tenant who builds a house builds it at his own risk and has to remove the materials and vacate the site. That decision was followed in *Ram Harakh* v. *Ambika Datt Ram* (2). The Judicial Commissioners in that case were Mr. Lindsay and Mr. Daniels, both of whom were Judges highly experienced in Indian village life and customs, and subsequently became Judges of this High Court. I think, therefore, that there can be no question that it has been clearly established that if there is a zamindar and a tenant of an agricultural village, who occupies a house in the abadi, there is a legal presumption that he holds the site as appurtenant to his tenancy and has no right to retain it against the wish of the landlord on ceasing to be a tenant in the village.

(1) [1915] 13 A.L.J. 745=30 I.C. 782.
(2) [1918] 21 O.C. 257=48 I.C. 420=5 O.L.J. 642.

Of course, like any other presumption, this presumption is open to rebuttal. It may be, as Knox, J., pointed out, that there is some special custom or contract, but the onus is on the defendants to establish such special contract or custom. It is for him to rebut the presumption which exists. The question in this case is have the defendants discharged the onus which was upon them? In my view, they have not.

It is to be noted that the learned Judge of the lower appellate Court has not noted at all the question of this presumption. Apparently his attention has not been drawn to the cases which are the authorities upon this matter. He deals, therefore, with the case in a manner rather different to that in which I have dealt with it. I think it probable that, if he had considered the question of presumption, he might have come to another conclusion. Accepting all the findings 'of fact, as found in the judgment of the lower appellate Court I have come to the conclusion that there is not enough to rebut the presumption. The lower appellate Court has found that the original founder of the defendant's family came to the village and settled there as a printer and dyer. I think that that conclusion can hardly be drawn from the fact, as he says, that:

"when Jahangir came to Imilha then he lived in his own house and that his father died in Imilha. Does it not follow from this that Jahangir's father, Turab, had his own house in the village before Jahangir came to this village and took to agriculture after the mutiny."

The customs of families in this country being as they are, the mere fact that Turab died in Imilha does not show that he died in a house separate from that of Jahangir. In fact the presumption would be the other way about. But assuming that Turab originally came to the village primarily to carry on the business of printing and dyeing, it does not prove conclusively that he had not agricultural holdings as well, and in fact the learned Judge finds in his judgment that as early as 1860 a khatauni for that year shows that Jahangir, the son of Turab, was a cultivator of some lands in this village of four years standing. It is also to be noted that the village in which the business of printing and dyeing is carried on is not Imilha, but Bahadurpur and that this family is the only family which prints cloth in village Imilha. It appears to me from this that the family of the defendants came to this village in order to carry on their business, not so much in their own village, but in the village of Bahadurpur. It, therefore, seems to me that the zamindar would not be likely to grant a site in the abadi to the defendants' ancestors, unless they did some service either for himself or the village by cultivating land or by printing and dyeing cloth for the zamindar and his family. It is not enough for the defendants to say that they originally were printers. They ought, in my view, to go a step further and show the terms upon which they were admitted to the village abadi, because even if they were admitted on terms other than those of being cultivators of agricultural land, if those terms were not carried out by them, they could still be ejected from the land. Apparently at the moment they are performing no service for the zamindar, neither are they paying him any rent. In my view the original contract must have provided either for rent or service. The onus of establishing such a contract is upon the defendants. If they have not established a contract, then they have not rebutted the presumption. The mere fact that they are not paying any rent now or performing any service for the zamindar would raise a presumption that, whatever were the terms of the original contract, they are not now carrying them out, and that in itself would give the zamindar the right to eject them. On the whole I am satisfied that the decree of the two lower Courts cannot stand. The appeal is allowed with costs and there will be a decree in favour of the plaintiff for the ejectment of the defendants from their houses, permission being granted to them to remove the materials of the houses within three months.

As this matter is a somewhat difficult and novel one and is of great importance, I allow the defendants to proceed by way of Letters Patent appeal.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 516

SEN AND NAIMATULLAH, JJ.

L. Ram Ratan Lal—Plaintiff—Appellant.

v.

Mt. Gaura and *others*—Defendants—Respondents.

Second Appeal No. 60 of 1927, Decided on 6th January 1930, from decree of Sub-Judge, Shahjahanpur, D/- 29th March 1926.

Contract Act, Ss. 69 and 70—Successor-in-interest of lambardar's proprietary interest paying arrears of revenue for cosharers is entitled to be reimbursed—U. P. Land Revenue Act, Ss. 142 and 160.

Where the successor-in-interest of the proprietary interest of a lambardar pays the arrears of revenue which the cosharers are bound by law to pay, he is entitled to be reimbursed for the same under Ss. 69 and 70, Contract Act. [P 517 C 1]

N. P. Asthana—for Appellant.

A. P. Dube—for Respondents.

Sen, J.—This appeal arises out of a suit for recovery of Rs. 378-3-0 principal and Rs. 134-13-0 interest, in respect of certain land revenue which had been paid by the plaintiff-appellant by reason of a default on the part of the cosharers of mauza Mohammadpur Gularia, mahal Soem. Mt. Gaura and 34 other persons were cosharers in this mahal. Mt. Gaura had executed a simple mortgage of her share in this property in favour of the plaintiff-appellant. She had also passed a mortgage in favour of one Ujagir Singh. Ujagir Singh put his mortgage into suit, obtained a decree against Mt. Gaura and purchased her interest in the property himself. Plaintiff brought a suit for enforcement of his prior lien by suit No. 136 of 1917 which was directed both against Mt. Gaura, the mortgagor, and Ujagir Singh, the puisne encumbrancer, who had in the meantime already purchased the property. The plaintiff's claim was decreed and in execution of the final decree obtained by him, the interest of Mt. Gaura in the property was purchased by the plaintiff decree-holder on 20th December 1920.

Mt. Gaura was the cosharer of this mahal at the time of the auction sale. All the other cosharers who are defendants in the present action including Mt. Gaura, were in arrears of Government revenue to the extent of Rs. 378-3. The factum of the cosharers being in arrears to the above extent was notified at the time of sale, but the property itself does not appear to have been sold subject to the lien in favour of the Government. The Government, however, recovered the entire amount, namely, Rs. 378-3 from the plaintiff at the time of the auction purchase. The present suit has been instituted for recovery of that amount from the cosharers together with interest.

The defendants denied their liability and pleaded that the position of the plaintiff was that of a volunteer and he was not entitled to recoup himself by contribution or otherwise from the defendants. This plea found favour with the trial Court which dismissed the suit upon the ground that the payment made by the plaintiff was voluntary and the suit was misconceived. The lower appellate Court has affirmed this decision.

We have not the slightest doubt in our mind that the judgments of the Courts below are wrong and must be set aside.

Section 142, Land Revenue Act, provides that :

"all the proprietors of the mahal are jointly and severally responsible to Government for the revenue for the time being assessed thereon, and all persons succeeding to proprietary possession thereiu, otherwise than by purchase under S. 160, shall be responsible for all arrears of revenue due at the time of their succession."

It is not disputed that the plaintiff is a person who succeeded to the proprietary possession of the interest of Mt. Gaura in the mahal otherwise than by purchase under S. 160, Land Revenue Act. It is equally clear that he was responsible for all arrears of revenue which were due at the time when he succeeded to the property. The position of the plaintiff therefore was not that of a volunteer in any sense at all. The plaintiff did not voluntarily make payment, but the amount was recovered from him at the time of the auction sale. The learned Judge of the Court below was therefore not right in holding that the deposit made by the plaintiff was voluntary. The plaintiff was legally responsible for the payment of that amount. The liability was not of his own choosing or of his own creation. He was held responsible for the revenue which had fallen into

arrears by reason of the default of the cosharers before his auction purchase.

The next question which requires to be determined is as to whether the plaintiff was entitled to recover this amount from the cosharers. His claim against Mt. Gaura may stand upon a slightly different footing. He has succeeded to the estate of Mt. Gaura which was liable pro tanto to the extent of her liability in the arrears of Government revenue. The plaintiff having succeeded to the estate of Mt. Gaura may be held liable for the amount due to the Government which stood charged upon her share in the property. The position of the remaining 34 defendants was altogether different. They were jointly and severally liable with Mt. Gaura for the payment of Government revenue. The liability was sought to be enforced against Mt. Gaura because she happened to be the lambardar. The plaintiff having discharged this liability is entitled to recover that amount under Ss. 69 and 70, Contract Act. The plaintiff was clearly a person interested in the payment of the arrears of revenue which the defendants were bound by law to pay, and the plaintiff having had to pay the amount is therefore entitled to be reimbursed by these defendants. The payment moreover was made by the plaintiff not gratuitously but under a compulsion of law. Where the plaintiff therefore as being the auction-purchaser of this property had to pay the arrears of revenue due from the cosharers and not having intended to do so gratuitously, he is entitled to claim compensation from the cosharers under S. 70, Contract Act. The judgment of the Court below proceeds upon a preliminary point and we do not agree with its judgment. The case has not been disposed of on the merits.

We set aside the decrees of the Courts below and remand the case to the trial Court through the lower appellate Court for disposal of the claim on the merits. The plaintiff is entitled to the costs of this Court and also of the lower appellate Court. The other costs are to abide the event.

W.B./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 517

BANERJI AND NIAMATULLAH, JJ.

Bhora Hazari Lal — Defendant — Appellant.

v.

Bhora Nauranga Lal and *another*— Plaintiff and Defendant—Respondents.

Second Appeal No. 515 of 1927, Decided on 10th January 1930, from decree of Addl. Dist. Judge, Agra, D/- 18th December 1926.

Contract Act, S. 69—Lease by proprietor of share binding lessee to pay Government revenue—Death of lessor—In consequent controversy one party appointed lambardar and paying revenue in pursuance of U. P. Land Revenue Act, S. 142, for period he was lambardar—His title subverted and another party appointed in his place—Person who was eventually subverted but had paid revenue as lambardar was held entitled to be reimbursed from lessee.

A year before her death one *M* granted a theka of her share to *N* who was bound in terms of lease to pay the Government revenue. After the death of *M* two rival claimants appeared on the scene which resulted in a controversy before revenue Court which had varying results. At one stage of the controversy *H* was recognized as the rightful claimant and was appointed lambardar. During the period that he held the office he paid the Government revenue. Subsequently *H* was unsuccessful and his rival claimant obtained possession of the share once in possession of *M*. Consequently *H* brought a suit against *N* for recovery of land revenue which he had paid as lambardar and which *N* was bound to pay under the lease.

Held : that *H* was interested in the payment of money and was therefore entitled to be reimbursed by N. [P 518 C 1]

U. S. Bajpai—for Appellant.

N. P. Asthana—for Respondents.

Niamatullah, J.—This appeal arises out of a suit brought by the plaintiff-respondent for recovery of a certain sum of money paid by him towards the Government revenue in respect of a share in defendant-appellant's possession as thekadar. The circumstances which led to the institution of the suit are briefly these: Mt. Bhawani Kunwar was in possession of the share in respect of which revenue was paid by the plaintiff-respondent. She died in 1921. A year before her death she had granted a theka of her share to the defendant-appellant, who was bound in terms of his lease to pay the Government revenue. After the death of Bhawani Kunwar two rival claimants appeared on the scene. One was the

plaintiff-respondent and the other was a person who claimed to have a preferential reversionary right. The controversy before the revenue Courts had varying results. At one stage the plaintiff-respondent was recognized as the rightful claimant and was appointed a lambardar. During the period that he held the office of lambardar he paid the Government revenue, which he now seeks to recover from the defendant-appellant. Eventually the plaintiff-respondent was unsuccessful and his rival claimant obtained possession of the share once in possession of Mt. Bhawani Kunwar. The plaintiff-respondent brought the present suit for recovery of the land revenue which he paid and which the defendant-appellant ought to have paid in terms of his lease. The lower appellate Court has decreed the claim. The defendant-appellant has preferred the present appeal.

It is contended on behalf of the appellant that S. 69, Contract Act, which has been relied on by the lower appellate Court in decreeing the claim of the plaintiff-respondent is not applicable to the circumstances of the case. It is urged that in making the payment the plaintiff-respondent intended to further his own interest, as at that time the litigation between himself and the rival claimant made it necessary that he should pay the Government revenue to strengthen his claim against his adversary. We are unable to accept this contention. The plaintiff-respondent was admittedly the lambardar at the time when he paid the Government revenue. If he had made default in payment of the revenue he could have been arrested, his moveable and immovable property, other than the share in dispute, could have been attached. In this state of things the argument that the payment made by him was a payment made by a volunteer has no force. We are of opinion that the plaintiff-respondent was, to say the least of it, interested in making the payment which he did. The defendant-appellant was not only bound to pay the Government revenue, which had fallen due, in terms of his theka, but he was also liable to pay it under the provisions of the Land Revenue Act: see S. 142, Explanation. For these reasons we are of opinion that the view taken by the lower appellate Court is correct. The appeal must therefore fail. It is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 518

MUKERJI AND BENNET, JJ.

Ram Brich Pandey—Plaintiff—Appellant.

v.

Gopal Pandey—Defendant—Respondent.

Letters Patent Appeal No. 76 of 1927, Decided on 14th December 1929, against judgment of Dalal, J., D/- 24th June 1927.

Agra Tenancy Act (2 of 1901), S. 22—Collateral not sharing in cultivation with deceased is not entitled to succeed in preference to collateral in possession of holding.

A collateral who did not share cultivation with the deceased occupancy tenant is not entitled to succeed to the deceased occupancy tenant in preference to a collateral in possession of the holding. [P 518 C 2]

S. N. Verma—for Appellant.

Jwala Prasad Bhargava—for Respondent.

Bennet, J.—This is a Letters Patent Appeal brought by Ram Brich Pandey, plaintiff, against a decree of a learned Judge of this Court dismissing the suit of the plaintiff which had been decreed by the lower appellate Court. The decree granted by the lower appellate Court was for giving possession to the plaintiff of one-half of certain occupancy plots which had originally formed the holding of Sheo Bhajan. It is found as a fact by the lower appellate Court that the defendant is in possession of this half of this occupancy holding.

The claim of the plaintiff to possession of the half of the occupancy holding in possession of the defendant is based on the argument that plaintiff alone was entitled to succeed to the whole of the occupancy holding of Sheo Bhajan on his death, because plaintiff was a nearer collateral than defendant. But under S. 22, Act 2 of 1901, a collateral who did not share in cultivation with the deceased as occupancy tenant is not entitled to succeed. The finding of fact of the lower appellate Court is that Sheo Bhajan was separate. Accordingly, the plaintiff did not share in his cultivation and therefore was not a person entitled to succeed to the occupancy holding of Sheo Bhajan under

S. 22, Act 2 of 1901. The plaintiff therefore has failed to establish any preferential right against the defendant as successor of Sheo Bhajan. Accordingly we consider that the learned Judge of this Court was right in dismissing the suit of the plaintiff. We dismiss this Letters Patent appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 519

DALAL, J.

Baleshar Pandey and *another*—Defendants—Appellants.

v.

Ram Tahal Pandey and *others*—Plaintiffs—Respondents.

Second Appeal No. 345 of 1928, Decided on 21st January 1930, against decree of Sub-Judge, Ghazipur, D/- 25th November 1927.

(a) Agra Tenancy Act (3 of 1926), — Person ejected by third person through zamindar—Suit for possession of land lies in revenue Court.

A suit for possession of land from which a person has been ejected by a third person through instrumentality of the zamindar lies to the revenue Court both under the old and the new Tenancy Act. [P 519 C 2]

(b) Practice—Appeal—Objection to jurisdiction in second appeal—Objection must be allowed if defect is manifest.

Where defect as to jurisdiction is manifest an objection to jurisdiction must be allowed even in second appeal and even though the objection is not taken in grounds of appeal : *A. I. R.* 1924 *P. C.* 95, *Foll.* [P 519 C 1]

A. P. Pandey—for Appellants.

M. L. Agarwala—for Respondents.

Judgment.—A plea of jurisdiction has been raised during arguments though it was not taken in the grounds of appeal. Such a plea is admissible, and I have allowed such a plea to be raised, though counsel for the opposite party objected to the plea being raised in the second Court of appeal. The observations of their Lordships of the Privy Council in *Ram Lal* v. *Kisan Chandra* (1) are very clear : see p. 393 of 22 *A. L. J.* para. 3. It is important to notice what the claim was. The plaintiffs desired joint possession along with the defendants over two plots of land. The whole plot 221 is divided into three portions entirely independent of one another : one of 2 biswas 15 dhurs, another of 2 biswas 9 dhurs, and a third of 12 dhurs. Over the first two plots the plaintiffs desired joint possession along with the defendants. Subsequent to the passing of the present Tenancy Act such a suit would lie in the revenue Court. Prior to the passing of that Act the suit would lie in the civil Court as ejectment was pleaded by co-tenants. The suit was mainly for declaration ; and, in the alternative, possession was claimed. It was argued on behalf of the defendants-appellants that though there may be a vested right of relief which could not be taken away except by a definite rule in the new statute, no one is entitled to apply to a particular Court or lodge a suit there. In the present case the question is not only one of filing a suit in a particular Court, but the question is a legal one of limitation. If the plaintiffs went to the revenue Court they would fail through lapse of time while they would not fail in the civil Court. They had acquired a right to litigate within twelve years, and such a right can be enforced only in the civil Court. Under the circumstances the new statute did not deprive them of their right to litigate in the civil Court. The findings of the two subordinate Courts are those of facts. For this reason I dismiss the appeal as regards plots in patti Lachhi Rai and patti Nakchhedi Singh.

As regards the 12 dhurs land in patti Sant Bilas Singh, the case is different. There the plea is that the plaintiffs have been ejected by the defendants through the instrumentality of the zamindar. The plea amounts to this: that the zamindar dispossessed the plaintiffs from this area of land entirely. As regards this 12 dhurs of land the claim was not of joint possession, though ultimately joint possession has been granted to the plaintiffs. The plea was one of possession of the entire land from which the defendants through the instrumentality of the zamindar had ejected the plaintiffs. Such a suit would lie in the revenue Court even prior to the passing of the Tenancy Act of 1926. The learned counsel for the respondents argued that when in a joint suit part of the matter was open for decision by the civil Court and the other part by the revenue Court the

(1) A. I. R. 1924 P. C. 95=51 Cal. 361=20 N. L. R. 33=51 I. A. 72 (P. C.).

entire matter should be decided by the civil Court. There is, however, no connexion between the three plots. They are all separately marked out. In fact as regards two, joint possession was claimed, and as regards the third, separate possession was claimed. There would have been no difficulty in bringing separate suits with regard to these plots, one suit in the civil Court with regard to two of the plots and the other in the revenue Court with regard to the third.

The next point argued by the respondents' learned counsel was that under the provisions of S. 268, Ten. Act, the plea of jurisdiction could not be raised now when it was not raised in the subordinate Courts. The provisions of that section did not apply because in the case of a suit brought in the revenue Court as regards the 12 dhurs land an appeal would not have lain to the same Court of the District Judge.

For these reasons I dismiss the suit as regards the 12 dhurs land.

In the result the appeal is dismissed as regards two plots of pattis Lachhi Rai and Nakchhedi Singh, and is allowed with respect to one plot in patti Sant Bilas Singh. The plea of jurisdiction was raised very late here. I, therefore, allow the plaintiffs half costs throughout, and the defendants shall bear their own costs.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 520

'SULAIMAN, AG. C. J., AND SEN, J.

Abbas Ali—Judgment-debtor—Appellant.

v.

Gulab Rai—Decree-holder—Respondent.

Execution First Appeal No. 273 of 1929, Decided on 23rd October 1929, from decree of Sub-Judge, Gorakhpur, D/- 27th May 1929.

Civil P. C., O. 34, R. 5—Final decree passed by Court having jurisdiction cannot be contested by judgment-debtor who remains absent on notice being served.

Where the decree-holder rightly or wrongly applies to the proper Court having jurisdiction for preparing a final decree in a mortgage suit and the judgment-debtor does not contest the application, even though notice is duly served on him, the final decree, which is passed is within jurisdiction and capable of execution. Application for execution made within three years of final decree is within time.

[P 520 C 2]

K. Verma—for Appellant.

Sen, J.—This is a judgment-debtor's appeal and arises out of an application for execution which was made in the year 1928.

A compromise decree was obtained by the plaintiff-respondent in a suit for sale on a mortgage on 29th June 1923. The decree was passed in plaintiff's favour for Rs. 5,000 and the decree provided that the amount was to be paid by the judgment-debtor in easy instalments within 15 months of the date of the decree. Upon the expiry of the period of 15 months the decree-holder applied for a final decree to be passed in his favour. Notice of this application was duly served upon the judgment-debtor but he did not contest the application. The result was that a final decree was passed on 6th February 1926.

The decree-holder applied for the execution of this final decree and it was resisted by the judgment-debtor on the ground that the decree was passed without jurisdiction and was therefore a nullity. It was contended that the original decree passed on 29th June 1923 was a self-contained decree which was capable of execution and that the provisions of O. 34, R. 5, Civil P. C., did not apply to such a decree. It was also contended that the decree dated 29th June 1923 was capable of execution within three years from the expiry of 15 months and that the present application was beyond that period and was therefore statute barred.

It is not necessary to determine whether the provisions of O. 34, R. 5, Civil P. C., apply to the decree dated 29th June 1923. The short ground upon which the appeal can be disposed of is that the decree-holder rightly or wrongly applied to the proper Court for preparing a final decree in the case. The Court had jurisdiction to entertain the application. The judgment-debtor did not contest and the Court eventually passed a final decree. We are clearly of opinion that the decree passed in the case was within jurisdiction and was capable of execution. The application for execution being within three years of the final decree is within time. We dismiss the appeal under O. 41, R. 11, Civil P. C.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 521

MUKERJI AND BENNET, JJ.

Mt. Rasulan Bibi and *others* — Plaintiffs—Appellants.

v.

Nand Lal and *others* — Defendants—Respondents.

Letters Patent Appeal No. 14 of 1928, Decided on 20th February 1930, from a judgment of Banerji, J., D/- 20th November 1928.

Transfer of Property Act, S. 41 — Mere inspection of khewat is not sufficiently good inquiry even in the case of auction-purchaser, especially when judgment-debtor is Mahomedan.

In most cases coming from Mahomedan families, the names of the sisters and mother, who are also heirs of a deceassd Mahomedan, are never entered in the khewat. It cannot be held, therefore, that Mahomedan sons, simply because their names alone are down in the khewat, are entitled to give a good title to the transferee and the mother and sisters shall be precluded from claiming their shares. Thus a mere inspection of the khewat even in the case of an auction-purchaser is not sufficiently good inquiry especially where the judgment-debtor is a Mahomedan :

[P 522 C 1]

Shiva Prasad Sinha—for Appellants.

M. L. Agarwala—for Respondents.

Mukerji, J.—This appeal must be allowed. The facts are briefiy these : In execution of a simple money decree obtained by Saheb Din and others decree-holders, against two brothers, Hidayat and Yaqub, a certain property was attached. Thereupon a brother and two sisters and mother of the judgment-debtors preferred an objection in the execution department, claiming their shares on the ground that the property attached was originally the property of the ancestor, Zakir Ali, being the father of the judgment-debtors. It appears that the names of the brothers alone were recorded in the khewat. In that view the share of Yad Ali, namely one-third at any rate, should have been exempted from the sale. It, however, appears to be a fact that the objection failed in the execution department, and the brother, sisters and mother of the judgment-debtors brought the suit, out of which this appeal has arisen, to obtain a declaration that their shares in Zakir Ali's property was not liable to be sold in execution of the decree. After instituting the suit the plaintiffs took the precaution of making an application to the Court for issuing an injunction restraining the decree-holders from selling the property till the decision of the suit. That application was also disallowed. The property was sold and was purchased by one Nand Lal, who was, later on, added as a defendant to the suit.

The defence taken among others was that two of the plaintiffs were not daughters of Zakir Ali, and the suit was barred by limitation and also under S. 41, T. P. Act. The Court of first instance decreed the suit, but the lower appellate Court dismissed it on the sole ground that the suit was barred by S. 41, T. P. Act. On the question of fact the learned appellate Judge held that the two plaintiffs, Mt. Razia Bibi and Mt. Bannu Bibi, were Zakir Ali's daughters. A second appeal was filed before this Court, and a learned single Judge of this Court dismissed the appeal, holding that S. 41, T. P. Act. had been properly applied to the facts of the case. In the Letters Patent appeal it is contended that S. 41 should not have been applied and the suit should have been decreed. The sole point, therefore, that we have to decide in this suit is whether, in the circumstances of the case, S. 41, T.P. Act, was rightly applied or not.

We do not know the exact date of Zakir Ali's death, but it appears that he died about 15 years ago. It further appears that after the death of the father the two judgment-debtors, Hidayat and Yaqub, on two occasions transferred a portion of the property of Zakir Ali. Nand Lal entered the witness box and swore that all the enquiry that he made into the title of the judgment-debtors was an inspection of the khewat and the sale proclamation which advertise d the fact that the property of the judgment-debtors was going to be sold. The question then is whether this inquiry on the part of the purchaser was enough, or whether he ought to have taken further precautions and made a better inquiry into the title of the judgment-debtors.

Although the language of S. 41, T. P. Act, would indicate that it applies to the case of a private transfer alone, we take it, without deciding the point, that it may be applied also to the case of an auction-purchase. The proviso would

still remain, namely in order to create an estoppel, on the principle on which the section is based, the transferee should make the purchase

"after taking reasonable care to ascertain that the transferee had power to make the transfer and has acted in good faith."

It has been argued by the learned counsel for the respondent that an inspection of the khewat was enough on the part of the auction-purchaser and he need not have enquired whether the property was purchased by the judgment-debtors, or whether it had been inherited by them or what were other sources of acquisition on the part of the judgment-debtors. We are unable to agree with this view. In most cases coming from Mahomedan families, the names of the sisters and mother, who are also heirs-at-law of a deceased Mahomedan, are never entered in the khewat. If we are to say that Mahomedan sons, simply because their names alone are down in the khewat, are entitled to give a good title to a transferee, and the mother and the sisters shall be precluded from claiming their shares, it would be disastrous indeed. As remarked in so many cases, each case must be treated on its own facts. Ordinarily, when a man makes purchase, he enquires the source of the vendor's title. A mere inspection of the khewat should not suffice as a sufficiently good inquiry under S. 41, T. P. Act, especially where the vendor or the judgment-debtor is a Mahomedan. To hold otherwise would be to disregard what is a well-known practice in the land.

Let us consider the nature of an entry in the khewat. The mutation order has nothing of the judicial in its character. as observed their Lordships of the Privy Council in *Nirnna Singh* v. *Rudra Pratap Narain Singh* (1) at p. 539-540 (*of* 48 *All.*).

They (proceedings for mutation of names) are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid.

It is little less than a travesty of judicial proceeding to regard the two orders of the Assistant Commissioner of Bahraich and of the Deputy Commissioner as judicial determination expelling, proprio vigore, any individual from any proprietary right or interest he claims in the immovable property.

These observations are based, no doubt, on the provisions of the Land Revenue Act itself, which lays down, in S. 40 (Act 3 of 1901) that all disputes regarding entries in the annual registers (khewats) shall be decided on the basis of possession. Where possession is doubtful, the officer is directed to hold a summary inquiry as to title and to put the party, so found to be entitled to the property, into possession. It then provides that any order of possession so passed shall not debar any party from instituting a suit for the establishment of his right. It is clear, therefore, the State wants to find out from whom it should easily recover the land tax. The very law under which the khewat is prepared and maintained, does not say that the khewat is a document of title. If that be the case, how can a mere inspection of the khewat sufficiently satisfy a reasonable inquirer, as to title? The first thing that a solicitor, who has to report as to the title of, say, an intending seller, would do, is to ask for the title-deed of the man. He will, no doubt, look into the khewat. If the name be there, the solicitor would ask for the title-deed. If the intending vendor says that he did not purchase the property but he inherited it, the next question to be put to him would be, from whom he inherited. When this is known the next inquiry would be who were the heirs of the deceased ancestor. It is impossible to hold that a mere inspection of the khewat is a sufficient inquiry as laid down by S. 41, T. P. Act. We hold that the auction purchaser is not protected. Then it is difficult to see how the auction purchaser, who is a purchaser pendente lite, could escape the effect of such a purchase. He must take the property subject to the result of the suit. This point was not argued before the learned single Judge and, therefore, we need not dilate upon it. In the result we allow the appeal, set aside the judgment of this Court and the decree of the lower appellate Court and restore the decree of the Munsiff. The appellants will have their costs in all the Courts.

P.N./R.K. *Appeal allowed.*

(1) A. I. R. 1926 P. C, 100=48 All, 529 = 53 I. A. 220 (P.C.).

A. I. R. 1930 Allahabad 523

MUKERJI AND SEN, JJ.

Amba Prasad and *others*—Defendants—Appellants.

v.

Moonga Ram and *others*—Plaintiffs—Respondents.

Second Appeal No. 569 of 1927, Decided on 4th February 1930, from decree of Addl. Sub-Judge, Agra, D/- 19th January 1927.

(a) Transfer of Property Act, Ss. 91 and 95—Cosharer puisne mortgagee redeeming part of mortgaged property as other part was purchased by mortgagee — Other co-sharers-mortgagors can redeem only their proper share.

Where a cosharer puisne mortgagee of the entire property institutes a suit to redeem a prior mortgage of the same, but finding that the mortgagee had purchased half share in the property mortgaged, redeems the other half for payment of the proportionate mortgage debt, the other cosharer-mortgagors cannot redeem more than their proper share of the mortgaged property. [P 524 C 2]

(b) Mortgage — Construction — Suit for redemption—Non-deposit or non-tender of mortgage money as agreed does not entail the dismissal of suit.

Where one of the terms of redemption is that the mortgagor should deposit the mortgage money on or before a particular date, the non-tender or non-deposit of the mortgage money on that date is no ground for dismissing the redemption suit in its entirety. The equities of the case, if necessary, may be settled by making a prior order as to costs : *A. I. R.* 1921 *All.* 71, *Fell.* [P 524 C 1, 2]

S. N. Mukerji, *S. K. Dar* and *Gopinath Kunzru*—for Appellants.

Mushtaq Ahmad—for Respondents.

Mukerji, J.—The facts of the case are complicated and will have to be gone into at some length.

It appears that a 10 biswas share in village Mangora, as described in the plaint, was under a very ancient usufructuary mortgage with one Mr. Wright, in or about 1838. On 19th March 1874 some of the persons in whom the right to redeem was vested made a mortgage of the same property, viz., 10 biswas share, in favour of Durga Prasad, a predecessor-in-title of the appellants before us. The mortgage in favour of Mr. Wright was for Rs. 2,200. The mortgage that was made in favour of Durga Prasad was for Rs. 2,800. Durga Prasad was also one of the persons entitled to share in the property, as a co-mortgagor. It was therefore agreed that Durga Prasad should pay down in cash Rs. 800 to his mortgagors and should pay Rs. 2,200 to Mr. Wright or his successor-in-title for redemption. The difference between Rs. 2,200 and Rs. 2,800 was to be provided for by Durga Prasad himself, inasmuch as Durga Prasad was a co-mortgagor under the ancient mortgage of 1838. Durga Prasad, it appears, obtained assignment of a part of the mortgaged property in 1879. The history behind his purchase is that in 1870 one Akkhay sold to Madho Singh 1½ biswas share for Rs. 80. Madho Singh's heirs' names were recorded in the khewat. In 1879, Durga Prasad's name was substituted in place of those of Madho Singh's sons. The lower appellate Court has found, and we must accept that finding as correct, that Madho Singh was really a benamidar for Durga Prasad. In the result, before the mortgage of 1874 in his favour, Durga Prasad held two shares in the property, namely 10 biswas, under the purchase of 1870.

Having acquired the mortgage of 1874, Durga Prasad proceeded to redeem the mortgage of 1838. At this stage, the mortgagee rights of Mr. Wright had become vested in one Faqruddin. Durga Prasad instituted a suit against Faqruddin and it was found that Faqruddin had purchased a 5 biswas share out of the 10 biswas mortgaged with him. In the result, by the judgment of the Court, dated 1st September 1875, Durga Prasad was given a decree for redemption of the remaining 5 biswas alone. Durga Prasad thereupon paid Rs. 1,100, being one-half of the mortgage amount, Rs. 2,200, and obtained delivery of possession.

The present plaintiffs professed to be the transferees of some of the co-mortgagors of Durga Prasad. They claimed redemption of the entire 5 biswas share in the hands of Durga Prasad's heirs, the appellants before us.

Durga Prasad's heirs raised various defences to the suit, many of which we need not consider at all now. They claimed large sums of money as due to them under the terms of the mortgage of 1874.

The learned Munsif dismissed the suit because he was unable to find out what was the plaintiff's share in the mortgage property. He held that the plaintiffs could not, in the circumstances of the

case, obtain redemption of more than their proper share in the property.

The learned Subordinate Judge was of opinion that the plaintiffs were entitled to redeem the entire 5 biswas share. He thought that because the alleged purchase by Durga Prasad of 1879 was a fictitious one, he having acquired the property benami through Madho Singh in 1870, there was no acquisition by Durga Prasad of any share of the mortgaged property after the mortgage of 1874. The learned Judge, therefore, held that there was no breach of the integrity of the mortgage. The integrity, according to the learned Judge, having not been broken, the plaintiffs were entitled to redeem the entire 5 biswas share of the zamindari property. Various points have been argued on behalf of the appellants and we shall take them up separately.

The first question is whether the plaintiffs are entitled to redeem the entire 5 biswas share or only their legitimate share, according to the proper calculations. On this point we are of opinion that the plaintiffs cannot redeem anything more than their proper share of the mortgaged property. Accepting the learned Subordinate Judge's finding that there was no purchase by Durga Prasad after the mortgage, the fact remains that at the date of the mortgage of 1874, Durga Prasad was already a cosharer in the property. The result of redemption by Durga Prasad was that one of the co-mortgagors redeemed the mortgage. By virtue of a statement in the deed of 1874 itself, it is clear that Durga Prasad had a share in the property. He, having redeemed Faqruddin, was in the position of several mortgagors redeeming the mortgage. Such being the case, no co-mortgagor can ask Durga Prasad or his heirs to hand over to him more than his own legitimate share. The principle on which the entire property is handed back on redemption does not apply to this case. If the property redeemed is going to be security for the money advanced, Durga Prasad is as much entitled to hold the property as the plaintiffs would be on payment. One result of allowing, to-day, redemption of the entire 5 biswas share is, that tomorrow Durga Prasad's heirs would be entitled to go and ask for redemption of their shares. It seems to be absolutely clear to us, therefore, that the plaintiffs cannot redeem anything more than their legitimate share of the mortgaged property.

The next point is, what is the amount of the plaintiffs' share? This has not been determined by the lower appellate Court. The learned Munsif found himself not to be in a position, from the evidence, to come to a conclusion. The lower appellate Court has not come to any finding. We shall have to ask the learned Subordinate Judge to come to a finding of his own on the evidence, as it stands.

The next point argued before us on behalf of the appellant was that as no money had been deposited prior to the institution of the redemption suit, the suit should have been dismissed in its entirety. It is argued that one of the terms of redemption was that the money was to be deposited in the month of Jeth. This argument is really concluded by the Full Bench case of *Ahmad Beg* v. *Dharman Rai* (1) and the non-deposit or non-tender of the mortgage money in the month of Jeth is no ground for dismissing the suit in its entirety. The equities of the case, if necessary, may be settled by making a proper order as to costs.

The next point is as regards the accounts. In the deed of mortgage of 1874, one of the terms was that when redemption is asked for, the mortgagee would be entitled to all the arrears of takavi and rent that may be "due" by the mortgagors themselves and the tenants. The learned Subordinate Judge has held that this meant arrears recoverable under the three years of limitation. We think that this view was the right one, on the terms of the deed itself. We, therefore, uphold this part of the judgment.

The next point that has been urged for the appellant is that interest should have been allowed to the defendants on the sum of Rs. 2,800 from the date of the mortgage, namely 19th March 1874 till recovery of possession from Faqruddin by Durga Prasad. The learned Subordinate Judge has allowed interest on the sum of Rs. 800 only. As regards the interest on the balance, we are of opinion that the defendants are not entitled

(1) A. I. R. 1921 All. 71=43 All. 424 (F.B.).

to anything further. They have failed to prove that they had deposited the sum of Rs. 2,200 almost immediately after the execution of the deed of the mortgage or that they had deposited it at all.

The next point is that the defendants are entitled to interest on the sum of Rs. 400, being one-half of the sum of Rs. 800 which the mortgagors took, believing that it was going to be a mortgage of 10 biswas. There is no stipulation in the mortgage deed for any interest for any sum that might be taken by the mortgagors. The Interest Act does not apply and we do not think that on pure equitable grounds we should allow any interest on such an ancient transaction, which was entered into about 55 years ago. To allow interest would really mean prevention of redemption.

Then, we have been told that there was a clerical error in the calculation of the profits. This is pointed out in para. 7 of the grounds of appeal taken in this Court. As the question of accounts will have again to be gone into, we need not consider whether there is any error in the decree of the lower Courts in the calculation.

Then exception has been taken on behalf of the appellants as to opening of the question of malkana. The learned Subordinate Judge at p. 37 of the judgment says :

"The question of malkana allowancedue to the mortgagors has not been gone into by the learned Munsif ..... I do not mean to hold that malkana has or has not been paid to the mortgagors. That will be a point for the learned Munsif to decide."

The learned counsel for the appellant has urged that the plaintiffs are not entitled to claim credit for malkana unless they have taken an assignment of the same from the mortgagors. On behalf of the respondents it has been urged that whether there is an assignment or not, the malkana is payable to the vendors of the respondent and therefore to the respondents themselves under the terms of the deed. These points have not been gone into or decided and we would leave them open for the consideration of the Court of first instance.

In the result we have to send down an issue for determination by the lower appellate Court. Till the issue is decided, we shall not be in a position to say on what condition the case should go back to the learned Munsif or whether it is to go back to him at all. The issue is :

"What is the share of the plaintiffs in the 5 biswas share sought to be redeemed? If it is found that the plaintiffs' share is nil, or that it cannot be ascertained on the evidence that stands on the record, the whole suit will have to be dismissed."

We allow six weeks' time to the lower appellate Court for remitting of findings. No further evidence will be allowed to be adduced. One point has to be noted. This appeal was really an appeal against an order of remand. The appellant has paid full court-fee as if it were an appeal against a decree. In passing final orders in this appeal, we shall consider the question of costs.

V.B./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 525

SEN AND NIAMATULLAH, JJ.

Kundan Lal-Ram Chander—Plaintiffs—Appellants.

v.

Lachmi Narain and *another*— Defendants—Respondents.

Second Appeal No. 1116 of 1927, Decided on 24th January 1930, from decree of Addl. Dist. Judge, Cawnpore, D/- 5th March 1927.

(a) Practice—Appellate Court—Appellate Court can go into matter clearly in issue but for which no distinct issue framed.

Where a matter is clearly in issue between the parties as disclosed from pleadings but no distinct issue is framed by the lower Court, it is open to the first Court of appeal to go into the matter. [P 526 C 2]

(b) Contract Act, S. 30 — Claim for recovery of loss sustained in consequence of contract in nature of wager is not enforceable.

A claim for recovery of loss in consequence of a contract of the nature of a wager is not legally enforceable and if such contract be by one person with another, who is partner of a firm and the contract is as between principal and principal, the person is not entitled to be recouped for his loss, by suit against the other partners of the firm. [P 526 C 2]

Damodar Das and *Ralhey Mohan Lal*—for Appellants.

K. N. Katju and *K. D. Malaviya*—for Respondents.

Sen, J. — This is an appeal by the plaintiff, and it arises out of a suit for recovery of Rs. 1,251-4-6, principal, and Rs. 337-8-0, interest, in connexion with a certain transaction relating to the purchase of wheat which was entered into between the parties.

The plaintiff is a firm carrying on business at Binki, in the district of Fatehpur, under the designation of "Kundan Lal Ram Chander." The defendants are the proprietors of the firm Lachmi Narain Shankar Lal, located at the same station. The plaintiff alleged that he had purchased 500 tons of wheat from a Bombay firm, named Ram Kishen Das Chiranji Lal, that the firm of the defendants purchased from the plaintiff 50 tons out of these 500 tons of wheat and that delivery was agreed upon on 21st May 1923. The defendants refused to take delivery because there was a fall in the price of wheat in the market. The plaintiff had to pay Rs. 1,251-4-6 to the Bombay firm on account of the defendants. Hence the suit.

The defendant firm consists of two partners, viz., Lachmi Narain and Shankar Lal. Lachmi Narain pleaded that neither he nor his firm entered into any contract with the plaintiff for the purchase of 50 tons of wheat. He contended that the transaction was of the nature of wager and that it was entered into by Shankar Lal on his own account and on his own responsibility. Shankar Lal pleaded that the contract was of the nature of wager and that he had already paid Rs. 1,260 as loss to the plaintiff and that the claim was not maintainable against him.

The Court of first instance upheld the contention of the defendants and substantially dismissed the suit. A decree was passed for a sum of Rs. 85-5-0. This position of the decree has not been challenged before this Court.

The lower appellate Court has affirmed the decision. The findings recorded by it are: (1) that the firm of Lachmi Narain Shankar Lal did not enter into a contract with the plaintiff for the purchase of 50 tons of wheat, (2) that Lachmi Narain was no party to the alleged agreement to purchase, (3) that the contract was of the nature of a wager and had been entered into between the plaintiff and Shankar Lal alone upon the latter's responsibility, (4) that the said contract was not capable of being enforced in a Court of law by suit, and (5) that the plaintiff had not established that he had paid Rs. 1,251-4-6 on behalf of Shankar Lal.

The lower appellate Court has assigned excellent reasons for coming to the conclusion that the transaction between the plaintiff and Shankar Lal was of the nature of a wager. The claim for recovery of loss in consequence of such a contract was not legally enforceable.

Upon the findings arrived at by the lower appellate Court no claim could, under any circumstances, be brought either against Lachmi Narain or against the firm of which he was a partner.

The claim being of the nature of wager, it could not be enforced against Shankar Lal. It is pleaded, however, that because Shankar Lal and the plaintiff were engaged on the same side in a joint venture and the plaintiff had to pay on account of Shankar Lal, he is entitled to recover the said amount from Shankar Lal, his partner. The findings arrived at by the lower appellate Court make it clear in the transaction relating to the purchase, the dealing between Shankar Lal on one side and the plaintiff on the other was that between principal and principal and not between principal and agent. Under these circumstances, if the transaction had in it the taint of wager, the plaintiff is not entitled to recoup his loss by suit against his partner.

The plaintiff is faced with another difficulty. The lower appellate Court has come to a definite finding that the plaintiff had failed to establish that he had paid Rs. 1,251-4-6 to the Bombay firm on behalf of the defendant. If this finding be not open to challenge, it completely concludes the claim. It has been argued, however, that the lower appellate Court has gone off the rails in recording a finding on this point, because it did not arise from the allegations of the parties. We have examined the plaint and the written statements. In para. 7 of the plaint, the plaintiff claims to have paid the aforesaid amount to the Bombay firm on account of the defendants. This allegation was distinctly denied by the defendants. The matter was, therefore, clearly in issue between the parties. It is true that no distinct issue was framed by the Court of first instance; but the lower appellate Court was entitled to go into this matter, which cut at the root of the claim. We are clearly of opinion that this appeal is without force, and it is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 527

NIAMATULLAH, J.

(*Mandir*) *Thakurji Maharaj*—Plaintiff—Appellant.

v.

Risal—Defendant—Respondent.

Second Appeal No. 1425 of 1928, Decided on 11th February 1930, from decree of Addl. Dist. Judge, Meerut, D/- 9th June 1928.

Agra Tenancy Act (3 of 1926), S. 81—Previous application for arrears contested by tenant and converted into suit—Subsequent suit for arrears of rent—Tenant can claim bar of Civil P. C., O. 2, R. 2.

If a tenant contests the claim of the landlord to arrears of rent an application becomes a plaint on proper Court-fee being paid and whatever may be the character of the subsequent suit, O. 2, R. 2, will be applicable if the landlord is suing for arrears of rent, though he may be entitled to the additional relief of ejectment in a certain contingency.

[P 527 C 2, P 528 C 2]

M. L. Agarwala—for Appellant.

U. S. Bajpai—for Respondent.

Judgment.—This is an appeal from the judgment and decree passed by the Additional District Judge, Meerut, in proceedings under S. 81, Agra Tenancy Act 3 of 1926.

Appellant is the zamindar of village Nagal in which the respondent is his tenant. The appellant issued a notice under S. 81, Tenancy Act, against the defendant calling upon him to pay arrears of rent for the years 1332, 1333 and Rabi 1334 Fasli. Notice was, as usual, filed in the Court of the Tahsildar with an application referred to in that section praying for ejectment of the tenant in case arrears were not paid. The respondent contested that notice on the ground that the appellant's claim to the arrears of rent for the years mentioned above was barred by the provisions of O. 2, R. 2, Civil P. C., inasmuch as the appellant had instituted, on 23rd April 1927, a suit for arrears of rent for Rabi 1331 Fasli. It should be mentioned that the rent for the years 1332, 1333 and Rabi 1334 Fasli was overdue on 23rd April 1927 when the suit was instituted. It was, therefore, contended by the respondent that the present claim for those years is barred by O. 2, R. 2, Civil P. C. Both the lower Courts have given effect to this plea and the plaintiff has preferred the present second appeal.

The only question argued before me has reference to the respondent's plea that the appellant's claim to arrears of rent for 1332, 1333 and Rabi 1334 Fasli is barred by O. 2, R. 2, Civil P. C., S. 81, Agra Tenancy Act 3 of 1926. entities a landholder to apply to the Tahsildar for the issue of a notice to his tenant, not being a permanent tenure-holder or a fixed rate tenant, for payment of arrears of rent and for his ejectment in case of default. It is, however, open to a tenant on whom such notice is served to contest the claim, in which case:

"the application for issue of notice shall be deemed to be a suit for arrears of rent on payment of the proper Court-fee. If the arrears claimed does not exceed Rs. 200 the Tahsildar shall, subject to the provisions of S. 78 (4), decide the suit if the arrears claimed exceeds Rs. 200, the Tahsildar shall forward the suit to the Court of the Assistant Collector in charge of the subdivision, who shall decide it."

It has been conceded before me by the learned counsel for the appellant that if instead of taking proceedings under S. 81, the landholder had instituted an ordinary suit for arrears of rent for the years 1332, 1333 and Rabi 1334 Fasli it would have been barred by O. 2, R. 2, Civil P. C., in consequence of a suit for arrears of rent having been instituted on 23rd April 1927, and of the rent for the years now in suit not having been claimed. The whole controversy is thus narrowed down to the question whether different considerations are applicable to the claim for arrears of rent made under S. 81, Tenancy Act.

Section 81 (5), the material part of which has been quoted by me above, makes it clear that if the tenant contests the claim of the landholder to arrears of rent the application becomes a plaint on proper Court-fee being paid. It is not disputed before me that Court-fee was paid in the present case. The application must therefore be deemed to be the plaint of a suit for arrears of rent for the years already mentioned. The proceedings under S. 81, were by operation of law converted into a regular suit for arrears of rent. It follows that the tenant who should be regarded as the defendant in such suit is entitled to put forward all pleas open to him in a suit for arrears of rent including a plea in bar.

Order 2, R. 2 (2) of the Civil P. C., provides as follows:

"Where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portions so omitted or relinquished."

If the landholder can be said to be suing in respect of the portion omitted in the previous suit, while he is prosecuting the arrears of rent suit into which his application is converted, there can be no doubt that O. 2, R. 2, Civil P. C. is as much a bar as would be the case if he had brought an ordinary suit for arrears of rent. It cannot be contended that the landholder is not suing for arrears of rent under S. 81 (5) when his application for notice is "deemed to be a suit."

The learned counsel for the appellant has founded an argument on the words "subject to the provisions of S. 78 (4)" occurring in S. 81 (5), Tenancy Act. He argues that the decree to be passed in the suit for arrears of rent contemplated by S. 81 (5), is a decree directing the defendant to pay the rent and directing further, that he be ejected in default of payment of rent. It is urged that the suit into which an application under S. 81, is converted is not a suit for arrears of rent pure and simple, but also for the relief of ejectment on the tenant failing to pay the rent. Reference has also been made to S. 132 of the same Act. I find nothing in that section which in any way, supports the contention put forward on behalf of the appellant. S. 78, provides that

"no decree or order for ejectment of a tenant shall be passed or enforced until any claimduly made by him on account of improvements has been investigated and the Court has recorded a finding as to the amount of compensation if payable to the tenant on that account."

An Assistant Collector of the second class is not empowered to entertain such a claim and to record a finding relating to it. Sub-S. (4) of that section therefore provides that:

"if the Court to which a claim under sub-S. 1, is made, is the Court of an Assistant Collector of the Second Class, he shall forward the proceedinge to the Assistant Collector in charge of the subdivision who shall dispose of the case as if it had been instituted before himself."

It is argued that a reference to S. 78 (4) in S. 81 (5) is a clear indication that the suit contemplated by the latter section is a suit not only for arrears of rent but also for ejectment in the event rent is not paid. I do not think that such reference to S. 78 (4) is necessarily an indication of that fact. S. 79 entitles a landholder to execute a decree for arrears of rent by the ejectment of the tenant from the holding in respect of which the decree was passed. S. 80 provides that:

"on receipt of an application under S. 79 the Court shall issue notice to the tenant, requiring him to pay the amount into Court within 15 days of the service of the notice, or to show cause why he should not be ejected from his holding."

S. 81 (5) is not very happily drafted, but I entertain no doubt that an ordinary decree for arrears of rent has to be passed when the application is contested by the tenant and the application is thereupon converted into a suit provided it is decided in favour of the landholder. If the landholder is desirous of executing such decree by ejecting the tenant, he has to take action under Ss. 79 and 80 of the Act. The provision in S. 81 (5) that:

"if the arrears claimed do not exceed rupees 200 the Tahsildar shall, subject to the provisions of S. 78 (4), decide the suit."

Is suggestive of a contingency in which a tenant may claim compensation for improvement. In such a case the section declares that:

"the Assistant Collector, Second Class, is not to decide the suit."

If the tenant declares in the initial stages of the suit that he would claim compensation for improvements the suit is to be transferred to the Sub-Divisional officer under S. 78 (4), otherwise the Assistant Collector, Second Class is to proceed to a decree in favour of the landholder if rent is due, in which case no occasion will arise for transfer of proceedings under S. 78 (4) until action is taken under Ss. 79 and 80. For these reasons I am clearly of opinion that the suit referred to in S. 81 (5) is a suit for arrears of rent pure and simple and if the application of O. 2, R. 2, Civil P. C. depends, in the present case on the subsequent suit being regarded as one for arrears of rent, I have no hesitation in holding that the suit out of which the present appeal has arisen, was a suit of that character.

But I am of opinion that whatever may be the character of the subsequent suit O. 2, R. 2, Civil P. C., will be applicable if the plaintiff is suing for arrears of rent, though he may be entitled to the additional relief of ejectment in a certain contingency. In such a case his

claim to arrears of rent will be barred and ejectment proceedings will be out of question. I do not think the bar created by O. 2, R. 2, Civil P. C., can be got over if in the subsequent suit additional reliefs are claimed by the plaintiff or can be granted by the Court.

For the foregoing reasons I am of opinion that the decree passed by the Court below is correct.

This appeal is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 529 (1)

SULAIMAN AND KENDALL, JJ.

Maqbul Ahmad and *others* — Defendants—Appellants.

v.

Brijdeo Tewari and *others*—Plaintiffs—Respondents.

Second Appeal No. 2036 of 1927, Decided on 13th December 1929, against decree of Sub-Judge, Jaunpur, D/- 23rd June 1927.

Hindu law — Alienation — Daughter inheriting estate of her mother—Expenses for barkhi ceremony of mother can be met by her out of such property.

The performance of the barkhi ceremony, i.e., first annual death ceremony is a duty on the person inheriting the estate of the deceased and therefore a daughter who inherits the estate of her mother can validly mortgage that property for meeting the expenses for such ceremony.

[P 529 C 2]

Iqbal Ahmad and *Mukhtar Ahmad*—for Appellants.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for recovery of possession by avoidance of a sale deed of 1913. This deed was executed for a sum of Rs. 169 by one Mt. Poona in order to pay off a prior mortgage dated 4th December 1909 executed by her in favour of Mendai, the defendant's father. The property transferred was what had been inherited by her from her mother. It was therefore a Hindu woman's limited estate in her possession, and no valid transfer could have been made without legal necessity. The recital in the earlier mortgage deed as shown by a certified copy was to the effect that the money had been borrowed for barkhi, that is the first annual death ceremony of her mother, Mt. Ram Kali. There was also oral evidence to the same effect. The present plaintiffs have after the death of Mt. Poona purchased this very property, viz., one pie share from her sons who became the heirs to the estate.

The lower appellate Court has distinctly found that the sale deed of 1913 was for legal necessity, inasmuch as it was proved that the money had been raised to pay off the prior mortgage deed under which money had been borrowed for the barkhi ceremony of her mother. The learned Judge has pointed out that according to the prevalent belief it would have been improper for Mt. Poona to perform the death ceremony of her mother out of her own money or out of the income of her property, as it is considered a sin for a mother to be benefited by the income of her daughter, and that it was on account of such a sentiment that Mt. Poona must have raised money out of the property left by her mother Mt. Ram Kali to perform the barkhi ceremony of the latter. The performance of such a ceremony would be a duty on the person who inherits the estate of the deceased and the expenses could be met out of such property. The original mortgage deed of 1909 was not produced and apparently there was no definite proof of its loss. The lower appellate Court, however, thought that the loss of the original is required to be proved only if the document is being enforced in a suit and that there is no such requisite if the copy is merely produced as a piece of evidence. It would be difficult to accept this view of the law, as under S. 65, Evidence Act, no secondary evidence can be admitted for any purpose unless it is shown that the original has been lost or is not procurable. But the learned Judge has based his finding, independently of the document, on the oral evidence produced by the parties. His finding therefore must be accepted as a finding of fact. The appeal is accordingly dismissed but without any order as to costs as no one appears for the respondent.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 529 (2)

SULAIMAN AND KENDALL, JJ.

Ghanshiam Das Baijnath—Plaintiff—Applicant.

v.

Mithan Lal Tandan and *another*—Defendants—Opposite Parties.

Civil Revn. No. 323 of 1928, Decided on 14th February 1930.

Evidence Act, S. 92—Claim on promissory note—Debtor cannot resist it saying that amount would be given credit to in final settlement of accounts between parties.

A claim based on a promissory note payable on demand cannot be resisted on the ground that the amount would be given credit to in the final settlement of accounts between the parties : *A. I. R.* 1922 *All.* 213, *Ref.*

[P 530 C 1]

Hazari Lal Kapoor—for Applicant.

N. P. Ashthana and *Baijnath Sahai*—for Opposite Parties.

Sulaiman, J.—This is an application in revision from a decree of the Court of Small Causes dismissing a suit based on a promissory note. The promissory note was executed by the defendants in favour of the plaintiff, but the Court below has come to the conclusion that although the defendants received consideration, they did so not from the plaintiff, but from Bisheshar Nath, and has held that the suit is premature, because the defendants state that settlement will be made between them when their accounts are settled.

It is clear that the learned Judge has not dismissed the suit on the ground that a benamidar could not sue in place of the true owner' if the promissory note stood in his name. Such a ground would not be tenable. The dismissal is based on the supposition that the claim is premature. It seems to us that a claim based on a promissory note payable on demand must be decreed, and the defendants cannot resist the claim by saying that the amount would be given credit for in the final settlement of accounts between the parties : vide *Shri Ram* v. *Sobha Ram* (1).

The learned advocate for the applicants concedes that the amount of the decree when realised may remain in Court to the credit of Bisheshar Nath, on whose behalf the plaintiff firm has sued. On this undertaking we allow the application, and setting aside the decree of the Court below, decree the claim. But we direct that the parties should bear their own costs in both Courts.

V.B./R.K. *Application allowed.*

(1) A. I. R. 1922 All. 213=44 All. 521.

A. I. R. 1930 Allahabad 530

KING, J.

Muhammad Ishaq — Defendant—Appellant.

v.

Municipal Board, Cawnpore—Plaintiff—Respondent.

Second Appeal No. 1384 of 1928, Decided on 17th January 1930, from decree of First Sub-Judge, Cawnpore, D/- 30th April 1928.

Limitation Act, Art. 132—Suit for recovery of house or water-tax under U. P. Municipality Act comes within Art. 132—U. P. Municipality Act (2 of 1916), Ss. 177 and 128 (1) (1).

A suit for the recovery of a sum of money due on account of house-tax and water-tax under U. P. Municipality Act is a suit to enforce payment of money charged upon immovable property within the meaning of Art. 132, Lim. Act: 42 *Cal.* 625, *Rel. on.* [P 531 C 1]

Syed Majid Ali—for Appellant.

S. N. Seth—for Respondent.

Judgment.—This appeal arises out of a suit by the Municipal Board of Cawnpore against one Muhammad Ishaq for the recovery of a certain sum of money due on account of house-tax and water-tax for the period from 1st October 1917 to 31st March 1928.

The suit was resisted on the ground that no tax which accrued due for a period more than six years before the institution of the suit was within the period of limitation. It was also contended that the defendant had gifted half of his house to his son and, therefore, was not liable to pay the whole amount of the tax claimed.

The Court of first instance found that the alleged gift by the defendant to his son had not been proved and this finding was not challenged in the lower appellate Court; so I must take it that the alleged gift has not been proved.

The only point which has been argued before me is whether the Courts below were right in finding that the period of limitation applicable to the suit was governed by Art. 132, Sch. 1, Lim. Act, which provides a period of 12 years to enforce the payment of money charged upon immovable property starting from the time when the money sued for becomes due. It should be noted that the plaintiff expressly asks for the enforcement of the charge by sale of the property upon which the taxes are assessed, and a decree has been given to this effect.

The only question, therefore, is whether the sums claimed by the municipality on account of house-tax and water-tax are sums which are "charged upon immovable property," within the meaning of Art. 132.

Under S. 177, U. P. Municipalities Act all sums due on account of a tax imposed on the annual value of buildings or lands or of both shall, subject to the prior payment of land revenue, if any, due to His Majesty thereupon be a first charge upon such buildings or lands. S. 128 makes it clear that sums due on account of house-tax and of water-tax are sums due on account of a tax imposed on the annual value of buildings or lands.

In S. 128 (1) (1) a "house-tax" is described as a tax on the annual value of buildings or lands or of both; and in Cl. 10 a "water tax" is described as a water-tax on the annual value of buildings or lands or of both.

Under S 177, therefore, the sums due on account of house-tax and water-tax are declared by statute to be a first charge upon the buildings or lands with reference to which tax is imposed.

I agree with the Court below, therefore, that Art. 132 applies to the present suit since it is a suit to enforce payment of money charged upon immovable property.

The learned counsel for the appellant has not been able to cite any authority which helps him while the ruling in *Akhoy Kumar Banerji* v. *Corporation of Calcutta* (1) supports the contention of the respondent. I dismiss the appeal with costs.

V B./R K. *Appeal dismissed.*

(1) [1915] 42 Cal. 625=21 C. L. J. 171=27 I. C. 261=19 C. W. N. 37.

A. I. R. 1930 Allahabad 531

MUKERJI AND BENNET, JJ.

Bhawani Prasad and *others*—Defendants—Appellants.

v.

Pahlad Singh and *another*—Plaintiffs—Respondents.

Letters Patent Appeal No 115 of 1927, Decided on 14th February 1930, from judgment of Ashworth, J., D/- 16th May 1927.

U. P. Municipal Act (2 of 1916), S. 2 (19) (b)—Criteria determining whether land is public street is definition given in Act in force when suit is brought—U. P. Municipal Act (1 of 1900), S. 314.

Whether a particular land is a public street or otherwise is to be determined by the application of criteria determining it as mentioned in the Act in force when the suit is brought.

[P 532 C 1]

K. N. Katju and *K. C. Mital*—for Appellants.

Panna Lal—for Respondents.

Bennet, J—This is a Letters Patent appeal by the defendants against a judgment of a learned single Judge of this Court, finding in favour of the plaintiff in regard to the claim of the plaintiff for the removal of a drain made by defendant across a courtyard on which the houses of the parties abut. The drain was made with permission from the Municipal Board of Meerut. The courtyard is connected with a road, and the finding of the lower appellate Court is:

"Once this courtyard belonged to the plaintiff, but in 1910 the Municipal Board of Meerut paved it out of Municipal funds and since then it became a public street,

I hold that the plaintiff is not now the owner of this lane, but its proprietorship is now vested at least since 1910 with the Municipal Board of Meerut."

Both the lower Courts dismissed the suit of the plaintiffs, but the learned single Judge of this Court has found in favour of the plaintiff in regard to this drain. He has arrived at that finding on a consideration of the definition of street. In the Municipalities Act (Act 2 of 1916) the definition of public street is as follows:

"Public street" means a street (a) which is declared a public street by the Board under the provisions of S. 221, or (b) which with the consent, express or implied, of the owner, of the land comprising the street has been leveled, paved, metalled, channelled, sewered or repaired out of the Municipal or other public funds."

The facts found in the present case are that in 1910, the Municipal Board paved this yard. There is an admission of a mukhtariam of the plaintiff in an application which states that the lane was paved by the municipality and that in his belief it was municipal property. There is also oral evidence which was accepted by the lower appellate Court that from 1914 the courtyard was swept by the municipal sweepers. We consider that these circumstances show the implied consent of the owner of the land to the paving of this courtyard in 1910 by the Municipal

Board. Accordingly it would come within the definition of public street. It was argued that the definition of street is different in S. 3 (4), Act 1 of 1900. It is true that the criteria as regards paving, etc., contained in S. 2 (19) (b), Act 2 of 1916, do not find a place in the earlier definition, but even if that is so, we consider that when the plaintiff brought his suit in 1923 we must have regard to the definition contained in the Act then in force, Act 2 of 1916. That Act defines a public street as a street which has been paved out of municipal funds with the consent, express or implied, of the owner. Accordingly, at the time the plaintiff bought this courtyard, it was a public street within the meaning of the Municipalities Act then in force.

A further question was raised in appeal, that the plaintiff had suffered special damage. This is no doubt contained in ground 6 of the second appeal, but the plaintiff did not claim that the drain was especially injurious to him in his plaint or in his grounds of appeal in the lower appellate Court. In the grounds of appeal to the lower appellate Court it was stated that it caused a serious obstacle to the plaintiff and the case for the plaintiff before the Court of first instance on which issue 2 was framed was :

"Does the defendants' drain cause any inconvenience to the plaintiff in taking out their carriage over the disputed land on the case of their house" ?

The finding of fact of the lower appellate Court on this point was :

"The nala which was made by the respondent, is, I am told, a covered one and no difficulty can be experienced by the plaintiff in getting his carriage pass over it."

We therefore consider that the matter of special damage is concluded in favour of the defendant by this finding of fact. We may also add that even if the land were the land of the plaintiff, the Municipal Board under S. 193 (1) Act 2 of 1916 has power to enable the defendant to make a drain across the land of the plaintiff. The rights of the plaintiff under that section are limited to making an objection to the Board. If the Board neglected to give the plaintiff a notice, that does not give him the right to bring a suit against the defendant, but his rights are merely limited to the appeal allowed by the Municipalities Act.

Accordingly, for the reasons given above, we allow this Letters Patent appeal and we dismiss the suit of the plaintiff with costs in all Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 532

BOYS AND YOUNG, JJ.

Emperor

v.

Sikandar—Accused.

Criminal Appeal No. 1059 of 1929, Decided on 18th March 1930, against order of Sess. Judge, Aligarh, D/- 5th September 1929.

(a) Evidence Act, S. 32 (c)—Dying statement not in deceased's own words but being mere note of substance is not sufficient for conviction.

It is unsafe to convict a person merely on the dying statement when such statement is not recorded in the deceased's own words and contains a note of the substance of what deceased told the police. [P 533 C 1]

(b) Penal Code, S. 302—Evidence—Murder by arsenic poisoning — Examination of viscera is necessary.

In view of the common diseases of this country whose symptoms are almost indistinguishable from that of arsenic poisoning it is very unsafe to convict a person without such evidence as can be obtained from a proper scientific enquiry. The proper enquiry consists in the careful examination of the viscera of the body and an analysis by a competent analyser showing from the amount of arsenic found in the viscera that at least a lethal dose must have been administered. Mere examination of the vomit or night-soil is totally insufficient and it is extremely dangerous to rely upon some traces of arsenic found in either of these two things. [P 533 C 2, P 534 C 1]

U. S. Bajpai—for the Crown.

G. S. Pathak—for Accused.

Young, J.—Sikandar was charged under S. 302, I. P. C., before the Sessions Judge of Aligarh with having poisoned one Mt. Tufania by administering arsenic to her. The learned Sessions Judge acquitted the accused, and the Government has appealed.

The case for the prosecution was that the accused, who had had illicit relations with the deceased woman, and also was in the habit of committing sodomy with her son, because the woman refused to leave the place in which she was then living and go and live with him, administered arsenic to her in *gur* on 22nd June 1929, and thereafter, within some twenty-four hours, she died as a result of arsenic poisoning.

The prosecution called three eye-witnesses who deposed that they had seen the accused giving the deceased *gur*. The witnesses also gave evidence that shortly afterwards the woman became very ill and vomited and purged. There was also on the record the statement of Mt. Tufania herself made to the police, which was admitted in evidence as a dying declaration. In that statement the woman said that the accused had illicit intimacy with her and also with her son ; that she refused to go to Aligarh with him, and that afterwards he gave her *gur* to eat saying that it was a "parshad" from a Pir ; that shortly afterwards she began to feel giddy and thirsty and drank water from a jar and that the water was bitter. She also said that the *gur* tasted bitter, and that she charged Sikandar with administering poison to her mixed with the *gur*. As regards the evidence of the three eyewitnesses, the learned Sessions Judge discards it on the ground that he was not satisfied that they were speaking the truth. We have carefully examined their evidence, and we have no reason to disagree with the finding of the learned Sessions Judge on this point. There remains, then, the evidence of the deceased woman herself as given in her dying statement. As regards the statement, the learned Sessions Judge came to the conclusion, from the internal evidence in the statement itself, that the statement was not given in the woman's own words but that it was merely a note of the substance of what she told the police. The learned Sessions Judge came to the conclusion that it would not be safe to convict the accused merely on the statement. We are in agreement with the learned Sessions Judge in the finding to which he came, and we see no reason to upset that finding and to convict the accused.

While we agree with the Sessions Judge we think we ought to put it on record that there are several other more important reasons than have been given by the learned Sessions Judge, or even discussed by him, for acquitting Sikandar. There is, in our opinion, no evidence on the record worthy of the name to prove that Mt. Tufania died of arsenic poisoning. In a case of arsenic poisoning two things must be proved : firstly, that the person alleged to have been murdered did die of arsenic poisoning ; and, secondly, that the arsenic was administered by the accused person. The only evidence in this case of arsenic poisoning is the evidence of the Civil Surgeon who says in his original report that the cause of death was "probably some irritant poison." Later on the Civil Surgeon was more definite. He said: "Death was due to some irritant poison." But he did not say that death was due to arsenic. Nor was he questioned either by counsel for the defence or by the Judge as to whether the condition of the stomach and the intestines which he found in the post-mortem examination was not consistent with gastro enteritis, cholera, or some similar complaint. Further, some of the vomit and the matter purged was collected from the ground and sent to the Chemical Examiner for report ; also the jar which had contained the water which she had drunk and in which, as was alleged by the prosecution, she had washed the *gur*, was sent to the Chemical Examiner. The Chemical Examiner reported, after using the Reinsh test, that arsenic "was detected" in the vomit of Mt. Tufania and also in the night-soil, but arsenic was not detected in the mud jug. The report of the Chemical Examiner is wholly insufficient to prove that the cause of the woman's death was arsenic poisoning. A very small and harmless quantity of arsenic can be "detected" by the Reinsh or Marsh test. It is of the utmost importance in a case of arsenic poisoning that the prosecution should prove that a lethal dose of arsenic that is, two grains or upwards, had been administered. The authorities, such as Taylor, are agreed that there must be unequivocal proof :

"that some rational quantity of arsenic was found in the viscera, or good evidence of such a lapse of time after the administration of the last dose as to give a satisfactory explanation of its possible absence."

In this case there is no lapse of time. In other words, there ought to be a careful examination of the viscera of the body and an analysis by a competent analyser showing from the amount of arsenic found in the viscera that at least a lethal dose must have been administered. Mere examination of vomit or night-soil is totally insufficient and it would be extremely dangerous to rely upon some traces of arsenic found in

either of these two things. Arsenic might have been put in the vomit or night-soil after death. Arsenic on the other hand may be legitimately in the body through various causes. Arsenic in some forms is obtained from earth, and as in this case the vomit and night-soil was taken from the earth, it is not beyond the bounds of reasonable possibility that traces of arsenic might have been detected in these two substances from that cause. It is usual where the matter to be examined has been contaminated with earth to send a sample of the earth from a neighbouring spot to be analysed in order to show whether there is arsenic in the earth or not. In India arsenic is used as a medicine in all manner of diseases, and it is also used as an aphrodisiac. It is, therefore, impossible to take the mere evidence that arsenic was detected as sufficient to prove conclusively death from arsenic poisoning. It is of the utmost importance, before a Court could find any individual guilty of murder by the administration of arsenic, that a very much more complete chemical analysis should be made than in this case. There are several methods of analysing the viscera of a dead body and of making a quantitative analysis. Reference to any of the books on this subject can easily be made. That such analysis has been made in India in the past is clear from a reference to Dr. Cheyer's Medical Jurisprudence, published in 1870, where he observes at p. 116: "Dr. Macnamara discovered considerable quantities of arsenic in both stomachs." Given the necessary knowledge and the necessary instruments, modern science has no difficulty in coming to a conclusion as to the approximate quantity administered.

There is one other point to which we would like to allude as regards this particular case. From the evidence on the record it is not impossible that the *gur* taken by the deceased did not contain arsenic. The woman said that the *gur* tasted bitter. The authorities are unanimous on the point that arsenic is tasteless, and at p. 507 of Taylor's Medical Jurisprudence it is said:

"Sir T. Stevenson has known an ounce of arsenic homicidally put into a pint of rice pudding. The pudding was eaten without suspicion."

It seems to be a common error to consider that arsenic tastes bitter at the moment of eating, and, therefore, it is suspicious, when the fact is otherwise, to see in the statement of this woman that the *gur* was bitter when she ate it. The most that can be said is that later it produces a burning sensation in the throat. In every murder case in Britain, where arsenic poisoning is alleged, the contest always is over the evidence as to the amount of arsenic found in the body. We are told that quantitative analyses have been for some years unknown in this country in arsenic cases. It is our opinion that without such evidence as can be obtained from a proper scientific enquiry it would in most cases be very unsafe to convict any person of murder by arsenic, especially in view of the common diseases in this country whose symptoms are almost indistinguishable from that of arsenic poisoning.

The appeal is dismissed. If Sikandar is under arrest he will be set at liberty immediately if he is not wanted on any other charge.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 534

DALAL, J.

Suraj Prasad—Appellant.

v.

Emperor

Criminal Appeal No. 1145 of 1929, Decided on 1st April 1930, against order of Addl. Sess. Judge, Benares, D/. 27th November 1929.

Criminal Trial—Court's duty — Sessions Judge's duty in trials.

A Sessions Judge should start his interest in a case at the very beginning of the trial and not when the time comes to write or dictate the judgment. First of all the ingredients of an offence ought to be clearly grasped and then attempts made continuously to discover whether the evidence of the complainant and that of the prosecution witnesses did satisfy those ingredients or not. When a consideration of the facts of the case and of their applicability to a particular section of the law are left to the end, a trial is bound to suffer and often a decision is arrived at in conflict with law. [P 536 C 1]

Captain C. O. Carleton—for Appellant.

Sankar Saran—for the Crown.

Judgment.—I am afraid that the Sessions Judge has not got a grip of the facts of the case and misunderstood

them. There can be no doubt that the patwari on 17th September 1928, gave a wrong copy of certain entries in the village records to the complainant Ram Nandan. The wrongness of the entries consisted in the patwari (appellant) not noting in the copy that besides Mt. Jhagri there were other tenants of the plots in suit. It is, however, important to remember that the complainant Ram Nandan had already purchased what he considered a fixed-rate tenancy from Mt. Jhagri prior to 17th September, that is, five days prior, on 12th September 1928. It cannot, therefore, be said that the wrong copy induced him to spend money in making the purchase.

On 24th September he sued not only Mt. Jhagri but the others whose names appeared in the records for a declaration that the others were not tenants of the land. This suit was brought for a declaration under S. 123, Tenancy Act of 1926. His suit was dismissed on the ground that Mt. Jhagri was not a fixed-rate tenant and had no right of transfer. The incorrect copy was filed by the complainant in the suit which he filed on 24th September. He, however, refused to summon the patwari and on 19th November made a statement to the revenue Court that the patwari be not summoned as he was an enemy. Subsequently the patwari was summoned by the defendant Mangal of that suit and then it was discovered that Mangal was also a tenant of the land. I have not the slightest doubt that the patwari knowingly made a false copy, but there are further points to be considered whether the false copy was made with the connivance of Ram Nandan himself and whether there could have been any intention on the part of the patwari to cause harm to Ram Nandan. After reading the evidence I have come to the conclusion that the patwari is a blackguard. He has, fortunately for him, escaped the clutches of the criminal law. It is certain that Ram Nandan to bolster up his claim of a declaration that Mangal was not a tenant induced the patwari to give a false copy, and the patwari, presumably for consideration, did so. Ram Nandan hoped that the original would not be sent for and actually went to the length of refusing to summon the patwari. I cannot possibly believe that after obtaining the copy he could have feared that the patwari would depose against the copy, if in reality he had not known that the copy was falsely prepared. Mangal, however, insisted on summoning the patwari, and the patwari had not the courage in Court to depose falsely about the entries in his papers. The trick to be played on Mangal was by collusion between Ram Nandan and the patwari to avoid the summoning of the original papers. Possibly Ram Nandan hoped that even if the patwari was summoned he would favour his cause and make a false deposition. When the patwari failed to oblige him to that extreme extent Ram Nandan filed a complaint. As I often observed in these cases it is unfortunate that a private person can prosecute a patwari without any departmental inquiry being made on the subject. These prosecutions have recently been so frequent that a suggestion may be made that some kind of protection may be given to these revenue officials by making a departmental inquiry necessary before a criminal prosecution is launched. Anyone acquainted with revenue law like a qanungo or a tahsildar would have discovered at once that Ram Nandan and the patwari were colluding at first and that Ram Nandan knew well that the copy which he obtained was a false copy.

The Judge does not seem to have read the charge framed against the patwari. The charge was that he gave wrong copy with the intention of inducing Ram Nandan to file a suit, and thereby incur expense which would cause him harm in money. This is the only possible harm which the patwari may have contemplated. The harm is far too remote. Even if the patwari was an enemy it would hardly be worth his while to damage Ram Nandan by inducing him to bring a suit in which he was sure not to succeed. I cannot believe that such harm would be contemplated by one enemy for another. The Judge, however, takes a totally different view. What he says is :

> " It is thus clear that the accused gave an incorrect copy to the mukhtar "
>
> (meaning the complainant)
>
> " with a view that he would thereby cause injury to the complainant, inasmuch as the mukhtar lost his case for the declaration that Mangal and others were no tenants of the plots."

The harm intended was, according to the Sessions Judge, that the complainant may lose his suit. It is obvious that the complainant did not lose his suit because of the wrong copy, and the wrong copy, therefore, did not harm the complainant in that manner.

It is not necessary to examine the false defence of the patwari that the wrong copy was extorted from him. It may, however, be pointed out to the Sessions Judge that he took no trouble to obtain from Ram Nandan's own mouth what the harm was which he suffered by the wrong copy. A judicial officer who had understood the case from the commencement would have made an inquiry as to how when Ram Nandan got a wrong copy in which the interest of Mangal was not mentioned, he happened to sue Mangal seven days later for a declaration. It is my belief that during trials Sessions Judges rely far too much on a badly instructed Government Pleader or on the evidence of the prosecution shaping itself as best it may. It is much to be desired that a Sessions Judge should start his interest in a case at the very beginning of the trial and not when the time comes to write or dictate the judgment. First of all the ingredients of an offence ought to be clearly grasped and then attempts made continuously to discover whether the evidence of the complainant and that of the prosecution witnesses did satisfy those ingredients or not. When a consideration of the facts of the case and of their applicability to a particular section of the law are left to the end, a trial is bound to suffer and often a decision is arrived at in conflict with law. I set aside the conviction and sentence of Suraj Prasad and order his bail bond to be cancelled.

V.B./R.K. *Conviction set aside.*

A. I. R. 1930 Allahabad 536

SEN AND NIAMATULLAH, JJ.

Durga Prasad and *another*—Plaintiffs—Appellants.

v.

Chauharja Prasad—Respondent.

Second Appeal No. 1577 of 1926, Decided on 18th December 1929.

Hindu law—Joint family—Presumption—Property acquired by member of joint family not shown to have nucleus is not always joint family property.

There is no presumption that any property acquired by an individual member of a joint Hindu family, which is not shown to have possessed any nucleus, was joint family property. [P 537 C 1]

P. L. Banerji and *Ram Nama Prasad*—for Appellants.

K. N. Katju—for Respondents.

Niamatullah, J. — The present appeal has arisen out of a suit brought by the plaintiffs-appellants for a declaration of their right to and possession of a house, which admittedly belonged at one time to Munshi Sheoambar Lal, whose adopted son plaintiff 1 (father of plaintiff 2) is. It was alleged that the house in dispute was joint family property, in which plaintiff-appellant 1 obtained an interest at the time he was adopted by Sheoambar Lal. The defence was that it was the self-acquired property of Sheoambar Lal, in which the plaintiffs-appellants obtained no interest, the same having been made a gift of to defendant 2 (son of defendant 1), who was related to Sheoambar Lal and for whom the latter had great regard. The gift is said to have been made in 1912, when Sheoambar Lal intimated that fact to the Municipal Board and requested that the name of the donee be entered in the register of houses situate within the municipal limits. Subsequently a formal deed of gift duly registered was executed by Sheoambar Lal in favour of the defendant-respondent 2. Both the Courts have dismissed the suit. The lower appellate Court has held that the defendants have been in adverse possession for more than twelve years before the institution of the suit and that, though the property should be considered (in the view that it took) as joint family property, yet the plaintiffs have no right left to it.

The decrees of the Courts below have been impugned in appeal. Two questions have been argued before us: (1) whether the house in dispute was joint family property in which plaintiff-appellant 1 acquired an interest at the time of his adoption, so that Sheoambar Lal could not make a gift of it to defendant 2; and (2) whether the defendants have perfected their title by adverse possession for more than twelve years. As regards the first question, the finding of the lower appellate Court is somewhat obscure. It held that Sheoambar Lal had a brother, Shankar Lal, who

should be presumed to be a member of a joint Hindu family with him, but that :

"whether the property was acquired in the lifetime of Sheoambar Lal's father or after his death, whether the purchase money was from earnings acquired by Sheoambar Lal or from earnings acquired by Ganesh, or from both, or from ancestral joint family property, there appears to me to be no reliable evidence."

As regards the so-called joint family consisting of Shankar Lal and Sheoambar Lal, the learned Judge was unable to find on evidence that their father left any property other than a residential house, as to which it was doubtful whether it had been constructed by him. At any rate on his finding it cannot be said that there was any property which could be the source of income from which subsequent acquisitions could be made. There is again total absence of evidence showing that Shankar Lal and Sheoambar Lal together owned any property as members of a joint Hindu family which could form the nucleus of subsequent additions. The only foundation, then, of the existence of a joint family consisting of Shankar Lal and Sheoambar Lal was their relationship, to which may be added joint residence and mess. The house in dispute was brought by Sheoambar Lal, who constructed it. On these findings it must be held that the plaintiffs, on whom decidedly the burden lay, failed to establish that the house in dispute was ancestral or joint family property in which they had an interest. It may be presumed that two Hindu brothers, or father and son, were members of a joint Hindu family; but it does not follow that any particular property in dispute in a case should be presumed to be joint family property. If, however, it is established that there was a nucleus of joint family property around which subsequent acquisitions could gather, it may be presumed, in the absence of proof to the contrary, that later acquisitions were part of the joint family property. There is no presumption that any property acquired by an individual member of a joint Hindu family, which is not shown to have possessed any nucleus, was joint family property. In this view of the matter we think that the plaintiffs-appellants have failed to make out their title to the house in dispute.

On the question of adverse possession, the finding of the lower appellate Court that the defendants have been in possession exclusively from the year 1912 is decisive. It is said that defendant 1 assumed the guardianship of plaintiff 1 under the will of Sheoambar Lal dated 1908. Sheoambar Lal died some time after 1913. As already stated, in 1912 he placed defendant 2 in possession of this house under an oral gift, referred to by him in his petition dated 5th February 1912 to the Municipal Board. The subsequent registered deed of gift, dated 16th February 1913, confirmed the previous inchoate gift. The present suit was brought on 16th February 1925, i. e. more than 12 years after the oral gift but less than 12 years after the registered deed of gift. It has been found that the defendants have been in possession since, at least, 5th February 1912. The character of this possession has been exclusive and in assertion of the title derived from the gift. It has also been found that the present suit was brought more than three years after the plaintiff attained majority. Under these circumstances there can be no question that the defendants have perfected their title by adverse possession. For the foregoing reasons, this appeal must fail and is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 537

MUKERJI AND BENNET, JJ.

Partap Singh—Defendant—Appellant.

v.

Dalip Singh—Plaintiff—Respondent.

First Appeal No. 439 of 1925, Decided on 22nd January 1930.

(a) Hindu law—Joint family— Partition—Partition between father and son—Mother's share.

Where there is a partition between a Hindu father and his sons, the wife of the Hindu father has a right to a share equal to that of the father or the sons: 32 *Cal.* 234 and 34 *All.* 505, *Ref.*; 33 *All.* 118 and 3 *All.* 88 (*F.B.*), *Dist.* [P 540 C 2]

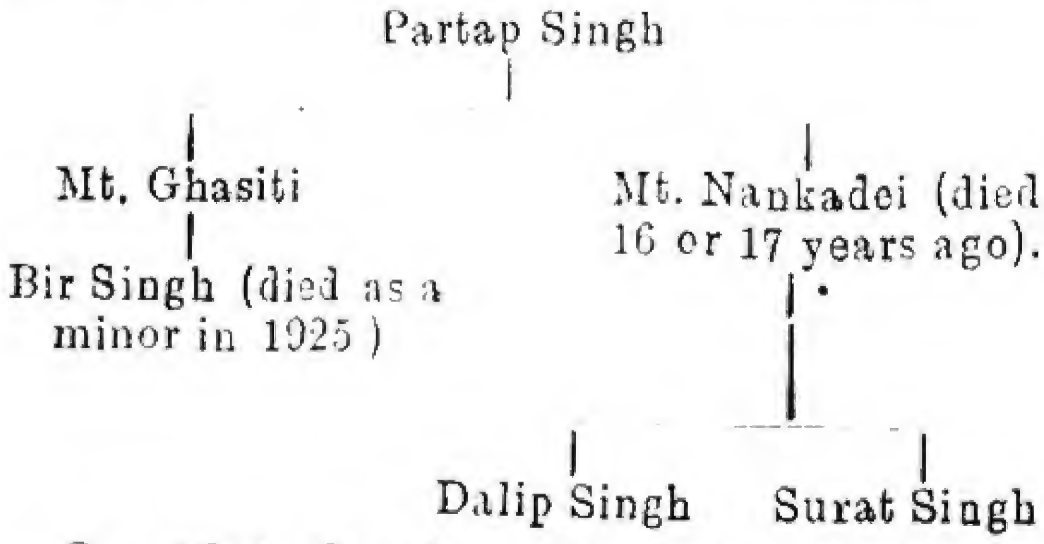
(b) Hindu law—Partition—Mother—Right to share is not lost by non-assertion of right in previous partition.

The proposition that on Hindu mother is entitled to a share on partition is not well-known, and a non-assertion of her right by the mother in previous partition does amount to acquiescence of no right. [P 540 C 2]

K. N. Katju and *H. C. Mukerji*—for Appellant.

Tej Bahadur Sapru, M. N. Rama and *Shaba Saran*—for Respondent.

Bennet, J.—These are two first appeals, one being No. 439 of 1926 brought by Partap Singh against Dalip Singh and the other No. 198 of 1928 by Dalip Singh against Mt. Ghasiti and Partap Singh. The family tree is as follows:



On 20th October 1921 Surat Singh separated from the joint family by a deed of partition to which his father and brother Dalip Singh were parties.

On 30th May 1923 there was a registered deed of partition by which Dalip Singh separated, obtaining one-third share of the joint family property and the remaining two-thirds shares were retained by Partap Singh and his minor son Bir Singh who was then alive. Subsequently Dalip Singh brought a suit No. 161 of 1924 against his father Partap Singh claiming damages for fraud, but he withdrew that suit. Again on 20th November 1924 Dalip Singh sued for partition against Partap Singh and Bir Singh in suit No. 256 of 1924 on the ground that the deed of partition of 30th May 1923 was unfair, and that he desired that the properties should be re-partitioned. During the pendency of that suit Bir Singh died, and on 5th September 1925 Dalip Singh withdrew his suit, and on 12th September 1925 Dalip Singh filed his present suit No. 303 of 1925, claiming half share of the family property. That suit by Dalip Singh was brought against his father Partap Singh alone. On 13th August 1926 Mt. Ghasiti, wife of Partap Singh and stepmother of Dalip Singh, made an application to the Court asking that she should be joined as a party to that suit, and that she should get a share on partition. That application was rejected, because it was held it was made late after the evidence for the plaintiff had been closed, and the Court proceeded to grant a decree to Dalip Singh for half of the joint family property on 24th August 1926. Prior to this decree on 21st August 1926, Mt Ghasiti brought a suit No. 239 of 1926 against her husband Partap Singh and her stepson Dalip Singh, claiming that she should get a declaration that at the time of partition between her husband and her stepson she was entitled to one-third or at least one-fourth of the family property. On 30th March 1928 a different Subordinate Judge has granted a decree to Mt. Ghasiti that she is entitled to a share in the family property equal to the respective shares of her husband and her stepson, i.e., one-third of the joint family property.

It is, therefore, evident that the partition Court is faced with a considerable difficulty as there are two conflicting decrees, one of which lays down that this joint family property is to be divided into two equal shares between Partap Singh and Dalip Singh, and the other decree declares that it is to be divided into three equal shares between Dalip Singh, Partap Singh and Mt. Ghasiti. We have heard these two appeals together as it is impossible to decide one without reference to the other.

We will first deal with the first appeal No. 439 of 1926 by Partap Singh. That appeal is chiefly against the finding of the learned Subordinate Judge that there was a fraud committed by Partap Singh on his son Dalip Singh. We have been taken through the evidence in this connexion which consists chiefly of the finding of a commissioner appointed by the Court. The commissioner's report shows that the total value of the family property in 1923 was Rs. 1,12,663 and the total value of the property allotted to Dalip Singh was Rs. 21,490, that is Dalip Singh received a little less than one-fifth of the family property, whereas the deed of partition states that he is to receive one-third. This conclusion is further supported by a calculation given by a witness, Ratan Singh, as to the rental value of the family property. This calculation shows that Dalip Singh received property yielding one-sixth rental of the joint family property.

We consider that the learned Subordinate Judge was correct in finding that there was fraud which vitiated the partition deed of 30th May 1923. Accordingly we agree with his conclusion that the partition deed should be set aside. It is common ground between

learned counsel on either side that this deed of partition effected a partition of the joint family and that subsequent to that partition the property ceased to be joint family property, though it still may have remained as joint property. We do not agree with the finding of the learned Subordinate Judge on this point and we consider that the learned Subordinate Judge was in error in holding that the plaintiff still remained a member of a joint Hindu family after that partition. We may note that even apart from the deed of partition the suit for partition, which the plaintiff brought in 1924, would also have the effect of separating the joint family.

It was contended by the learned counsel for Partap Singh that regard was to be had to the state of the joint family in 1923 in order to ascertain the amount of share to which Dalip Singh is now entitled. On the other hand it was contended for Dalip Singh that we should have regard to the persons composing the joint family who happened to be alive at the date of suit. This point is of importance, because the minor Bir Singh, who was alive in 1923, was dead before the date of the present suit. Therefore there is now one person less in the joint family to take a share on partition. Is advantage of this fact to accrue to Dalip Singh or is it to accrue to other members of the joint family? We consider that Dalip Singh must be regarded as having separated from the joint family in 1923, and therefore the subsequent death of a member of the joint family cannot increase the share to which he is now entitled.

We now turn to the appeal of Dalip Singh against the decree in favour of Mt. Ghasiti. The first point with which we are concerned is the argument that whatever rights Mt. Ghasiti might be entitled to under Hindu law she has lost those rights by her failure to put forward a claim in 1923 to a share on the partition effected by the deed of 30th May 1923, that is that by acquiescence in the position that only the male members of the family should divide the property between them, she has lost her rights to obtain a share now. As is usual in oral evidence we find that each side overstated their case grossly. Mt. Ghasiti put forward the case that she was not aware at all that there was any division of the property in 1923. She was not supported in her allegation by her father Fateh Chand or by her husband Partap Singh. Her husband Partap Singh says: "I did not consult my wife when I separated from Dalip Singh or Surat Singh." But the allegation that he did not consult her is quite different from the allegation that she was not aware of what was taking place. On the other hand, we have the statement of Dalip Singh: "This partition was talked over in the chauk in the presence of the plaintiff (Mt. Ghasiti)." Mt. Bhagwandei, wife of Dalip Singh, has given evidence that Mt. Ghasiti knew all about the partition and that there was a dispute in regard to the ornaments of Dalip Singh's mother and that Mt. Ghasiti was successful in inducing her husband to give her those ornaments. We, therefore, consider that Mt. Ghasiti did know that there was a partition taking place at the time that it took place, and that she did not make any claim to have a share in that partition.

But it is nowhere stated in evidence that Mt. Ghasiti had any knowledge in 1923 that she had a right to receive a share on partition. The proposition of law that a Hindu mother in the position of Mt. Ghasiti is entitled to a share on partition is not a proposition which is at all well known, and in fact we have had a long and able argument from the learned counsel on the opposite side that she is not entitled to any share on a partition. Under the circumstances of the present case we consider, therefore, that there is no bar of acquiescence against the assertion by Mt. Ghasiti of the rights to which she is entitled under Hindu law.

We now come to a consideration of what those rights are. In Mitakshara Ch. 1, S. 7, it is laid down:

> "When a distribution is made during the life of the father, the participation of his wives equally with his sons, has been directed."

In Hindu law-books on Inheritance by Mr. S. S. Setlur, p. 9, there is quoted a text of Yajnavalkya in dealing with the partition by a father:

> "If he make the allotments equal, his wives, to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions."

Sir Tej Bahadur Sapru, on behalf of Dalip Singh, has laid before us various

rulings as follows: In *Bilaso* v. *Dinanath* (1) a Full Bench of this Court considered the text of Mitakshara and held that the mother could share with the sons after the death of the father. That ruling did not consider the case of a partition made during the lifetime of the father. In *Beti Kunwar* v. *Janki Kunwar* (2), there was also the case of a partition among the sons after the death of the father, and it was held that the mother had a right to a share on the ground that she would have been entitled to it on partition.

On the other hand, Dr. Katju, who has ably argued the case on behalf of Mt. Ghasiti, refers to *Dalar Koeri* v. *Dwarkanath* (3). In this case the family tree was as follows:

Dwarkanath

=Dular Koeri
Brindranath
:plaintiff.

=Mt. Maina Koeri
Sons Defts. 2, 3 and 4.

This was a case of partition during the lifetime of the father, and it was held that his two wives had rights to shares and the property was divided into nine shares.

The next case to which allusion was made is *Sheo Narain* v. *Janki Prasad* (4). In this case the family tree was as follows:

Janki Prasad Deft.
=Mt. Ramdei

Bishambhar, defendant.

Sheo Narain, plaintiff.

Lachmi Narain, defendant.

There was before the Full Bench a question as to whether Janki Prasad's mother, Mt. Maina, the grandmother of the plaintiff, had a right to a share in a partition, and it was held that the texts of Mitakshara and other authorities only relate to the wife of the father and not to the mother of the father in the partition between a father and his sons. Accordingly it was held that the grandmother was not entitled to a share in a partition between the father and his sons, but it was nowhere contested that the lower Court was not correct in awarding a share to Mt. Ramdei, the wife of Janki Prasad, the father with whom the partition was being made in that case. Accordingly we may consider by implication that this Full Bench ruling supports the claim of the wife of a father to a partition along with the father and his sons.

We consider that the texts of Mitakshara and Yajnavalkya and the authorities which we have quoted are authority for the proposition that where there is a partition between a Hindu father and his sons the wife of the Hindu father has a right to a share equal to that of the father or the sons. Accordingly we consider that in the present case Mt. Ghasiti has a right to a share equally with her husband and sons. Taking the state of the family, as it stood in 1923, there were at the time the father, the mother and two sons in the undivided family. Accordingly the share of Mt. Ghasiti in 1923 was one-fourth of the joint family property.

One other matter remains for decision and that is who obtained the benefit of the death of Bir Singh subsequent to the partition of 1923 and before the present suit. By that partition the property was divided into two shares one of which was allotted to Dalip Singh and the remainder of the property was to be held jointly by Partap Singh and his son Bir Singh. Therefore we consider that Partap Singh and his son Bir Singh continued to form a joint Hindu family and on the death of Bir Singh. Partap Singh took the whole of that property which had belonged previously to the joint family by survivorship.

We now come to the effect of our decision on the two appeals before us. The appeal No. 198 of 1928 by Dalip Singh is allowed to this extent that we hold that the share which is to be allotted to Mt. Ghasiti is to be one-fourth and not one-third. Costs in this appeal will be granted proportionately to success and failure.

In the appeal of Partap Singh No. 439 of 1926, we hold that the share of Dalip Singh is one-fourth and the share of Partap Singh is one-half. As to costs, we allow each side half costs.

The result is that in F. A. No. 439 we direct that the lower Court will make

(1) [1881] 3 All. 85.
(2) [1911] 33 All. 118=7 I. C. 908=7 A. L. J. 980.
(3) [1905] 32 Cal. 234=1 C. L. J. 283=9 C. W. N. 270.
(4) [1912] 34 All. 505=16 I. C. 88=9 A. L. J. 749.

Mt. Ghasiti a party and in carrying out the partition she will be allotted one-fourth share of the property less the ornaments of the value of Rs. 500 which we hold, with the Court below, she received at the time of her marriage.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 541

SULAIMAN, AG. C. J., AND KENDALL, J.

Deo Narain Singh and *others*—Defendants—Appellants.

v.

Phagu Singh and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 85 of 1926, Decided on 16th October 1929, from judgment of Daniels, J., D/- 7th July 1926.

(a) Hindu law — Joint family — Presumption.

The ordinary presumption of Hindu law is that brothers and uncles are joint. [P 541 C 2]

(b) Hindu law — Alienation—Manager—Family is sufficiently represented when manager is impleaded in mortgage suit.

Where all the adult members of a family senior to the member not impleaded in the mortgage suit execute the mortgage deed and are actually impleaded in the mortgage suit, the manager must be one of the senior members and the junior member therefore must be taken to be fully represented. The mere omission of his name from the array of defendants would not make the decree null and void: 34 *All.* 549, *Ref.* [P 542 C 1]

P. L. Banerji—for Appellants.

Mukhtar Ahmad—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for redemption of a mortgage dated 22nd July 1867, executed by four brothers and their sons in favour of Ganga Prasad Singh, for Rs. 425. Bajrang, who was the father of the present plaintiffs and who on the findings was alive at the time, was not among the executants of the deed. But his elder brother Lachhman, his father Ram Sahai and three uncles as well as cousins joined in it.

A suit was brought on the basis of this mortgage deed and a mortgage decree was obtained on 22nd August 1878, against the survivors of the executants. Admittedly Bajrang was not impleaded in this suit. Seven gandas share which belonged to this family was put up at auction on 18th November 1878, and was purchased by the mortgagee himself. Subsequently in 1885 the mortgagee transferred the share purchased by him at auction to the mother of the contesting defendants.

The sons of Bajrang bring the suit for redemption on the ground that they are not affected by the auction sale because Bajrang, their father, had not been impleaded in the mortgage suit. The Court of first instance dismissed the suit. But on appeal the learned Additional Subordinate Judge allowed the appeal and decreed the suit for redemption in respect of the plaintiff's share in the mortgaged property. That decree has been affirmed by a learned Judge of this Court.

The judgment of the learned Judge suggests that it was represented to him that Bajrang, the father of the plaintiffs, was among the mortgagors, and yet he was not impleaded in the mortgage suit. As a matter of fact, as stated above, Bajrang had not joined in the deed at all. That might be a possible explanation of his not having been impleaded in the mortgage suit. The lower appellate Court found as a fact that it was not proved that Lachhman, the elder brother of Bajrang, was really the head and manager of the family in 1878. This finding is a finding of fact and must be accepted. But the Court has not found that the family was not joint in 1878, but that its members were separate. As a matter of fact in the plaint there was no suggestion that there was any separation in this family in 1878, nor was there any issue framed in the trial Court as regards this point. The ordinary presumption of Hindu law is that brothers and uncles are joint. It therefore seems to us that the finding that Lachhman was not proved to have been the head and manager of the family in 1878 was not sufficient for the claim of the plaintiffs to be decreed.

When the plaintiffs come to redeem a mortgage executed by the members of their family other than their father, they must assume that at the time the mortgage was made the family was joint and the managing members had authority to execute the mortgage deed, otherwise their claim would be hopelessly out of time. If the family was joint in 1867 the presumption is that it continued

joint till 1878. In that year Bajrang had two uncles and an elder brother and cousins alive. In the ordinary course one of the senior members of the family would be the head and the manager. One would not expect that a younger brother Bajrang would be the manager and the head when his elder brother and his uncles were alive. There was no suggestion of this kind made in the Court below, nor was there any finding that Bajrang was himself the head and manager of the family. Similarly there was no suggestion in the trial Court that Bajrang was separate from his brother Lachhman. It therefore follows that all the adult members of the family who were senior to Bajrang and who had executed the mortgage deed were actually impleaded in the mortgage suit. Bajrang had not joined in the deed and was not impleaded in the suit. It is impossible to say that Bajrang himself was the manager. It therefore follows that the manager of the family must have been one of the senior members who were all impleaded. Bajrang was therefore fully represented in the suit, and the mere fact that his name was omitted from the array of the defendants would not make the decree null and void as against him. It has been held in the Full Bench case of *Hori Lal* v. *Mumman Kunwar* (1), that in a mortgage suit against a joint Hindu family in which the manager is impleaded, the family is sufficiently represented by him, and a suit is not defective by reason of the nonjoinder of the other members of the family. According to the view expressed by Banerji, J., in that case it is not even necessary that in that suit against the family the manager of the family should be described as such (p. 561).

The main question in this case has always been whether the plaintiff's father Bajrang was or was not fully represented in the mortgage suit. On the facts as found by the lower appellate Court and as is to be assumed under the ordinary presumptions of Hindu law Bajrang must have been represented.

We are therefore of opinion that it is not now open to the plaintiffs to claim a redemption of a share in the property which was sold at auction against the family in 1878.

(1) [1912] 34 All. 549=15 I.C. 126=9 A.L.J. 819 (F.B.).

As the facts do not appear to have been put clearly before the learned Judge of this Court we would, although allowing the appeal and the suit, not allow the defendants their costs in this Court.

The result therefore is that this appeal is allowed, the decree of this Court and the lower appellate Court are set aside and that of the Court of first instance restored with costs in the Ccurt below. The parties will bear their own costs in the appeal before the learned Judge of this Court and in the Letters Patent appeal.

R.M./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 542

SULAIMAN AND BANERJI, JJ.

Abdul Rauf Khan — Purchaser—Applicant.

v.

Mt. Qamrunnissa and *another*—Judgment-debtor and Decree-holder—Opposite Parties.

Civil Revn. No. 283 of 1928, Decided on 7th February 1930, from order of Dist. Judge, Bareilly, D/- 11th August 1928.

(a) Civil P. C., O. 21, R. 90 (proviso)—Addition made by Allahabad High Court to proviso—Addition to proviso only prevents judgment-debtor to base his application on ground that lower estimate in proclamation is itself material irregularity.

Addition to proviso simply prevents the judgment-debtor to base his application on the ground that the low estimate in the proclamation sale is itself a material irregularity. It does not debar him from showing that substantial injury has been caused on account of some other irregularity. [P 543 C 1]

(b) Civil P. C., O. 21, R. 69 (1)—Specific day and hour of adjournment not announced—It may be material irregularity.

If there is no announcement of the specific day and hour to which the sale is adjourned the Court may come to the conclusion that there has been a material irregularity : *A. I. R.* 1927 *All.* 241 and *A. I. R.* 1929 *All.* 948, *Rel. on.* [P 543 C 2]

M. A. Aziz—for Applicant.

U. S. Bajpai and *G. S. Pathak*—for Opposite Parties.

Sulaiman, J.—This is an application in revision from an order setting aside a sale on appeal. The sale was fixed originally for 18th January 1928 and the usual proclamation for sale had been issued. The estimated price given in it was Rs. 2,350. The usual notice had been issued to the judgment-debtor but

she did not appear to question the accuracy of the proclamation sale. She got an order of the Court postponing the sale to 26th January 1928. The sale took place on the last mentioned date and the property was sold for Rs. 2,550, i. e., for a price slightly above the estimated price. The judgment-debtor applied under O. 21, R. 90 for setting aside the sale on the ground of material irregularity and substantial injury by reason of it. The first Court dismissed the application holding that neither the one nor the other was proved. The judgment-debtor preferred an appeal to the District Judge who appointed two commissioners to value the property. Their report was that the house in question was worth Rs. 4,000. The learned Judge in his order remarks that the postponement was not properly announced and that the house was reported to be worth Rs 4,000. The order is very brief and might well have been fuller. But there is no doubt that what the learned Judge meant was that there was an irregularity, inasmuch as the postponement of the date of sale had not been properly announced and property worth Rs. 4,000 was sold for just over half that amount.

In revision the learned advocate for the applicant first contends that it was not open to the judgment-debtor to allege that the property was worth more than the estimated amount given in the proclamation of sale. For this contention he relies on the language of the addition made by this High Court to the proviso to O. 21, R. 90, under which no application is to be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up. Obviously the application referred to is the application for setting aside the sale on the ground of material irregularity or fraud in publishing or conducting it. The addition is to the proviso and not to the substantive rule itself. It therefore does not debar the judgment debtor from showing that substantial injury has been caused on account of some other irregularity. All that it prevents him from doing is to base his application on the ground that the low estimate in the proclamation sale was in itself a material irregularity.

Although the learned Judge's order is not clear, he obviously was of the opinion that it was not properly announced that the sale would take place on 26th January 1928. Although when a sale is adjourned for a period not longer than fourteen days no fresh proclamation need be issued under O. 21, R. 69 (2), the adjournment must be to a specified day and hour under R. 69 (1). If there is no announcement of the specified day and hour to which the sale is adjourned the Court may come to the conclusion that there has been a material irregularity : *Babu Ram* v. *Inamullah* (1) and *Rup Kishor* v. *Collector of Etah*, *A. I. R.* 1929 *All.* 948. Even if the learned Judge has committed an error of law in arriving at his conclusion we cannot interfere with his order in revision. The application is accordingly dismissed with costs.

P.N./R.K. *Revision dismissed.*

(1) A. I. R. 1927 All. 241 = 49 All. 402.

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* A. I. R. 1930 Allahabad 543

SULAIMAN AND KENDALL, JJ.

Baijnath Singh— Defendant—Appellant.

v.

Lala Misri Lal and *others*—Plaintiffs—Respondents.

First Appeal No. 524 of 1926, Decided on 17th March 1930, from decree of Sub-Judge, Allahabad, D/- 19th June 1926.

*** Contract Act, S. 126—Person promising to pay extra rate of interest in consideration of creditor giving time to debtor, without any liability on part of debtor is not surety but is liable personally for excess rate of interest.**

Where a person promises to pay an extra rate of interest in consideration of the creditor giving more time to the debtor without any liability on the part of the debtor towards the creditor for such an extra rate the position of that person with regard to the payment of this excess of interest is not that of surety, but by this contract he makes himself personally and directly liable for the amount. [P 544 C 2]

Panna Lal—for Appellant.

U. S. Bajpai and *Hyder Mehdi*—for Respondents.

Kendall, J.—This is a defendant's appeal arising out of a suit for recovery of interest. Rana Raj Kumar Lal was indebted to the plaintiffs to the extent of Rs. 60,000 under a promissory note executed by him. Admittedly the whole amount of the principal plus interest due on this promissory note on 28th

February 1921 came to Rs. 67,306-13-6. The correspondence which passed between the plaintiffs and the present defendant goes to suggest that the defendant either was in some way responsible for the payment of this money or at any rate agreed to see that the payment was made. The plaintiffs, however, insisted on the immediate payment of the amount due, and the defendant wrote to the plaintiffs to give the Rana more time. The plaintiffs replied saying that they could not wait, as the original rate of interest, viz : 0-8-6% per mensem, was inadequate, and that if the defendant did not reply they would presume that he was agreeable to 9% per annum being charged (p. 16). The defendant replied to this and said that he would accept 7½% interest which he would willingly pay (p. 17). He also sent a telegram to the same effect on the same day (p. 18).

The plaintiffs, however, did not accept this rate, but wired on 17th March 1921 saying :

"Can't accept below nine per cent : either, pay whole amount or accept terms. If latter pay interest up to February. Wire reply immediately."

This offer was accepted by the defendant in the following words :

"Your telegram 17th agree pay Rs. 9 per cent from March send interest account up to February."

These telegrams were confirmed by letters sent on the same date. After this there can be no doubt that the defendant agreed with the plaintiffs to pay a higher rate of interest, viz. 0-10-0% per mensem instead of the original rate of about 6% per mensem if the plaintiffs gave the Rana more time. There was no contract between the Rana on the one hand and the plaintiffs on the other for payment of this extra rate of interest. On the other hand there was a direct contract between the plaintiffs and the defendant. There can be no doubt that the defendant promised personally to pay at this rate of interest. The consideration for it was the giving of more time by the plaintiffs to the Rana.

The plaintiffs waited up to 1925, and the Rana paid off the amount in instalments till ultimately on 14th October 1925 the whole of the principal together with interest at the rate of 0-8-6% was cleared off. There was no undertaking given by the plaintiffs at the time that the defendant would be released from all further liability to pay the balance of interest. On demand having been made and the amount not being paid the plaintiffs have instituted the suit against the defendant.

In the written statement the defendant admitted that he had taken upon himself the responsibility of paying the amount of the promissory note together with interest at the rate of 0-12-0% per mensem, but added that this was on the special condition that the plaintiffs would not harass the Rana by making demands, nor would they realize the amount from him. The defendant pleaded that he was relieved from his liability to pay the amount because the plaintiffs had made repeated demands from the said Rana and had also realized the entire amount due from him. The learned Subordinate Judge has overruled this contention and has decreed the claim. The defendant has appealed, and reiterates the grounds taken in the Court below.

There is absolutely no evidence on the record to show that there was any promise made by the plaintiffs not to make any demands from the Rana or not to realize the amount from him. On the other hand, the correspondence referred to above shows that the defendant never laid this down as a condition precedent to the fulfilment of the contract by him. There has accordingly been no breach on the part of the plaintiffs.

The next point urged on behalf of the defendant is that his position was that of a surety, and that inasmuch as the plaintiffs had discharged the principal debtor from all further liability the surety also was discharged. This contention cannot be accepted. So far as the amount of the principal and the interest at the rate of 0-8-6% are concerned, the Rana was in the position of a debtor and the defendant was in the position of a surety. That amount has now been paid up and the defendant's liability to that extent stands discharged. But as there was no contract by the Rana to pay interest at the excess rate, and that contract was solely between the defendant on the one hand and the plaintiffs on the other, the position of the defendant with regard to the payment of this extra interest cannot be

that of a surety. Under S. 126, Contract Act, he would have been a surety if there had been a promise or liability of the Rana to pay this extra interest. As remarked above there was no such promise on his part and no such liability. The position of the defendant therefore cannot be that of a surety. The case is one of a direct contract between the defendant on the one hand and the plaintiffs on the other for the latter to give time to the Rana, a nominee of the defendant, and for the defendant to agree personally to pay the extra amount of interest. We, therefore, see no reason why he should not pay it. There is no proof that the plaintiffs ever agreed to discharge him from this liability.

The next point urged in argument which is not taken in the grounds of appeal is that the interest of 0-12-0% per mensem was simple and not compound interest. The learned Subordinate Judge has noted that the original rate of interest, viz : 0-8-6% was compoundable six monthly and there can be no doubt that when the plaintiffs wanted to increase the rate they intended to maintain the compound rate.

There is therefore no force in this appeal and it is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 545

SEN AND NIAMATULLAH, JJ.

Roopji & Sons—Plaintiffs—Appellants.

v.

Dyer Meaken & Co., Ltd.—Defendants—Respondents.

Second Appeal No. 643 of 1927, Decided on 24th January 1930, against decree of Addl. Dist. Judge, Meerut, D/- 5th January 1927.

(a) Contract Act, S. 219—Principal and Agent—Purchaser found by agent—Remuneration becomes due even if whole transaction is not completed through agent's intervention.

Where a contract is arrived at between a house-owner and a broker for finding a purchaser, the house-owner agreeing to pay Rs. 5 per cent on the purchase money as remuneration, the broker is entitled to receive his fee, when the sale of the house has actually taken place in favour of the purchaser, upon his finding the purchaser, even though the negotiations or completion of the sale between the buyer and seller may not have taken place through the direct intervention of the broker or commission agent: *Burchell* v. *Gourie*, (1910) *A. C.* 614; *Green* v. *Bartlett*, (1863) 14 *C. B. P.* 681: *Fisher* v. *Drewett*, (1879) 48 *L. J. Ex.* 32; *Wilkinson* v. *Martin*, (1837) *H. C.* 5and 20 *Bom.* 124, *Foll.* [P 548 C 2]

(b) Contract Act, S. 74—Quantum meruit—Doctrine is inapplicable where definite agreement exists.

A plaintiff cannot claim on quantum meruit if he has chosen to tie himself down with the express terms of an agreement, for a liability by implication is excluded by the contract being express: *Martin* v. *Tucker* (1830) 1 *T. L. R.*, 655 and *Lott* v. *Cuthwait*, (1893) 10 *T. L. R.* 76, *Foll.* [P 549 C 2]

K. N. Katju and *M. N. Raina*—for Appellants.

Ram Nama Prasad—for Respondents.

Niamatullah, J.—This appeal is directed against a decree of the learned Additional District Judge of Meerut in a suit for recovery of Rs. 1,750 on a contract of brokerage.

The plaintiffs are a firm of general merchants, auctioneers and commission agents who carry on their business at Meerut through Mr. Roop Ram, their managing partner. The defendants are a registered company with their Head Office at Solon, and owned a bungalow No. 22 known as "the Belvedere" situate on the Ordinance Row, near the Mall in Meerut Cantonments. The plaintiffs, having come to know that the defendants intended to sell the aforesaid house, offered their services to the defendants to find a purchaser. The defendants accepted the offer and agreed to pay the plaintiffs a commission or brokerage at the rate of 5 per cent. Originally the defendants had fixed the price at Rs. 30,000, free of all charges, but the price was raised from Rs. 30,000 to Rs. 35,000 at the suggestion of the plaintiffs. The plaintiffs came to know that the Controller of Military Accounts at Meerut was desirous of purchasing a commodious house for locating his office. On 28th August 1924 the manager of the plaintiffs' firm had an interview with an official of the Controller's Office. He wanted to see the Controller but Col. Peacock refused to see him and refused to negotiate through the plaintiffs. He then advised the defendants to write to the Controller direct. On 10th June 1925, the house

was purchased by the Controller of Military Accounts from the defendants for Rs. 35,000.

The present suit was instituted in the Court of the Subordinate Judge of Meerut on 18th December 1925, for recovery of Rs. 1,750 being the amount of brokerage on the purchase money at the rate of 5 per cent.

The defendants contested the suit on the ground that the sale in question was not brought about by the plaintiffs, that there was no agreement for payment of any commission to the plaintiffs for this purchase, that the sale was made by the defendants directly with the Controller of Military Accounts and that the plaintiffs had no hand in it.

The transaction has been described by the defendants in paras. 12 and 13 of their written statement.

Paragraph 12:

"On 29th May 1924, the plaintiffs addressed a letter to the defendants' agents at Meerut suggesting some arrangement for the sale of the defendants' house at Meerut. The defendants wrote back in reply that if the plaintiffs could secure a purchaser at a reasonable price they would gladly pay them 5 per cent commission."

Paragraph 13:

"The defendants at first put down Rs. 30,000 net as the minimum price free of all charges and subsequently raised the figure to Rs. 35 000 net, free of all charges."

The Court of first instance gave the plaintiffs a decree for Rs. 1,500 and dismissed the claim for Rs. 250. The judgment proceeds upon the findings that the plaintiffs were acting as the agents of the defendants in the matter of securing a purchaser, that they had brought to the notice of certain officials in the office of the Controller of Military Accounts that a house of the defendants was for sale, that though the head of the department was not approached, the plaintiffs had approached the officials "next below him" and that the plaintiffs' intervention led to the purchase of the house, even though the negotiations and the final completion of the sale had not been made through them. The trial Court observed:

"I think the plaintiffs did approach the purchaser, though not directly to (sic) the Controller Military Accounts but to (sic) the officer next below him, there being evidence to show that the Controller was not approachable by ordinary persons of the plaintiffs' type. . . . . The defendants' theory cannot be accepted that the bargain had cropped up of its own motion and that plaintiffs, getting the scent, were only officious in picking up the business."

It may be noticed here that the trial Court disallowed a part of the claim on the ground, that the defendants had agreed to pay commission if the house was sold for Rs. 30,000 and that there was no agreement for payment of commission or brokerage on the additional sum of Rs. 5,000.

The defendants appealed and the plaintiffs filed a cross-objection. The lower appellate Court allowed the defendants' appeal and dismissed the plaintiffs' cross-objection. The lower appellate Court was of opinion that the entire case hinged upon the determination of the question as to whether the Controller of Military Accounts purchased the house "Belvedere" through the plaintiffs or otherwise, and came to the conclusion that the plaintiffs had failed to establish that they had negotiated the purchase with the Controller. Emphasis was laid upon the fact that the plaintiffs had not negotiated directly with Col. Peacock, and that indeed they had no access to him. A letter written by Col. Peacock on this subject was treated as conclusive.

We are of opinion that the learned Judge has misread the evidence and has failed to apply the correct law to the facts admitted or proved.

The basis of a claim for brokerage must initially be found in a contract of agency. In order to determine the liability of the defendants, the questions which emerge for decision are: What was the contract, if any, between the parties? And whether the terms of the contract had been fulfilled in this case? If the contract has not been fulfilled in its entirety, a further question may arise as to whether the plaintiffs are entitled on an implied contract to recover on quantum meruit?

The terms of the contract have to be collected from the letters, which passed between the parties, letters which have not been considered at all or at any rate not sufficiently appreciated by the Additional District Judge. It is abundantly clear from these documents that the contract between the parties was that the plaintiffs should find a purchaser for the defendants. On 11th June 1924,

the defendants, in anwer to a letter of the plaintiffs dated 29th May, wrote as follows:

"Please let us know the particular arrangement made by you with regard to the sale of our Meerut house. We cannot undertake to sell only through your good selves. If you can find us a purchaser at a reasonable figure we will gladly pay you 5 per cent commission."

The above would indicate that commission or brokerage at the rate of 5 per cent was payable upon the purchase money, irrespective of the amount, and the amount has not so far been indicated. The plaintiffs wrote back on 12th June 1924:

"We have got two, three purchasers in our hand and we think that they will buy at desirable price, so please let us know how much you want for your building. then you will take the offer from buyers because first, owner must give figure,"

In reply to this letter, the defendants stated that they wanted Rs. 30,000 free of all charges for their property at Meerut.

On 23rd August 1924 the plaintiffs wrote the following letters:

"With reference to your letter No. 18146 dated 14th June 1924, we have advertised the sale of your bungalow "Belvedere" No. 22 by our brokers' handbills. So we have got few offers and the purchaser ideas (sic) seem to pay the near amount at present. We have put the price Rs. 35,000 and we hope the sale will complete early. Officer Commanding Office of Military Accounts and Messrs. Kishan Lal Jaini, agent B. O. C. Petrol and Elgin Mills are also purchasers and they might write you direct regarding the same. So please ask them the price quoted above and direct them to have further correspondence with us. Besides them we have some more purchasers but they will return in September or early in October from hills."

This was replied to on 27th August:

"We are obliged for your letter of the 23rd instant and note therefrom that you have placed a minimum of Rs. 35,000 net on our property at Meerut. We therefore cancel our letter No. 1314G. dated 14th June 1924 placing the minimum of Rs. 30,000 net.,'

On 28th August 1924 the plaintiffs sent another letter to the defendant:

"Our manager had been in the C. M. A, office to-day and they asked him to show the authority for sale and other necessary papers concerning the bungalow, so that they may consult with their legal advisers and satisfy themselves in every respect. We told them that the company will take Rs. 5,000 in advance as soon as the matter is settled and the sale deed will be registered within a month's time. As for vacating the bungalow, we have not said anything to them, but please let us know how long you will take to vacate the bungalow. In your letter No. 1461 G dated 17th August 1924 you mentioned Rs. 35,000 as net amount you require but you have not stated regarding our commission at 5 per cent on sale proceeds, so please confirm now to this effect"

On 28th August letters passed between the defendants and the Controller of Military Accounts and eventually the house was purchased by the Controller, on 10th June 1925. In between, two other letters were addressed by the defendants to the plaintiffs. The letters dated 30th August 1924 read as follows:

"On receipt of your letter of the 23rd instant we referred the matter to the Controller of Military Accounts, Meerut Cantonments, who, in reply, writes: "In reply to your letter of 28th August regarding "Belvedere" I write to say that I have neither seen Messrs. Roopji and Sons nor have they offered me the place on your behalf. Their letter to you, therefore, contained a direct mis statement and I do not propose to have any communication either with or through them.,'

"You wrote on 28th saying your manager had been in the C. M A. office on the 28th and yet the Controller writes as above on the 29th."

The next letter is dated 15th September 1924:

"Your letter of the 12th instant, We regret we cannot accept your claim. The Controller of Military Accounts wrote to us saying that he had never seen your firm nor had he been offered the place by you."

The effect of the last two letters was that the plaintiffs were faced with contratemps. The lower appellate Court ignores the previous correspondence and builds its findings entirely upon the last two letters. There was no warrant for this course.

Upon a correct reading of the documentary evidence, the following conclusions are forced upon us:

1. The defendants had employed the plaintiffs as their agent or broker that they should find a purchaser.

2. At the suggestion of the defendants the price for the house was raised from Rs. 30,000 to Rs. 35,000.

3. The defendants had contracted to pay the plaintiffs 5 per cent. as commission or brokerage on the purchase money.

4. The plaintiffs had asked the defendants to directly correspond with the Controller of Military Accounts and that negotiations for purchase and sale between the defendants and the Controller proceeded upon the plaintiffs having introduced the Controller of Military Accounts as a possible purchaser.

The oral evidence on the record is equally clear and conclusive and shows

the exact extent of the plaintiffs' share in the transaction of sale. It has been conclusively proved that the plaintiffs got handbills printed and circulated for the sale of "Belvedere," that the manager of the plaintiffs' firm went to the office of the Controller and saw Mr. Sen, the Deputy Controller of Military Accounts, that he had a talk with Mr. Sen who asked him about the price, that Mr. Sen mentioned this fact to the Controller but that the Controller refused to settle the transaction through the plaintiffs. Mr F.C. Beynen, manager of the defendants' company, states:

"I offered to pay the commission to Messrs. Roopji and Sons on condition that he would sell my place as contained in my letter. He wrote to me first. They suggested certain names to us and we wrote to those people .... I came to know from the plaintiffs' letter dated 23rd August 1924, stating that the Controller of Military Accounts was a likely purchaser of the building. Before this letter came to me I had no idea of the C. M. A. Letters dated 28th August 1924 from the plaintiffs' and the letter dated 28th August 1924 from the Controller reached me the same time, 29th August 1924."

It appears therefore that immediately upon receiving information from Mr. Sen that "Belvedere" belonging to the defendants was for sale, an information which Mr. Sen received as the result of his interview with plaintiffs' manager the Controller of Military Accounts wrote to the defendants on 28th August 1924 and that on the same day, the defendants, acting upon the instructions of the plaintiffs, also wrote to the Controller. It is therefore clear that the owner and the purchaser were not brought together by any fortuitous circumstances but through the mediation of the plaintiffs. The plaintiffs were therefore causa causans of the ultimate sale.

Mr. Benyen continues:

"In the letter Ex. D, I cannot say how the Controller came to know that our premises were for sale. I cannot deny on oath that it was through the advertisement of the plaintiff that Lt. Colonel came to know of the sale. I knew nothing about it. I got my information all through letters ..... I meant that the price fetched should have a sufficient margin to cover all the charges. I put for Rs. 30,000 and I admit that plaintiff suggested me to put it at Rs. 35,000. I agreed to it."

The learned Additional District Judge was clearly in error in dismissing the plaintiffs' claim upon the ground that the sale to the Controller had not been negotiated or finished through the intervention of the plaintiffs. This is is the only data upon which the judgment proceeds and is manifestly wrong. Where a contract is arrived at between a house-owner and a broker for finding a purchaser, the house-owner agreeing to pay 5 per cent on the purchase money as remuneration the broker is entitled to receive his fee, when the sale of the house has actually taken place in favour of the said purchaser upon his finding the purchaser, even though the negotiation or completion of the sale between the buyer and the seller may not have taken place through the direct intervention of the broker or commission agent.

Generally speaking, the broker "is the middleman or intermediate negotiator between the parties:" Story's Law of Agency, p. 25. But his exact position may be defined or limited by the terms of the contract. His right to remuneration for any work done by him is dependent upon the terms of the contract and upon his fulfilment thereof. In order that the agent be entitled to receive remuneration from the principal for any work done, it is not absolutely necessary in each case, that the whole of the transaction should be done to a finish by him or through his intervention. Indeed the authorities have gone to the length of holding that the agent may in a proper case be entitled to receive remuneration even though the principal has got no benefit:

"Where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done what he undertook to do, even if the principal acquires no benefit from his services: Bowstead's Law of Agency, Edn. 6 of 1919, p. 201."

The rule of law applicable to this case has been stated in a number of authorities and has been settled beyond doubt:

"It is not necessary that the agent should actually complete the transaction, but he must show that it was brought about as the direct result of his intervention: Halsbury's Laws of England, Vol. 1, p, 194."

In the leading case of *Burchell* v. *Gourie* (1) the following observation occurs in the judgment of the Judicial Committee:

"In the words of Erle, C. J., in *Green* v. *Bartett* (2), if the relation of buyer and seller is really brought about by the act of the agent.

(1) [1910] A. C. 614=80 L. J. P. C. 41=103 L. T. 325.
(2) [1863] 14 C. B. 681=11 W. R. 881=32 L. J. C. P. 261=8 L. T. 503.

he is entitled to commission, although the actual sale has not been effected by him; or in the words of later authorities, the plaintiff must show that some act of his was the causa causans to the sale, *Tribe* v. *Taylor* (3), or was an efficient cause of the sale: *Miller* v. *Radford* (4)."

Bramwell, L. J., held in *Fisher* v. *Drewett* (5) that the current of modern opinion was to the effect that those who bargained to receive commission for introduction had a right to their commission as soon as they had completed their portion of the bargain, irrespective of what might take place subsequently between the parties introduced. In the *Municipal Corporation of Bombay* v. *Cuverji Hirji* (6) it was held that a broker was entitled to his commission, if the relation of buyer and seller was really brought about by him, although the actual sale had not been effected by him.

Green v. *Bartlett* (2) has been followed by the Indian Courts in a number of cases, which need not be enumerated and the principle laid down therein is clearly applicable to the case in hand.

In *Wilkinson* v. *Martin* (7) in summing up the case for the jury Tindal, C. J., is reported to have made the following observations:

"The only question for you to decide on the evidence of both sides is, whether the sale really proceeded in effect from the fact of the plaintiffs' acting as brokers whether it really and substantially proceeded from their act, though they did not complete the contract. If it did, they will be entitled to your verdict but if very far or less than this was done, and there was only a mere introduction and the office of the agent or middleman was never filled by the plaintiffs between the parties, then they will not be entitled to recover."

It may be conceded that the mere fact of introduction may not be conclusive. But where the introduction is the foundation on which the negotiation proceeded, and the negotiation eventually ripened into sale, the introducer is entitled to claim the fruit of his labour. The real test is whether the vendor and the purchaser were brought together by the agent acting in the matter either for one or the other or for both. If the ultimate sale could not have taken place but for the introduction made by the agent, the latter is entitled to get his brokerage.

It ought to be distinctly stated that the plaintiff's claim is not founded on quantum meruit.

Quantum meruit was an action on the case which was abolished in effect by the rules H. T. 1, William 4:

"This form of the claim was granted on a promise to pay the plaintiffs for doing a thing as much as they deserved or merited."

In view of the case set up in the plaint and the facts admitted or proved, it was not necessary to complicate the trial by introducing the question whether the plaintiffs were entitled to succeed pro tanto on quantum meruit.

If the plaintiffs had carried out their part of the contract, they must succeed and a recourse to the fiction of an implied contract to pay, would be wholly unnecessary, and indeed the plaintiffs could not claim on the quantum meruit because they had chosen to tie themselves down by the express terms of the agreement: vide Lord Coleridge, C. J., in *Martin* v. *Tucker* (8). A liability by implication is excluded by the contract being express. In *Lott* v. *Cuthwaite* (9) Lindley, L. J., is reported to have remarked:

"It was said that there was an implied contract to pay the agent a quantum meruit for his services. The answer was that there could be no implied contract when there was an express contract."

The lower Courts were therefore not right in treating the claim as based on quantum meruit.

We have already set out above that the plaintiffs' claim is not founded on quantum meruit. The plaintiffs had found the purchaser. The bargain was struck at Rs. 35,000 a figure which the plaintiffs had suggested and which the defendants had accepted. It was at the instance of the plaintiffs that the defendants had offered that figure to the Controller of Military Accounts. The plaintiffs were in the circumstances entitled to claim remuneration at Rs. 5 per cent on the entire sum of Rs. 35,000.

The result is that we allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the trial Court with this modification that the plaintiffs are entitled to Rs. 1,750 as claimed. Plaintiffs must have

(3) [1876] 1 C. P. D. 505.
(4) [1903] 19 T. L. R. 575.
(5) [1879] 48 L. J. Ex. 32=27 W. R. 12=39 L. T. 253.
(6) [1896] 20 Bom. 124.
(7) [1837] H. C. 5.
(8) [1835] 1 T. L. R 655,
(9) [1893] 10 T. L, R. 76.

their costs throughout, including in this Court, fees on the higher scale.

J.M./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 550

SULAIMAN AND KENDALL, JJ.

Gaya Prasad—Plaintiff—Appellant.

v.

Jaswant Rai and *others*—Defendants—Respondents.

First Appeal No. 562 of 1927, Decided on 11th January 1930, from decree of Addl. Sub-Judge, Banda, D/- 31st October 1927.

(a) Agra Pre-emption Act (11 of 1922), S. 20—Gift of joint family property by manager to vendee subsequent to institution of pre-emption suit—Vendee does not get indefeasible title.

Where after institution of a pre-emption suit in respect of property sold, the vendor, the manager of a Hindu joint family property, makes a gift of the property in favour of the vendee, the vendee does not acquire an indefeasible title to it so as to defeat the claim of the pre-emptor: *A. I. R.* 1929 *All.* 703 and *A. I. R.* 1929 *All.* 765, *Foll.* [P 550 C 2]

(b) Evidence Act, S. 90—Certified copy of document relied upon—Before any presumption under S. 90 can be made party relying must lay foundation by leading secondary evidence under S. 65.

Where a party relies upon the certified copy of a document before any presumption as to genuineness of the original can be made under S. 90, it is incumbent on the party trying to rely upon the document to lay the foundation by leading secondary evidence under S. 65: 22 *All.* 294; 41 *All.* 592; 6 *Cal.* 720 and 14 *Cal.* 486 (*P.C.*), *Foll.* [P 551 C 1]

(c) Evidence Act, S. 65 (1)—"Produce"—Meaning explained.

The word "produce" only means "procure the production or give it in evidence." [P 551 C 2]

(d) Evidence Act, S. 65 (c)—Question of sufficient reason for non-production required under S. 65 (c) is question of fact—Civil P. C., S. 100.

The question whether the non-production is due to any other sufficient reason not arising from his own default or neglect is one of fact and depends mainly on the discretion of the Court. [P 551 C 2]

(e) Hindu law—Joint family—Brothers and their sons messing and living together—Presumptions and rules of burden of proof discussed.

Where Hindu brothers and their sons live and mess together there is a presumption that they are members of a joint family. But there is no presumption that that family owns a joint family property in the absence of any proof of a nucleus; at the same time it would seem that there can be no presumption that any property which is in existence and is in possession of one member of the joint family is necessarily his separate property, or is his self-acquisition. The party who wishes to make out that it is his separate property over which he had absolute power of disposal should establish that case. No presumption can be made in his favour: 33 *All.* 677 and 35 *All.* 534, *Foll.* [P 552 C 1]

L. M. Roy—for Appellant.

K. N. Katju and *K. D. Malaviya*—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for pre-emption against a number of defendants, who have purchased shares in village Char under a deed dated 31st January 1925. The claim was mainly resisted on the strength of two deeds of gift executed by one Ram Nath, in favour of the defendant separately on 4th January 1926 and 1st March 1927. The first document was executed before the institution of the suit, but the second one was executed during its pendency. The plaintiff challenged the validity of these two gifts on the ground that the first one was fictitious, void and ineffectual, and that possession had not been delivered to the donees, and that the second one was in reality a sale deed and not a deed of gift. The learned Subordinate Judge has decided these questions of fact against the plaintiff, and the findings have been arrived at after an elaborate consideration of the evidence produced by both the parties. We agree with his conclusions, and do not feel inclined to disturb his findings of fact. He has, however, dismissed the plaintiff's suit on the ground that:

"there is no proof that the property transferred under the gifts is joint and also ancestral and as such Ram Nath could not have made the gift. Secondly the transaction is voidable and not void. So long as the deed remains unchallenged, the donees possess a good title."

As regards the second ground relied upon by him, he was clearly in error in view of the opinion expressed by this Court in the case of *Govind Singh* v. *Manglu* (1) as well as *Kundan Gir* v. *Jaswant Singh* (2).

The main point to consider is whether the defendants have acquired an indefeasible right by virtue of these gifts within the meaning of S. 20, Agra Pre-emption Act.

It is an admitted fact that the donor Ram Nath has a brother Bidhata and a minor son alive. They all live in one and the same house, though the plaintiff states that Bidhata has separate cultivation (p. 18).

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(1) A. I. R. 1929 All. 703=51 All. 930.
(2) A. I. R. 1929 All. 765.

In order to show that there was a nucleus of ancestral property in the hands of Ram Nath the plaintiff tendered a certified copy of a sale deed (Ex. 6, paper No. 41-C) dated 11th December 1875, purporting to transfer a one anna share in mauza Char in favour of Sanwale, son of Gauri Shankar, resident of that village. This document was not admitted by the counsel for the defendants, and apparently no notice was served under S. 66 by the plaintiff on Ram Nath to produce the original. It is also an unfortunate fact that the plaintiff's vakil in the Court below did not put any question to Ram Nath with regard to this deed when he was in the witness-box; nor was he at all questioned whether any property in his possession was ancestral or joint family property. The matter was left in the air by counsel for both the parties. No attempt was made on behalf of the plaintiff to prove that the original of this sale deed of 1875 had been lost or destroyed, or that it was in the possession of any of the defendants. But it is a fact that the Court below admitted it in evidence and marked it as Ex. 6 on 19th October 1927, while the plaintiff's oral evidence was being tendered.

It seems to us that before any presumption as to the genuineness of the original can be made under S. 90, it is incumbent on the party trying to rely upon the document to lay the foundation by leading secondary evidence under S. 65, Evidence Act : vide *Ishri Prasad Singh* v. *Lalli Jas Kunwar* and *Lalli Jas Kunwar* .v *Ishri Prasad Singh* (3) and *Dwarka Singh* v. *Ramanand Upadhia* (4). Their Lordships of the Privy Council have frequently emphasized that before secondary evidence of a document can be given its loss, destruction or the difficulty to produce it should be established: vide *Bhubaneswari Debi* v. *Harisaran Surma Moitra* (5) and *Krishna Kishori* v. *Kishori Lal Roy* (6) at p. 490. S. 64, Evidence Act, itself clearly lays down that documents must be proved by primary evidence except in the cases mentioned thereafter.

Under S. 65, sub-Cl (c), where the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time, secondary evidence may be admitted. The learned advocate for the respondents contends that the word "produce" in this section indicates that it was to be produced out of the custody of the party concerned. We do not think that this narrow construction should be necessarily put on this section. The word "produce" only means "procure the production of or give it in evidence". The question whether the non-production is due to any other sufficient reason not arising from his own default or neglect is one of fact, and depends mainly on the discretion of the Court. We have the fact that the learned Subordinate Judge felt himself satisfied, although he has not given any reason in the judgment, that the copy should be admitted in evidence and marked as an exhibit. We are therefore reluctant to interfere with the discretion exercised by the Court below.

But it seems to us that even assuming that the certified copy could be admitted as secondary evidence, and also that the presumption under S. 90 has been legitimately made, it does not follow that the identity of the transferee with the father of Ram Nath is also to be necessarily presumed.

But in this case it appears not only that Sanwale was the name of Ram Nath's father, but that the name of Ram Nath's grandfather was Gauri Shankar and they were residents of the same village. The sale deed of 1875 shows that the name of the father of the transferee Sanwale also was Gauri Shankar and they were residents of the same village. The property transferred under the deed was a one anna share, and just over a half anna share is now owned by Ram Nath. Indeed, the share now possessed by Ram Nath is situated in a patti called after Sanwale (p. 54). Under S. 3, Evidence Act, a fact is said to be proved when the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act on the supposition that it exists. We think that although there is no direct oral evidence to establish the identity of Sanwale, the circumstances of this case are such that a prudent man ought to act

(3) [1900] 22 All. 294=(1900) A. W. N. 82.
(4) [1919] 41 All. 592=51 I. C. 275=17 A. L. J. 711.
(5) [1881] 6 Cal. 720=8 C. L. R. 337 (P. C.).
(6) [1887] 14 Cal. 486=14 I. A. 71=5 Sar. 18 (P. C.).

upon the supposition of such identity. It would, therefore, follow that Ram Nath's father did possess a share in this village.

Even apart from this we are of opinion that the burden of establishing that the defendants have acquired an indefeasible right so as to defeat the claim for pre-emption lies upon the defendants. All that they have succeeded in showing is that Ram Nath has made a gift of a portion of the share held by him in their favour that he has delivered possession to them. On the one hand the plaintiff merely shows that Ram Nath has a brother and a son alive and that there are some properties, a house and zamindari share in existence. On the other hand, the defendants only show that Ram Nath professing to own the share has made the transfer, but they have not shown that he had acquired this property himself, or that it was necessarily his self-acquired property. There is in our opinion an initial presumption that Ram Nath, his brother and his sons are members of a joint Hindu family: but there is no presumption that that family owns a joint family property in the absence of any proof of a nucleus: vide *Ram Kishan Das* v. *Tanda Mal* (7). At the same time it would seem that there can be no presumption that any property which is in existence and is in the possession of one member of this joint family, is necessarily his separate property, or is his self-acquisition. The party who wishes to make out that it is his separate property over which he had an absolute power of disposal, should establish that case. No presumption can be drawn in his favour: per Richards C. J., in *Kundan Lal* v. *Shankar Lal* (8).

In the present case we, however, think that there are sufficient materials on which the presumption could be made that the property was not the separate property of Ram Nath. We not only have a joint family consisting of two brothers and the children of at least one of them, but their shares are part of one patti, which is called patti Sanwale. The patti itself is named after the father of Ram Nath and Bidhata, and we are entitled to infer from this fact that it existed at the time when Sanwale was alive, that is to say, that the property has devolved upon Ram Nath and Bidhata from the time of Sanwale. There is admittedly a house in which these three persons are living jointly. There is no evidence that they are separate in mess, although there is the statement of the plaintiff that there is separate cultivation. Having regard to all these circumstances we are of opinion that the defendants have failed to establish that the gift of the share taken from Ram Nath has conferred upon them an indefeasible right which cannot be challenged by the other members of his family.

We would accordingly allow this appeal, set aside the decree of the Court below and decree the plaintiff's claim for pre-emption on payment of Rs. 6,000 within two months from this date. In case of such payment, the plaintiff will be entitled to his costs in both Courts including in this Court fees on the higher scale. In case of default of payment within the time allowed, the plaintiff's suit would stand dimissed with costs in both Courts including in this Court fees on the higher scale.

V.B./R.K. *Appeal allowed.*

(7) [1911] 33 All. 677=10 I. C. 543=28 A. L. J. 723.

(8) [1913] 35 All. 564=21 I. C. 13=11 A. L. J. 910.

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SEN AND NIAMATULLAH, JJ.

Shankar Lal and *another* — Appellants.

v.

Mohammad Ismail and *another*—Respondents.

Second Appeal No. 11 of 1929, Decided on 19th February 1930, against order of Dist. Judge, Saharanpur, D/- 16th April 1929.

(a) Civil P C.,O.21, Rr. 41 and 57 — "Attachment"—Meaning and effect explained.

In the normal course of things, attachment does not per se create or confer a title. It only prevents an alienation of the property during the subsistence of the attachment. [P 553 C 2]

(b) Provincial Insolvency Act, S. 4 (1)—Devolution of estate by inheritance on insolvent—Question of priority between creditors of deceased and of insolvent has to be decided by Court of insolvency.

Where an estate has devolved on insolvents by inheritance and there are creditors of the deceased and also creditors of the insolvents, the question of priority between the two has to be decided by the Court of insolvency. [P 554 C 2]

(c) Provincial Insolvency Act, Ss. 4 (1) and 28 (2)—There is no conflict between Ss. 4 (1) and 28 (2).

Under S. 4 (1) the powers of the Court of insolvency are very wide, and do not in any way militate against S. 28 (2). [P 555 C 1]

(d) Provincial Insolvency Act, S. 4 (1)—Property of Mahomedan devolving by inheritance on heir who subsequently becoming insolvent—Creditors of insolvent cannot seize property in competition with creditors of deceased ancestor.

Under Mahomedan law, although upon the death of the ancestor, his estate devolves immediately upon his heirs, the heirs take it subject to the payment of his debts and therefore, although there may not be a specific charge upon the estate for the payment of debts, the debts may be deemed to constitute a general charge on the estate. That being so, if such an estate devolves upon a person who is subsequently declared insolvent, the creditors of the insolvent cannot seize the property in competition with the creditors of the deceased : 7 *All*, 822 ; *Kinderley* v. *Jervis*, 22 *Beav*, 1 ; 26 *All*. 28, *Ref.* : *A. I. R*, 1929 *Mad*, 609, *Dist*.

[P 555 C 1, 2]

G. S. Pathak—for Appellants.

K. N. Katju, *M. A. Aziz* and *M. L. Chaturvedi*—for Respondents.

Sen, J. — This is an appeal from an appellate order passed by the District Judge of Saharanpur in a matter arising out of insolvency.

One Mahmud Ahmad had borrowed money from Mohammad Ismail, respondent 1, and executed a promissory note in his favour. He died leaving as his heirs three sons, Ziaul Haq, Nazir Ahmad and Inamul Haq and a widow Mt. Mariam Bibi. Mohammad Ismail sued these heirs on the promissory note and obtained a decree in suit No. 163 of 1926. The assets left by the deceased were attached in execution of this decree and 20th February 1929 was fixed for sale of the property.

Ziaul Haq, his mother and his two brothers had contracted debts from Shankar Lal and Pearey Lal in their personal capacity. On 26th November 1928, the creditors applied that these persons be adjudicated insolvents. Before any order of adjudication had been passed, these creditors applied to the insolvency Court on 11th February 1929, for the stay of sale pending the disposal of their petition for adjudication. The Subordinate Judge, who, in the exercise of the insolvency jurisdiction had the seisin of the case, made the following order :

"Let the sale be stayed pending the disposal of the insolvency application."

On 19th February 1929, Mohamed Ismail moved the insolvency Court to revoke the order passed on the application of Shankar Lal and Pearey Lal upon the ground that his decree in suit No. 163 of 1926, was passed for recovery of a debt due from Mahmud Ahmad against his assets in the hands of Ziaul Haq and others, that the latter were in possession of those assets "as administrators" under the Mahomedan law and that Shankar Lal and Pearey Lal, by reason of their claim against Ziaul Haq and others personally, were not entitled to a priority over his decree. This application was rejected with the following order :

"Whatever may be the right of the applicant in respect of his debt there can be no doubt that the property belongs to the debtors. If they are adjudged insolvents the property shall vest in the receiver subject to any equities that may exist in favour of the applicant. I do not think it desirable that the property be sold during the pendency of the insolvency application. I see no reason to alter my order."

On appeal, the learned District Judge upheld the contention of Mohamed Ismail, set aside the order of the Court below, and directed that the sale in execution of Mohamed Ismail's decree should be proceeded with according to law.

Shankar Lal and Pearey Lal have appealed to this Court and contend that no priority can be claimed by a judgment-creditor over the Official Receiver in respect of property attached by him previously to the vesting order. Reliance is placed upon *Frederick Peacock* v. *Madan Gopal* (1).

It may be conceded at once that in the normal course of things, attachment does not per se create or confer a title. It only prevents an alienation of the property during the subsistence of the attachment.

It may also be conceded that a simple creditor of a deceased Mahomedan has no specific lien upon the assets left by the deceased which are now in the hands of his heirs. But we have no doubt in our mind that the creditor of the deceased under the Mahomedan law occupies a more favourable position than the creditors of the heirs and is entitled to a marshalling of the assets left by the deceased, as will be borne out from the following text in Al Sirajiyyah translated by Sir William Jones :

(1) [1902] 29 Cal. 423=6 C.W.N. 577 (F.B.).

"There belong to the property of a person deceased four successive duties to the performed by the Magistrate : first, his funeral ceremony and burial without superfluity of expense, yet without deficiency ; next, the discharge of his just debts from the whole of his remaining effects : then the payment of his legacies out of a third of what remains after his debts are paid ; and lastly, the distribution of the residue among his successors, according to the Divine Book, to the traditions, and to the assent of the learned. (Sir William Jones Work, Vol. 3, p. 517)."

In *Jafri Begam* v. *Amir Muhamad Khan* (2), Mahmood, J., quotes the above passage and observes :

"I have quoted this passage to show the priority possessed by the three charges to which the estate is subject when inherited by heirs. This order of priority is, as is obvious from the passage, merely a direction as to the administration of the estate, and has no bearing upon the question of the exact point of time when inheritance devolves upon the heirs."

An unsecured creditor of a deceased Mahomedan may not have a specific lien or charge upon the general assets left by the deceased, but he may well have a general charge upon the assets so left. This general charge may partake the character of an equitable lien such as has been recognized in the case of *Kinderley* v. *Jervis* (3). The last-mentioned case was expressly applied by this Court in favour of a creditor of a deceased Mahomedan in *Bhola Nath* v. *Maqbul-unnissa* (4).

This case was argued with considerable skill and ability by Mr. G. S. Pathak who contended that upon the death of a Mahomedan his property immediately devolved upon his heirs, and upon the latter's insolvency it vested in the Official Receiver under S. 28 (2), Provincial Insolvency Act (Act 5 of 1920). He relied upon the decision in *Jafri Begam's* case which has already been referred to in support of the proposition that upon the death of a Mahomedan intestate who leaves unpaid debts, whether large or small, with reference to the value of his estate, the ownership of such estate devolves immediately upon his heirs and such devolution is not contingent upon and suspended till the payment of his debts. He further contended on the authority of *P. K. Nainar Rowthen* v. *Kuppai Pichai Rowthen*, *A. I. R* 1929 *Mad.* 609, that the debts of a deceased Mahomedan did not form any charge on the property inherited by the heirs and so there could be no lien or charge on the property in the hands of the Official Receiver where Mahomedan heirs became insolvent subsequent to the decree against the estate of their ancestors in their hands and the creditors could not claim to be secured creditors but must prove as ordinary creditors.

It cannot be controverted that where a Mahomedan dies leaving certain assets and certain unsecured debts, the payment of the debt is not a condition precedent to the devolution of inheritance. It is settled law that the inheritance opens out immediately at the moment of death and is not suspended till the payment of debts. We have conceded that an unsecured creditor has no specific lien upon the assets of the deceased, but we are not in agreement with the learned Judges of the Madras High Court in the case referred to above if they intend to lay down that no general lien exists upon the assets on account of the debts left by the deceased.

The question of the devolution of the estate ought not to be confounded with the question as regards the administration or marshalling of assets. This distinction was sharply pointed out in the case of *Jafri Begam* ; and the following passage from the judgment of Mahmood, J., will bear quotation :

" It is one thing to say that these three charges take precedence of the inheritance, in the administration of the estate and its distribution among heirs, and it is another thing to say that the inheritance itself does not open up until those charges are satisfied. . . . . "

" Funeral expenses, debts and legacies, or any one or more of them, may indeed absorb the estate of the deceased, defeating every succeeding charge : and it is obvious that if nothing is left for the heirs they can take nothing. But this is a proposition widely different from saying that the devolution of inheritance is suspended till the various charges are satisfied."

It is clear therefore that the debt has priority and if the estate is absorbed in the payment of the debt, nothing is left to the heirs to inherit.

Under S. 28 (2), Provincial Insolvency Act, upon adjudication, the estate of the insolvents vests in the Official Receiver. Where such estate has devolved by inheritance and there are creditors of the deceased and also creditors of the insolvents, the question of priority between the two has to be decided by the Court of insolvency. S. 4 (1), Provincial Insolvency Act, enacts :

(2) [1885] 7 All. 822=(1885) A.W.N. 248.
(3) [1856] 22 Beav.1=4 W.R. 579=25 L.J. Ch. 538=2 Jur. (n.s.) 602.
(4) [1904] 26 All. 28=(1903) A.W.N. 184.

"Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

The powers of the Court of insolvency are therefore very wide. Those conferred by this section do not in any way militate against S. 28 (2). The mere fact that the inheritance has devolved upon the sons and the widow of the deceased does not justify the Court of insolvency to place the creditors of the deceased on the same level with the creditors of the insolvents. The property may have become the property of the insolvents by devolution under the Mahomedan law and yet may not be available to the creditors of the insolvents themselves as distinguished from the creditors of the deceased. The creditors of the insolvents cannot seize the property in competition with the creditors of the deceased. It may, indeed, be doubted if the property, which under these peculiar circumstances, has descended to the insolvents under the Mahomedan law can be called "property" within the definition of that term in S. 2 of the Act. In S. 2 (d) :

"Property includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit."

According to the Mahomedan law the property has to be administered in a particular order ; after the several charges already enumerated in a previous part of our judgment have been met, the residue is the property of the heirs over which or the profits of which they may be said to possess an unconditional power of disposal.

Indeed, the matter is not res integra. The matter came up before this Court in a suit which did not arise out of an insolvency proceeding : *Bhola Nath* v. *Maqbulunnissa* (4). In this case, Mt. Maqbulunnissa who was the widow of Chaudhry Said Uddin Husain, obtained a decree for dower against Yaqub Husain, son and heir of Said Uddin Husain. In execution of that decree, she attached certain shares in the property which had been Said Uddin Husain's in his lifetime. The defendant Bhola Nath held a simple money decree against Yaqub Husain for a personal debt and in execution thereof he proceeded to attach the property which had previously been attached by Maqbulunnissa. The question which arose in the case was which of the two decree-holders had precedence. The answer was that Mt Maqbulunnissa who held a decree for debts due from her husband was entitled to priority. Stanley, C. J., made the following observation (p. 33) :

"According to the principle of the Mahomedan law debts are claimable before legacies, and legacies must be paid before the inheritance is distributed. (Macnaghten's Mohammadan Law, Chap. 1, R. 5) ;"

also:

"All the debts due by the testator must be liquidated before the legacies can be claimed : id. Chap. 6 of Wills, R. 6)."

and again :

"Heirs are answerable for the debts of their ancestor as far as there are assets : id., Chap. 2 on Debts, R. 1. It cannot be disputed that the liquidation of the debts of a deceased Mahomedan should precede the distribution of his property amongst the heirs. Here the immovable property of the respondent's husband is intact and available for the satisfaction of his debts. It has not been sold or mortgaged, and it appears to me only just and equitable that it should be applied in satisfaction of the respondent's debt before a creditor of the heir can realize out of it his claim. The property is under attachment to satisfy the respondent's claim, and I see no good reason why it should not be realized and her claims satisfied in priority to the claim of a creditor of the heir."

Banerji, J., also took the same view :

"It would be inequitable to make one man's property pay the debt of another. Under the Mahomedan law, although upon the death of the ancestor, his estate devolves immediately upon his heirs, the heirs take it subject to the payment of his debts, and therefore, although there may not be a specific charge upon the estate for the payment of the debts, the debts may be deemed to constitute a general charge on the estate. That being so, the plaintiff who is the creditor of the father of the appellant's debtor has priority over the appellant in respect of her debt (vide p. 36)."

It makes no difference that the above-mentioned case did not arise out of insolvency proceedings. The same principle would apply. The insolvency Court was bound to consider the case of the competing creditors and to determine the question of priority. This is what has been done in this case. We are in complete agreement with the view taken by the lower appellate Court and dismiss this appeal with costs including in this Court fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 556

SULAIMAN AND KENDALL, JJ.

Mt. Indar Koer and *another*—Plaintiffs—Appellants.

v.

Sah Dharam Narain and *others*—Defendants—Respondents.

First Appeal No. 532 of 1926, Decided on 10th March 1930, against decree of Sub-Judge, Farrukhabad, D/- 13th May 1926.

(a) Agra Tenancy Act (2 of 1901), S. 160—Civil P. C., O. 21 applies to revenue Courts.

Order 21, Civil P. C., is not excluded from applicability to revenue Courts. [P 556 C 2]

(b) Civil P. C., O. 21, Rr. 90 and 92 (3)—Setting aside sale in execution of decree on ground of fraud or material irregularity in proclamation of sale—Only remedy is under O. 21, R. 90 and no suit under R. 92 lies.

The only remedy open to a person trying to set aside a sale in execution of a decree on the ground of material irregularity or fraud in the conduct of proclamation of the sale is by an application under O. 21, R. 90. If such an application is made and disallowed or not made and sale confirmed no suit to set aside the order shall lie under R. 92 (3). [P 556 C 2]

(c) Decree—Setting aside — Two decrees consolidated and property sold in execution by one bid—To challenge sale on ground of irregularity sales in execution of both decrees must be challenged — Civil P. C., O. 21, R. 90.

Where two decrees against a judgment-debtor have been consolidated and sale takes place in execution of both the decrees and property is sold by one bid, in order to challenge the sale on the ground of irregularity sales in execution of both the decrees must be challenged. [P 557 C 2]

K. N. Katju and *Baleshwari Prasad*—for Appellants.

P.L. Banerji, *Panna Lal* and *Swarup Chandra*—for Respondents.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for avoiding a decree and an execution sale in pursuance of it and for possession of the property sold at auction. A suit was brought by one Mt. Indar Kunwar and Gur Prasad, the former of whom died during the pendency of this appeal, and Gur Prasad is her heir qua her alleged share in the property. The allegations of the plaintiffs as put forward in the plaint were that defendant 1, Sah Dharam Narain, had by fraud obtained from the revenue Court a decree for arrears of revenue in 1920 against the plaintiffs by adopting secret proceedings as regards the service of summons and preventing the knowledge of the suit from reaching the plaintiffs; and that subsequently he got the decree executed and 5 biswa share in mauza Sharifabad sold at auction in a fraudulent and collusive proceeding of which knowledge was withheld from the plaintiffs. It was further asserted that the real purchaser was defendant 1 himself, although the property was knocked down in the name of defendant 2, Chandar Bhan.

Defendant 1 denied all allegations of fraud and also denied that he himself was the purchaser. It was further pleaded that the sale had taken place in execution of more than one decree and that the other decree-holder had not been impleaded. It was also urged that the suit was not maintainable. Similarly defendant 2 pleaded that the suit was not maintainable and also denied all allegations of fraud. He also asserted that he himself was the real purchaser and that another decree-holder had not been impleaded in the suit which was accordingly defective.

The learned Subordinate Judge has found that the allegations of the plaintiffs as regards any fraud in obtaining the decree or the auction sale has not been established, and has accordingly dismissed the suit. The plaintiffs have appealed to this Court and challenge that finding.

In the first place it is quite clear that it is not open to the plaintiffs to get the auction sale set aside by this suit on the ground of any fraud in the conduct or proclamation of the sale. For that their remedy was under O. 21 only and no separate suit lies. The sale took place in execution of a decree for arrears of revenue under S. 160, Agra Tenancy Act (Act 2 of 1901). Under S. 193 of that Act the Civil Procedure Code was applicable to the proceedings in the revenue Court except the provisions excluded thereunder. Ss. 312 and 314 falling under Chap. 19 of the old Code were not so excluded. O. 21 of the new Civil Procedure Code corresponds to that chapter and is, therefore, not excluded from applicability to revenue Courts. This is quite clear from the provisions of S. 158, Civil P.C., under which references to the old Code have to be substituted by those to the corresponding provisions in the new Code. We have already stated that this was the execution of a

revenue Court decree and not a decree of a civil Court transferred to the revenue Court to which Sch. 3, Civil P. C., might apply.

Under O. 21, R. 90, a sale can be set aside by the execution Court on the ground of material irregularity or fraud in publishing or conducting it. If such application is made and refused or not made and the sale is confirmed, then O. 21, R. 92 (3), expressly provides that no suit to set aside an order made under this rule shall be brought by any person against whom such order is made. It is, therefore, quite clear that the plaintiffs were not entitled in this suit to challenge the sale on the ground of any alleged fraud in respect of its conduct or publication.

This, however, would not prevent them from challenging it on the ground that the decree itself had been obtained by fraud, or that fraud was committed earlier than the stage of the commencement of the conduct or proclamation of the sale.

The second serious difficulty in the way of the plaintiffs which has not been prominently noticed by the Court below is that the sale actually took place for the satisfaction of two decrees, one in favour of Sah Dharam Narain and his co-decree-holder Mt. Tulsha Dei, and the other of Mt. Ram Dei. Mt. Ram Dei's decree was of 27th August 1923, (p. 59) and had been obtained after contest and appearance of at least one if not both the judgment-debtors through a mukhtariam (order sheet, p. 57). There is no allegation in the plaint that this decree had been obtained fraudulently. While the execution proceedings consequent upon the decree in favour of Dharam Narain was pending Mt. Ram Dei applied to the Court that the amount of her decree should be realised along with the sale of the share in Sharifabad, which had been fixed for 20th May following in execution of the otner decree (order-sheet p. 77). The Court granted this application by ordering that her amount should be included in the other decree and that the order for sale should cover both, and that the sale should be for the realisation of the amounts of both the decrees : Rs. 243 due to her and Rs. 60-12-0 due to Dharam Narain. The Court further granted Mt. Ram Dei, the decree-holder, permission to bid on condition that she should offer a reasonable price and pay the money in cash (p. 79). The statement showing the auction bids printed on p. 81 also shows that the sale took place for the realisation of the consolidated amount of Rs. 303-12-0. The same is also made clear by the sale certificate printed on p. 83. It cannct, therefore, be disputed that Mt. Ram Dei, the other decree-holder, was equally interested in the execution and the sale, and there is no allegation of fraud as against her. Her decree was at the time not more than one year old and no notice to the judgment-debtors under O. 21, R. 22 (1) was necessary. Furthermore, as she had applied for rateable distribution, her claim must be deemed to be a claim enforceable under an attachment in view of the explanation to S. 64, Civil P. C. There was no necessity for her to apply for a fresh attachment or to have any separate proceeding resulting in an independent auction sale. It is thus clear that the two decrees had been consolidated and the sale took place in execution of both the decrees, one of which has not been challenged on the ground of any illegal fraud. We are, therefore, of opinion that the sale which was one and was for one bid cannot be set aside.

Coming to the question of fact, all that has been shown is that the summonses in the original suit of Dharam Narain were not served personally on the judgment-debtors. The addresses of the two defendants given were of village Kishni, which admittedly is the residential house of the family, and where Gur Prasad, the male defendant who was the brother-in-law of the other lady, admittedly lived. The oral evidence led on behalf of the plaintiffs was to the effect that after the death of her husband Mt. Indar Kunwar had been living at the house of her father in Bareona which, though situated in a different district, is, according to the evidence of Jagannath Prasad, 12 miles from Kishni. But apart from the oral evidence whatever documentary evidence there is rather goes to suggest that Mt. Indar Kunwar also lived at Kishni or at any rate came there now and again. Data Ram, the patwari of Kishni has admitted that up to the current year's khewat he had been record-

ing Mt. Indar Kunwar as a resident of the village, although he explains this by saying that he simply followed the previous records. It is also quite clear that in Mt. Ram Dei's suit the residence of Mt. Indar Kunwar was shown as Kishni. The process server's report printed at p. 43 shows that the peon filed an affidavit stating that he had affixed the summons at the door of the house of the two defendants, that Indar Kunwar was a pardanashin lady and that Gur Prasad had gone away to Mainpuri. As the report stands, it does not suggest that any one informed the peon that Indar Kunwar was not in the house. There is nothing to show that the decree-holder's pairokar accompanied the peon or took any part in getting this report submitted. In the absence of such evidence it cannot be inferred from the mere fact of substituted service that there was any fraud committed by the decree-holder. Subsequently a notice of the prohibitory order under O. 21, R. 54 was also sent. According to the statement of Baldeo Prasad, the chaprasi of the tahsil, it was affixed on a nim tree in the presence of many persons and the report was written by the village patwari. As the decree-holders were not cosharers of Sharifabad where this notice was affixed, it cannot in the absence of any direct evidence be assumed that the patwari was or might have been in collusion with the decree-holder. In the ordinary course one would expect the patwari to convey the information to his own zamindars among whom were the judgment-debtors. In this case also there is no direct evidence to suggest any fraud. Before the proclamation of sale was issued the decree-holder filed a certificate of search (p. 63) which clearly showed that an incumbrance was created by Gur Prasad alone, who owned a moiety share in the 5 biswas, but the proclamation of sale which was actually issued by the office of the Court did not clearly specify that. For this omission of detail the decree-holder cannot be held responsible.

We have referred to the subsequent proceedings in order to meet the argument that the subsequent conduct of the decree-holder is some evidence of the initial fraud committed by him in the suit itself, otherwise the subsequent proceedings even if fraudulent would not be relevant. We are satisfied that the learned Subordinate Judge was right in holding that no such fraud has actually been established by the evidence. It is true that very often direct and positive evidence to prove fraud cannot be procured, but at the same time a finding cannot be based on mere suspicions.

There is no doubt that the property has been sold very cheap, particularly when it is to be borne in mind that 2½ biswas share of Mt. Indar Kunwar was entirely free from any incumbrance. According to the learned Subordinate Judge the value of the property might be Rs. 10,000 to Rs. 15,000, and it was sold at auction for Rs. 300 and odd. This may be merely the good luck of the purchaser. If the plaintiffs have suffered any loss it is due to their carelessness or acting on wrong advice.

We may state that apart from some distant connexion between Sah Dharam Narain and Chandra Bhan there is no evidence on the record to establish that Chandra Bhan is a benamidar. Dharam Narain, both in his deposition and written statement, disclaimed all interest in this property, and Chandra Bhan in his evidence has claimed to have purchased it. He appears to be a man of substance and has also produced his bahi to prove the consideration. The amount paid was small and it is impossible to assume that Chandra Bhan was not in a position to pay it. The sale certificate stands in his favour. The result, therefore, is that this appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 558

MUKERJI AND BENNET, JJ.

(*Chaudhri*) *Pahunchi Lal*—Appellant.

v.

Bhup Singh and *others*—Respondents.

Letters Patent Appeal No. 165 of 1929, Decided on 8th April 1930, against judgment of Ashworth, J., D/- 12th March 1929.

(a) Civil P. C., S. 122, and Letters Patent —Power of High Court to frame rules under Civil Procedure Code and Letters Patent cannot override provisions of Civil Procedure Code and Letters Patent — Letters Patent.

The basis of the power of High Court to frame rules is the power of High Court to

do all things that may be necessary to do in order to carry out the provisions of the Letters Patent and the Civil Procedure Code. That being the case and it being only a subordinate body in the matter of framing of rules it has no power to so frame rules as to override either the provisions of the Civil Procedure Code, or the Letters Patent. [P 559 C 2, P 560 C 1]

(b) Allahabad High Court Rules, Chap. 3, R. 6-C, para. (2)—Rule is ultra vires.

Rule 6-C, para. 2 being inconsistent with the provisions of the Letters Patent is ultra vires of the High Court. [P 560 C 1]

N. P. Asthana and *B. N. Sahai*—for Appellant.

Baleshwari Prasad—for Respondents.

Mukerji, J. — This is an appeal against a judgment of a learned single Judge of this Court. A preliminary point has been taken that no appeal is maintainable inasmuch as the learned Judge who pronounced the judgment did not grant leave to file an appeal as required by S. 10, Letters Patent, as recently amended. It has further been urged that the rule framed by the High Court as regards grant of leave to file a Letters Patent appeal is partially ultra vires of the High Court.

It appears that the judgment was delivered by Ashworth, J., on 12th March 1929. No application to obtain a certificate to the effect that the case was a "fit one for appeal" was made before the learned Judge. An application was later on made before the learned Chief Justice of the Court in pursuance of R. 6-C, para. 2, Chap. 3 of the Rules of the Court, and on his granting such a certificate the appeal was filed.

The contention on behalf of the respondents is that the rules framed by the High Court were made only to facilitate the filing of an appeal, but those rules could not in any way override the very Letters Patent subject to which the rules had to be made. The amended S. 10, Letters Patent of this High Court runs as follows:

" . . . . Provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court . . . . made on or after 1st February 1929 in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal . . "

It will be noted that ordinarily no right of appeal is given. The right of appeal that is given is subject to the condition that the Judge who passed the judgment declares that the case is a fit one for appeal.

No rule could be discovered by us, and none has been pointed out to us, which authorises the High Court to frame the rules, as they are to be found in Chap. 3, R. 6-A to R. 6-D. The question of the rule-making power of the High Court so as to carry out the provisions of the Letters Patent was raised so far back as in the case of *Naubat Ram* v. *Harnam Das* (1). There the question raised was whether the rule framed by the High Court, namely, a Letters Patent appeal must be filed within 90 days of the passing of the judgment was or was not ultra vires of the Court, that is to say whether the High Court could limit by time the right of a Letters Patent appeal. The learned Judges who decided the case could not find any authority under which the rule had been framed and expressed the opinion that "the ultimate origin of the rule could not be traced." The learned Judges thereupon assumed that it had a legal origin and was not ultra vires of the Court. Our own view is that the rules have been framed only because the provisions of the Letters Patent had to be carried out and unless any rules were framed it would be impossible to carry out the provisions of the Letters Patent granted by His Majesty. There can be no doubt, therefore, that the High Court has the power to do all things that may be necessary to do in order to carry out the provisions of the Letters Patent. That is the basis of the power of the High Court to make rules. That being the case, the powers of the High Court in framing rules cannot, evidently, override the rules provided for in the Letters Patent itself. The Letters Patent declares that an appeal shall be maintainable only on a certificate being granted by the Judge who decided the appeal that it was a fit one for appeal. It would not be within the province of any other Judge of the Court to take it upon himself to say that the case was one in which an appeal should or might be filed.

We have looked into the provisions of law which authorised the High Court to frame rules and even there we find

(1) [1886] 9 All. 115=(1886) A. W. N. 306 (F.B.).

no authority for so framing rules as to override the provisions of the Letters Patent. The only authority which can override and amend the rules laid down in the Letters Patent is the Indian Legislature: see S. 35, Letters Patent. S. 122, Civil P. C., authorises High Courts from time to time, after previous publication, to make rules regulating their own procedure and the procedure of civil Courts subject to their superintendence. But this power is subject to this provision that such rules shall not be inconsistent with the provision in the body of this Code (Civil Procedure Code: see S. 128, Civil P. C.) and subject to the further provision that these rules shall not be inconsistent with the Letters Patent establishing the High Court: see S. 129 Civil P. C.

It seems to us to be clear that the High Court in framing the rules Chap. 3, R. 6-C of the Rules of the Court overlooked the fact that the Letters Patent required the certificate from the Judge hearing the appeal himself. The High Court being only a subordinate legislative body in the matter of framing of rules, it has no power to so frame rules as to override either the provisions of the Civil Procedure Code or the provisions of the Letters Patent. The rule under consideration, therefore, is ultra vires of the High Court.

In the result we allow the objection raised by the learned counsel for the respondents and dismiss the appeal. In the circumstances of the case the parties shall pay their own costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 560

MUKERJI AND BENNET, JJ.

Sh. Mohammad Ata Husain — Plaintiff—Appellant,

v.

Haji Qadir Baksh and *others*—Defendants—Respondents.

Letters Patent Appeal No. 34 of 1928, Decided on 10th January 1930, from judgment of Dalal, J., D/- 10th January 1928.

(a) Easements Act, S. 13 (a) — Necessity means absolute necessity.

In Cl. (a), S. 13, "necessity" means an absolute necessity: 33 *All.* 467 and 17 *A. L. J.* 672, *Ref.* [P 561 C 1]

(b) Easements Act, S. 13 (a)—Easement of necessity—Passage possible for purchaser—Easement does not exist.

Where a purchaser could make a passage for himself by piercing a door, it could not be said that he had an easement of necessity of passing over his transferrer's property: 33 *All.* 467, *Foll.* [P 561 C 1]

(c) U. P. Municipalities Act (2 of 1916), S. 178—Opening door in existing wall does not materially alter building.

The opening of a door in an existing wall does not materially alter a building within the meaning of S. 178 and so the law does not enable the Municipal Board to refuse permission to open a door if it is to be opened reasonably in an existing wall. [P 561 C 2]

Mukhtar Ahmad—for Appellant.

T. A. K. Sherwani—for Respondents.

Mukerji, J. — The plan which has been made a part of the decree of the learned single Judge of this Court will be found useful in understanding the nature of this case. The plaintiff, who is the appellant before us, sold to the defendant the building described on this plan by the letters I H G F E B. It will be noticed that this building is a part of a much larger building which belonged to the plaintiff. The plaintiff brought the suit out of which this appeal has arisen to obtain an injunction restraining the defendant from using the door EJ as a passage. There are other reliefs with which we are not at present concerned. The suit was decreed by the Court of first instance. The lower appellate Court dismissed it. On second appeal, a learned Judge of this Court decreed the suit in part. What he did was to grant an injunction to the defendant that he shall not use the door EJ except for the purpose of passage for the sweeper, for the purpose of cleaning the latrine near the letter B. The learned Judge held that for other purposes the defendant had the doors P and Q to use.

The plaintiff has appealed to this Court and he contends that the learned Judge should not have allowed the defendant to use the door EJ even for the purpose of use of the sweeper.

The appellant's argument is that the learned Judge of this Court was in error when he assumed that the defendant has an easement of necessity for letting the sweeper use the door EJ.

On behalf of the respondent it was argued that the learned Judge was right and besides, by the deed of sale, a right was reserved to him for egress and ingress for himself and the servants through the door EJ.

We have examined the sale-deed dated 1912 and we are satisfied that no such right was reserved to the defendant. The words "rights appurtenant" did not mean any right of passage over the land which was not sold.

Coming to the question of easement of necessity, we have to refer to S. 13 (a), Easements Act. It lays down as follows:

"Where one person transfers ..... immovable property to another,

(a) if an easement in other immovable property of the transferrer ..... is necessary for enjoying the subject of the transfer ..... the transferee ....., ... shall be entitled to such easement."

The words, "if an easement is necessary" have been taken to imply an absolute necessity. A mere convenience has not been held to come within this language. In interpreting S. 13 (a) a comparison has to be made to other clauses of the same section and it will be at once found that there is a difference between an easement enjoyed as a necessity and an easement necessary to enjoy the property as it was enjoyed at the date of the transfer. Following this interpretation, in two reported cases of this Court, it was held that in Cl. (a), S. 13, "necessity" meant an absolute necessity: see *Sukhdai* v. *Kedarnath* (1) and *Gaddar* v. *Kalla* (2). With these cases we entirely agree.

Now we have to see whether the right of passage for a sweeper to the latrine is a matter of absolute necessity to the defendant or not. It is common ground that to the west of the building belonging to the parties is Municipal land and a public road (see the statement of the pleaders made before the Court of first instance, document 37-A). Looking at the plan, we find that it is quite possible for the plaintiff to open a door in the western wall between P and B so as to permit any sweeper to come and flush the latrine near D. In the case reported in *Sukhdai* v. *Kedarnath* (1) it was held that where a purchaser could make a passage for himself by piercing a door, it could not be said that he had an easement of necessity of passing over his transferrer's property. Following that case we are of opinion that the defendant can provide himself with a passage for the sweeper by opening a door at any place in the wall between B and P.

The learned counsel for the respondent has argued that he would be at the mercy of the Municipal Board in opening the proposed door, because the Municipality might refuse him permission to open it. We have been referred to S. 178, Municipalities Act (Local Act). It provides that a notice has to be given to the Municipal Board, inter alia, when a party wants "to re-erect or to make a material alteration of a building." What is a material alteration in a building has been defined in the same section, in Cl. (3). We are of opinion that the opening of a door in an existing wall will not materially alter a building within the meaning of S. 178, Municipalities Act. We must take it that the Municipality will act reasonably and not arbitrarily. The law, certainly, as we read it, does not enable the Municipal Board to refuse permission to open a door if it is to be opened reasonably in an existing wall.

The result is that we are of opinion that what has been allowed to the defendant by the learned Judge of this Court was not an easement of necessity. In this view the plaintiff's suit should have succeeded in its entirety.

In the result we allow the appeal, set aside the decree of this Court and restore the decree of the Court of first instance. The appellant will have his costs throughout.

V.B./R.K. *Appeal allowed.*

(1). [1911] 33 All. 467=9 I. C. 628=8 A. L. J. 280.

(2) [1919] 17 A. L. J. 672=50 I. C. 646=1 U. P. L. R. 55.

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SULAIMAN AND KENDALL, JJ.

Paras Ram and *another*—Plaintiffs—Appellants.

v.

Mt. Mewa Kunwar and *others*—Defendants—Respondents.

First Appeal No. 34 of 1928, Decided on 21st January 1930.

(a) Pardanashin lady — Independent advice.

Independent advice in the case of pardanashin ladies is not absolutely necessary : 36 *Ill.* 81 (*P.C.*) and *A. I. R.* 1925 *P. C.* 204, *Foll.*

[P 563 C 1]

(b) Pardanashin lady—Execution of deed —Burden of proof is on person relying on deed to prove that she understood legal effect.

The burden lies on the person relying upon a deed executed by a pardanashin lady to show to the satisfaction of the Court that not only

the nature of the transaction but its legal effect was fully understood by her. [P 563 C 2]

(c) Hindu Law — Partition—Evidence of partition.

Although the mere fact that a suit for partition was instituted would not have the necessary effect of establishing separation, yet in the absence of any satisfactory explanation or evidence to the contrary it would be evidence of such a separation : *A. I. R.* 1916 *P. C.* 104; *A. I. R.* 1917 *P.C.* 39 and *A.I.R.* 1928 *All.* 422, *Rel. on*; *A.I.R.* 1925 *P. C.* 254, *Ref.* [P 565 C 1]

*** (d) Interpretation of Statutes—Law of Evidence—It is generally retrospective.**

The law of evidence is a law of mere procedure and does not affect substantive rights and since "alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be," rules of evidence are retrospective in their operation: *Gardner* v. *Lucas*, 3 *A. C.* 582 at 603, *Ref.* [P 567 C 2]

(e) Tranfer of Property Act, S. 75—Third mortgagee redeeming first without redeeming second—Suit by second mortgagee impleading third as subsequent mortgagee—Third mortgagee can enforce his charge for redeeming first mortgagee.

Where a third mortgagee redeems the first mortgagee without redeeming the second and allows the second mortgagee to obtain a decree on his mortgage and the property is sold free from the third mortgage, the third mortgagee can recover his amount by enforcing a charge on the property within 12 years of the date of payment of the first mortgage : *A. I. R.* 1922 *All.* 153, *Ref.* [P 566 C 1, 2]

K.N. Katju and *G. Agarwala*—for Appellants.

P. L. Banerji, *U. S. Bajpai*, *N. P. Asthana*, *Panna Lal*, *B. Malik*, *S. N. Chaube*, *Hari Ram Jha* and *M. L. Chaturvedi*—for Respondents.

Kendall, J.—First Appeals Nos. 34 of 1928, 7 of 1926 and 20 of 1927 have by consent been connected in this Court, although they arise out of three different and independent suits. First Appeal No. 34 is an appeal by the plaintiffs in a suit brought on the basis of a mortgage deed dated 25th March 1909 executed by Durga Prasad for himself and as guardian of his minor nephew Kewal Kishen in favour of two sets of mortgagees. The present plaintiffs represent the mortgagees who had a three-fourths interest in the mortgage money. The other mortgagees had a one-fourth interest. The amount of mortgage money was Rs. 28 000 and carried interest at 11-annas per cent per mensem compoundable every six months. The share of the present plaintiffs in the mortgage money came to Rs. 21,000, and together with interest they claimed nearly Rs. 83,000 .n March 1926. The main defence was raised on behalf of Mt. Champa Kunwar, the widow of Debi Prasad, who was a brother of Durga Prasad, and was to the effect that Debi Prasad had died separate and that his interest in the family property had devolved on his widow as a Hindu widow's estate and could not have been mortgaged by Durga Prasad. The position taken up by the plaintiffs was that the family had remained joint, and on the death of Debi Prasad, his interest survived to the other members of the family, who were competent to mortgage the entire estate. Although in the plaint there was no reference to any deed executed by Mt. Champa Kunwar surrendering her rights in favour of Durga Prasad, a registered document dated 6th July 1908 was relied upon during the course of the evidence as showing both that the family was joint and that even if Mt. Champa Kunwar had any interest she had relinquished the same in favour of Durga Prasad before the execution of the mortgage.

The learned Subordinate Judge has come to the conclusion that the deed in question does not prevent Mt. Champa Kunwar from asserting that the family was in fact separate, and he has further found that it was established that there had been a partition in the family, with the result that Mt. Champa Kunwar's share had remained exempted from the mortgage. There are a few other minor points including that of limitation which have been decided against the plaintiffs.

The original deed of relinquishment executed by Mt. Champa Kunwar is not forthcoming, but the plaintiffs who are strangers to Durga Prasad's family cannot be held responsible for this. As it had been entered in register No. 4, even a certified copy of it was not available to the plaintiffs. They, however, got the original register summoned from the registration office and also got the thumb impression of Mt. Champa Knnwar on a book of thumb impressions separately kept by the office identified by an expert. They also led evidence to prove the execution of the original document by the lady. The learned Subordinate Judge on this evidence was satisfied that she had executed the deed of relinquishment dated 6th July 1908 and we accept that finding.

The learned Judge is, however, of opinion that it has not been established

that she fully understood the nature and the legal effect of the transaction, or that she was fully aware of her own rights at the time when she executed the document. As she was a pardanashin lady he has held that she is not bound by such a transaction.

An abstract of this document is printed at p. 50 of the paper book in first appeal No.34 of 1928, and a fuller translation of it is to be found in the judgment at p. 26 in first appeal No. 20 of 1927. As the deed stands, Mt. Champa Kunwar along with another lady admitted that the executants had no right in the property left by Lala Thakur Das, and that if they appeared or were found to have any right in any way they relinquished the same in favour of Durga Prasad and Kewal Kishen, and that Durga Prasad should manage the property in whatever way he thought proper and the ladies would have no objection whatever. According to the oral evidence.the deed was attested by Chokhey Lal, a brother of Mt. Champa Kunwar. The learned Subordinate Judge has also thought that it was not proved that Mt. Champa Kunwar had obtained any independent advice. He was apparently not aware that it has been laid down by their Lordships of the Privy Council in several cases that independent advice in the case of pardanashin ladies is not absolutely necessary: *Kali Bakhsh Singh* v. *Ram Gopal Singh* (1) and *Faridunnissa* v. *Mukhtar Ahmad* (2). One may also say that the presence of Chokhey Lal shows that the independent advice was available to her, although it is a fact that in the other case Mt. Champa Kunwar had stated that she was not on good terms with her brother. The witnesses produced on behalf of the plaintiffs state that after the draft had been prepared it was read to the ladies, who stated that it was correct, and that even after it had been faired out on the stamp paper the document was read out, and the ladies stated that it was correct and that the deed was read over and explained to her by the Sub-Registrar at the time of its registration. Mt. Champa Kunwar's case was that she was made to believe that she was executing a power-of-attorney and not a deed of relinquishment. There is, however, one strong circumstance which has impressed the learned Subordinate Judge considerably, and which also appeals to us. The deed was drafted on the supposition that Mt. Champa Kunwar had no interest whatsover in this property. At the same time when she executed this document she was therefore labouring under the belief that she had no interest whatsoever in this property. It was in that belief that she signed this deed. There is no evidence on the record to show that she was made to understand that she had really a Hindu widow's estate in the property. We cannot therefore presume that she would have been equally willing to part with this property if it had been previously made clear to her that in fact she did possess a Hindu widow's estate in the property and would remain in possession of it during her lifetime. It is one thing for a person to agree to relinquish all rights when she is made to believe that she has no right whatsoever, and quite another thing to make a gift of those rights believing that they exist. As has been repeatedly laid down by their Lordships, the burden lies on the person relying upon a deed executed by a pardanashin lady to show satisfactorily that not only the nature of the transaction but its legal effect was fully understood by her. If Mt. Champa Kunwar had been induced to believe that she had no rights whatsoever, she cannot be said to have fully understood the effect of the transaction and its legal consequences on her rights which really existed, but which she was made to understand did not exist. Having considered all the circumstances we have come to the conclusion that the view taken by the Court below, that this document should not be upheld to be binding on Mt. Champa Kunwar, must be accepted.

The plaintiffs led oral evidence to the effect that before taking the mortgage they had actually made enquiries from Mt. Champa Kunwar, and had been assured by her personally that the family was joint and that she had no right in the property. Narotam and Sham Behari were produced to prove this allegation. The learned Subordinate Judge who heard their evidence was not im-

(1) [1914] 36 All. 81=16 O. C. 373=21 I. C. 985=41 I. A 23 (P.C.).
(2) A. I. R. 1925 P. C. 204=47 All. 703=28 O. C. 338=52 I. A. 342 (P.C.).

pressed by them, and has rejected the story holding that it was improbable that a pardanashin lady belonging to a respectable family would talk to strangers within their gaze as deposed to by the witnesses. Having read the evidence we have come to the same conclusion, viz., that there had been no oral assurance given by Mt. Champa Kunwar to the plaintiffs about the mortgage which would operate as an estoppel against her.

We now come to the main question, whether the family was separate or joint. On this point the learned Subordinate Judge has not relied so much on the oral evidence as on the effect of a proceeding in Court. Early in 1905, suit No. 10 of that year was filed by Durga Prasad against his brothers Debi Prasad and Govind Prasad and their mother Mt. Parbati for partition of the family property. The claim was not contested by the other brothers, who raised no objection to the partition, but was resisted by the lady on the ground that there was a will of Thakur Das, the deceased ancestor, under which the property had been dedicated to the family idol. The case remained pending for about a year and was disposed of by the District Judge on 23rd February 1906 by an order under which he decreed the claim for partition and allowed the plaintiffs time to apply for the appointment of a commissioner and to deposit the costs for the carrying out of the partition. He held that the will was of no effect and that partition should be made. In the course of his judgment he threw out a suggestion that the sons of Thakur Das had themselves not acted upon the will, but had been borrowing money on the security of the property and had been enjoying the profits, and after having raised the money they wished to establish the will to serve as a defence. Admittedly the separation of shares and the actual partition of the property were not carried out. The decree-holder's case was dismissed for his default on 12th May 1906. Beyond this we know nothing more as to the circumstances under which the litigation terminated. There is, however, in the judgment itself a mention of a previous reference to arbitrators to partition the property in which also no award could be made. Debi Prasad died shortly afterwards. The exact date of his death is not known, but he certainly was dead in 1907 when the mutation proceedings took place. Mt. Champa Kunwar has stated that Govind Prasad had died even a year before her husband Debi Prasad's death. We are therefore in the dark, and it is not possible to know definitely whether the partition was not effected because the plaintiff deliberately changed his mind and abandoned the idea of separation, or because there was, owing to some circumstances, an unfortunate default on his part, or whether it was due to the fact that some members of the family died.

There is no evidence to show the conduct of Durga Prasad subsequent to the order of the District Judge and before the death of Debi Prasad. But we know that after Debi Prasad's death the name of his widow was not entered in the revenue papers, but the names of the surviving brother and nephew were entered. The mortgage in suit was itself effected within two years of the mutation proceedings.

In the case of *Girja Bai* v. *Sadashiv Dhundiraj* (3) their Lordships of the Privy Council clearly laid down that a separation in status can be effected by a definite expression of an intention to separate made by one member of the family, whether the other members consented to it or not. The same statement of law was re-affirmed by their Lordships of the Privy Council in the case of *Kawal Nain* v. *Budh Singh* (4). It seems to us that once such a clear, definite and unambiguous expression of intention has been established, it is not further incumbent on the party asserting separation to establish that such an intention was persisted in continuously for any length of time. At the same time it is certainly open to the party pleading jointness to establish that, although such an intention was expressed, it was subsequently definitely withdrawn or abandoned. In the case of *Ram Kali* v. *Khamman Lal* (5) (at 879 *of* 26 *A. L. J.*) Sen, J., in whose judgment Niamatullah, J. concurred, summarised the result of the various

(3) A. I. R. 1916 P. C. 104=43 Cal. 1031=43 I. A. 151. (P.C.).
(4) A. I. R. 1917 P. C. 39=38 All. 496=44 I. A. 159 (P.C.).
(5) A. I. R. 1928 All. 422.

previous decisions on this point in the following words :

"Where there is evidence of intention to separate, this can only be annulled by clear evidence of the renunciation of such intention, and in some cases by consensus or agreement on the part of the members of the family to re-unite."

We agree with this statement of the law.

The institution of the partition suit even irrespective of the previous reference to arbitration of bringing about a partition undoubtedly indicated a clear intention to separate. The suit itself was never withdrawn, but resulted in an order in favour of the plaintiff declaring his right to have the property partitioned and actually ordering a partition. The mere fact that the partition did not come into effect would not necessarily indicate a renunciation of the former intention. In the recent case of *Palani Ammal* v. *Muthuvenkatachala Moniagar* (6) (at pp. 258 and 259 *of* 48 *Mad.*) their Lordships remarked that the fact that any member of a joint family had separated may be proved by his suing for a partition of the joint family property, and the severance may be treated to take effect from the date when the suit was instituted ; and that although it is possible that no severance in the joint status results in spite of the filing of a plaint claiming a partition which was afterwards withdrawn ;

"such a plaint, even if withdrawn, would unless explained, afford evidence that an intention to separate had been entertained."

It therefore follows that although the mere fact that a suit for partition was instituted would not have the necessary effect of establishing separation, yet in the absence of any satisfactory explanation or evidence to the contrary it would be evidence of such a separation.

In the present case we find that beyond certain conjectures there is no tangible proof or explanation of the claim for partition not having been brought by Durga Prasad in good faith. The order of the District Judge following upon the filing of the plaint affords prima facie evidence of a clear intention to separate which was persisted in till the order was made. There is no reason to assume that this was not a bona fide transaction. None of the parties to that litigation nor any other witness connected with it has been produced in the case to explain away the effect of this litigation. In these circumstances we must agree with the Court below that there is ample evidence to show that Durga Prasad separated from the other members of the family which necessarily involved the separation inter se among all the members.

The share of Debi Prasad was not specified in the order of the District Judge. On that date if Mt. Parbati, the mother, had insisted on her right to claim an equal share, it would have been only one-fourth, but if she did not claim her equal share the extent would have been one-third. Furthermore, if she predeceased her son, the share of each would again be one-third. In the trial Court the plaintiffs did not press that the share of Mt. Champa Kunwar would only amount to one-fourth and not one-third, and there is no ground taken in the memorandum of appeal in First Appeal No. 34 of 1928 that the one-third share which has been set apart by the learned Subordinate Judge for her was in excess of of the share to which she was entitled, In these circumstances we must assume that she became entitled to one-third share in the entire estate left by Thakur Das.

The three-fourths share held by the plaintiffs in mortgage money included the amount due on a mortgage deed dated 13th July 1908, which was for Rs. 2,000, and was executed in their favour as well as in favour of Suraj Narayan and Chand Behari Lal. These latter mortgagees were entitled to Rs. 500 out of the principal sum. The plaintiffs produced no direct evidence to show that they paid Rs. 500 to Suraj Narain and Chand Behari Lal or their representatives but merely relied on the fact that the original mortgage deed was in their possession. The learned Subordinate Judge has rightly remarked that the plaintiffs themselves having been the mortgagees of the major portion of the amount, the original bond would naturally have been in their possession since 1908, and that fact would in no way establish any payment made by them to their co-mortgagees Suraj

(6) A. I. R. 1925 P. C. 49=48 Mad. 254=52 I. A. 93 (P.C.).

Narain and Chand Behari Lal. We think that the learned Judge is perfectly right in this conclusion. In the absence of any evidence it must be assumed that there is no proof that Rs. 500, with its proportionate interest had been paid by the plaintiffs to their co-mortgagees. The plaintiffs could not have given a valid discharge in respect of the entire mortgage money both on behalf of themselves and their co-mortgagees. We must, therefore, in the absence of any proof of payment hold that this part of the consideration did not actually pass, and that the benefit of non-payment to the previous creditors Suraj Narain and Chand Behari Lal must go to the mortgagors. The learned Judge has, therefore, rightly deducted this amount with its proportionate interest from the claim.

The next question is one of limitation. In 1908 a mortgage-deed was first executed in favour of Mt. Khilla Kunwar or her predecessor. A second mortgage was executed in 1904 in favour of Fateh Chand and Hira Lal. These latter are the mortgagees entitled to a one-fourth share in the mortgage in suit, which was executed in 1909. The present plaintiffs who took the third mortgage paid off Mt. Khilla Kunwar's mortgage of 1908 on 22nd July 1908. This sum was left in their hands for payment to the prior mortgagee. Fateh Chand and Hira Lal sued upon their second mortgage and impleaded the present plaintiffs, who were all subsequent mortgagees, but had paid off a prior mortgage. The Court held that Fateh Chand and Hira Lal could not be compelled in that suit to redeem the previous mortgage of 1908, but that the sale should be ordered subject to that prior mortgage. The present plaintiffs, viz., the third mortgagees, did not redeem the second mortgage, but allowed the property to be sold at auction and purchased by Fateh Chand and Hira Lal. It is quite clear that this sale was free from the third mortgage of 1909. If no such sale had taken place the plaintiffs would have been entitled to claim a charge for the amount of the mortgage of 1908 on the strength of their own mortgage of 1909: but the property was sold free from the charge created by the mortgage of 1909. Accordingly the only remedy that was left open to the present plaintiffs who had paid off the prior mortgage of 1908 was, if not to sue on the basis of the mortgage of 1908 of which strictly speaking they were not assignees, to recover the amount by enforcing a charge on the property within 12 years of the date of their payment : *Sahib Lal* v. *Munni Lal* (7).

As there was a period of five years fixed for payment of the mortgage of 1909 their claim based upon it is within time, but more than 12 years have expired since 22nd July 1908 when they paid off the mortgage of 1908. The learned Subordinate Judge has accordingly held that the claim to recover the amount of the mortgage of 1908 is barred by time. We think that this view is perfectly correct. The plaintiffs cannot now recover this amount.

The learned advocate for the appellants has lastly asked that the rateable distribution of the liability has not been fair and has pointed out that it is based on a deed of 1915 and not on the value of the properties in the year 1909, when the mortgage-deed was executed. It is urged that the basis should have been the price fetched at an auction sale of this very property in 1910. We think there are good reasons why the learned Subordinate Judge has adopted the deed of 1915 as the true basis for determining the ratio. One of the items of the properties is a house, as to which the only evidence on the record related to its present liability. In order to arrive at any fair approximation it would be more convenient to take the nearer year 1915 than 1910. Furthermore, the price fetched at auction is seldom the correct criterion for determining its true value. In the absence of any better evidence we are not disposed to disturb the rateable distribution, which has been fixed by the learned Subordinate Judge. The plaintiffs, having acquired an absolute interest in some of the properties foreclosed in the name of a female member of their family, have become owners of part of the properties mortgaged and the integrity of the mortgage-deed has undoubtedly been broken.

We may note that ground 11 taken in the memorandum of appeal in First Appeal No. 34 of 1928, which was di-

(7) A. I. R. 1922 All. 153=44 All. 67.

rected against the clients of Mr. Panna Lal, has been pressed before us. This related to certain properties, which have been found by the Court below to have been acquired subsequently to the mortgage of 1909, and, therefore, not to have been mortgaged under that deed.

On the finding that Mt. Champa Kunwar is not bound by the deed of relinquishment, dated 6th July 1908, the decree in her favour in First Appeal No. 20 of 1927 must be upheld.

The only new point raised in First Appeal No. 7 of 1926 is that the plaintiffs should have priority over the other mortgagees, who are entitled to a one-fourth interest. This plea is based on the supposition that they have paid off the prior mortgage of Mt. Khilla Kunwar. We have held already that the rights which accrued by virtue of this payment have been extinguished by lapse of time, and no question of priority now arises.

First Appeal No 20 of 1927 arises out of a suit brought by Mt. Champa Kunwar and Mt. Dhanwanti Kunwar to recover possession of a one-third share in the estate. The plaint alleged that a part of the property had been transferred by Mt. Champa .Kunwar to Mt. Dhanwanti Kunwar under a deed of gift, dated 14th May 1923, and the relief claimed was separate possession to the two plaintiffs of the two sets of properties respectively. In the written statement the contesting defendants merely stated that "the deed of gift referred to is not for want of knowledge admitted." There was a further plea that Mt. Champa Kunwar had no right to make the gift at all. The original deed of gift was produced in Court, and it bears the signature in Hindi of Mt. Champa Kunwar herself. When Mt. Champa Kunwar was in the witness box, she admitted having made the gift to Mt. Dhanwanti Kunwar and actually identified her signature on the document. The Court marked it as Ex. 16. Udho Singh, who had signed the document as a witness, was produced and proved his own signature on the document but stated that Mt. Champa Kunwar had not put her signature on it in his presence. On 19th September 1926, when the learned Subordinate Judge delivered his judgment, he held that the deed of gift was not proved according to law inasmuch as no proper attesting witness had been called.

In the first place, there was no specific plea taken in the written statement that the deed of gift even if executed was not valid as a deed of gift, because it had not been properly attested. The question of attestation was not in the forefront in the eyes of the plaintiffs. We also find that the denial of the execution of this document was by no means specific. All that the defendants had done was to put the plaintiffs to proof of this deed, because they themselves had no knowledge of its execution. That obviously was not a specific denial of the execution by Mt. Champa Kunwar. It was not a case of enforcing a gift against the donor, but the donor herself was admitting its genuineness.

On the very day on which the learned Judge delivered his judgment, viz., 9th September 1926, Act No. 31 of 1926 came into force under which a proviso to S. 68, Evidence Act, which required the calling of a witness, was added. Under that proviso it became no longer necessary to call an attesting witness in proof of execution of any document not being a will which had been registered..... unless its execution by the persons by whom it purports to have been executed is specifically denied. The law of evidence is a law of mere procedure and does not affect substantive rights.

Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. *Gardner* v. *Lucas* (8) (at p. 603).

The learned Subordinate Judge had already admitted this deed as having been duly proved, and had marked it as an exhibit. It was only on 9th September, when the new amendment had come into force that he ruled that it was not admissible. We think that the execution not having been specifically denied, there was no bar to the admissibility of this document, particularly when the executant herself had admitted it. In any case we are now dealing with this question in appeal and are entitled to admit documents which were tendered in evidence in the Court below, and which according to law as it stands today are admissible in evidence and

(8) [1878] 3 A. C. 582.

have been formally proved We therefore think that it must be held that the plaintiff sufficiently complied with the requirements of the law in proving that a valid deed of gift has been executed by Mt. Champa Kunwar in favour of Mt. Dhanwanti Kunwar, under which the latter became the donee of the share in mauza Simarai. It might also be added that inasmuch as both Mt. Champa Kunwar and Mt. Dhanwanti Kunwar had joined in the suit, even if the deed of gift was not established, the claim of Mt. Champa Kunwar with regard to the whole property might well have been decreed.

The learned advocate for the respondents, however, brings to our notice the fact that on the death of Mt. Dhanwanti Kunwar one of her stepsons, viz., Raghunandan, aged six years, has not been brought on the record, and that a stepdaughter, who is married has also been left out. Under the deed of gift, which is printed at p. 34 of the paper book of this appeal, the property was to go to Mt. Dhanwati Kunwar for her lifetime and after her death to her children and stepchildren in equal shares, and in that way to go back to the family of the husband of the donee. There can be no doubt that a vested interest and not merely a contingent interest was created under the deed in favour of the existing stepchildren of Mt. Champa Kunwar and all of them succeeded to the estate on her death in equal shares. The word used in the deed is "aulad" which literally mean "sons" though sometimes it is used in the sense of descendants. But the clause showing that the intention of the donor was that the property should go back to the family of the husband of the donee suggests that the male children only were meant inasmuch as according to Hindu suppositions a daughter after marriage passes out of the family of her father and belongs to the new family of her husband. We therefore think that on the death of Mt. Dhanwanti Kunwar, her four children and not her husband or daughter became entitled to the estate in equal shares. There was clearly a specification of their shares and they were not joint owners but owners in common. In this view it is quite clear that the omission to bring Raghunandan on the record is to make the appeal abate to the extent of his one-fourth share only; neither more nor less.

The result, therefore, is that Appeals Nos. 34 of 1928 and 7 of 1926 are dismissed with costs, and Appeal No. 20 of 1927 is allowed to this extent: that in addition to the decree in favour of Mt. Champa Kunwar given by the Court below, a decree for three-fourths out of the one-third share in village Simrai as detailed in the plaint is given in favour of Sardar Mal, Kishori and Brij Nandan, stepsons of Mt. Dhanwanti. The suit with regard to the one-fourth share of Raghunandan has abated. We direct that the parties should receive and pay costs in proportion to success and failure in First Appeal No. 20 of 1927.

No cross-objections were filed in First Appeal No. 34 of 1928. On our finding that the right to claim the prior mortgage money has become extinguished by lapse of time the cross-objections in First Appeal No. 7 are allowed with costs. On our finding that the family was separate, the cross-objections in First Appeal No. 20 of 1927 are dismissed with costs.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 568

SULAIMAN AND KENDALL, JJ.

Singar Kunwar—Appellant.

v.

Basdeo Prasad and *others*—Respondents.

First Appeal No. 458 of 1926, Decided on 11th February 1930,

Evidence Act, S. 101—Mortgage suit for sale — Execution of mortgage document proved—Mortgagor making acknowledgment of receipt of entire consideration and that there were hundies and promissory notes executed by him which were set off, i. e. money left for their payment with mortgagee — Mortgagor young man of profligate habits—Mortgagee in position to exercise undue influence and not in position to lend big sums—Initial presumption against mortgagor was rebutted—Negotiable Instruments Act, S. 118.

In a mortgage suit for sale, the initial presumption arising, under S. 118, Negotiable Instruments Act and from the acknowledgment admitting the receipt of the entire consideration, can be rebutted even by circumstantial evidence. And when it is thus rebutted the burden of evidence shifts on to the mortgagee to show that full consideration did actually pass. [P 569 C 2]

In a mortgage suit for sale the execution of the mortgage document was established and further the mortgagor had made an acknowledgment admitting the receipt of the entir.

consideration as well as the fact that there were hundis and promissory notes executed by him which had been set off or for the payment of which money had been left in the hands of mortgagee. But the mortgagor was a very young man of profligate habits and the mortgagee was in a position to dominate his will and to exercise undue influence over him. Further the mortgagee was not in a position to lend big sum of money.

Held: that the initial presumption of the passing of full consideration was sufficiently rebutted: 29 *M. L. J.* 236 and 31 *I. C.* 739, *Foll.* [P 571 C 2]

S. K. Dar and *N. P. Asthana*—for Appellant.

K. N. Katju—for Respondents.

Kendall, J.—This is a defendant's appeal arising out of a suit for sale on the basis of a mortgage deed dated 9th September 1913 executed by Kunwar Sheopal Singh, the deceased husband of defendant 1, in favour of Shekher Prasad, the father of the plaintiffs. The mortgage deed was for Rs. 15,000 and carried interest at 0-7-6 per cent per mensem with six-monthly rests. The plaintiffs have given credit for Rs. 150, and have claimed the balance together with interest amounting to nearly Rs. 27,000. The main defence raised on behalf of the defendants was want of consideration, although even the execution of the document was not admitted. The learned Subordinate Judge has found the mortgage deed to have been duly executed, but has held that part of the consideration has not been established, and has accordingly decreed the claim in part. The defendant has appealed and the plaintiffs have filed a cross-objection.

The mortgage deed is printed at p. 55 and the details of consideration are to be found on p. 56. In appeal before us only two of the items are now challenged on behalf of the defendant-appellant. The bulk of the amount is Rs. 3,424-10-3 stated to have been due on four hundis of 1912 in favour of the mortgagee himself, and Rs. 3,490 left in deposit with the mortgagee in order to pay off a hundi in favour of one Panna Lal. The cross-objections relate to the amount due on the promissory note of 1912 which was included in the sum of Rs 3,424-10-3. There can be no doubt that the execution of the document has been fully established, and indeed that plea is not now pressed before us. When the execution was proved there was the acknowledgment of Sheopal Singh admitting the receipt of the entire consideration, as well as the fact that there were hundis and promissory notes executed by him which had been set off, or for the payment of which money had been left in the hands of the mortgagee. There was therefore the initial presumption in favour of the plaintiffs that the full consideration had passed, and the burden was upon the defendants to rebut that presumption. Nevertheless the plaintiffs did lead evidence in the first instance, not only on the question of execution but also of consideration, though the evidence only related to the amount due under the hundi in favour of Panna Lal. On the other hand there was no direct evidence on behalf of the defendants to show that the amount did not actually pass, the reason being that the borrower Sheopal Singh was dead, and there was no one who could categorically deny the receipt of the consideration.

The learned advocate for the respondents has contended before us that under S. 118, Negotiable Instruments Act, there is a strong presumption in favour of the passing of consideration on the hundis and the promissory note, and that in the absence of any direct and positive evidence to rebut it the plaintiffs' claim must be decreed. We are not prepared to go to this length for, in our opinion, the presumption arising under S. 118 or that from the acknowledgment of the mortgagor can be rebutted even by circumstantial evidence. The plaintiffs in the Court below relied mainly on the acknowledgments of Sheopal Singh and his various admissions. There was no direct evidence to prove the payment of consideration on the four hundis or the promissory note, though there was the oral statement of Panna Lal to prove the payment of the amount on his hundi. Similarly there was no positive and direct evidence of the non-receipt of consideration on behalf of the defendants. But both the parties have led evidence and certain circumstances have been duly established, and therefore the main point for consideration is whether the circumstantial evidence is sufficient to rebut the ordinary presumption.

The learned Subordinate Judge has himself come to the conclusion that the ordinary presumption is so weak that

the plaintiffs' claim in respect of the hundis and the promissory note cannot be decreed in this case on merely formal proof of their execution (p. 22). He has, however, thought that there was some corroborative evidence as regards the hundis.

It cannot be disputed that the deceased Sheopal Singh was a young man of very extravagant habits. He attained majority about 1909, and his estate was managed for some time by one manager, and was then in charge of a receiver. The estate appears to have come directly into his own hands about 1913. The net income according to the plaintiffs was from Rs. 7,000 to Rs. 8,000, while according to the defendants it was about Rs.12,000 a year. The only debt which has been proved to have been left outstanding on the death of Sheopal Singh's father amounted to Rs. 30,000, which could have been easily paid off by a prudent and careful manager with the income at his disposal. As observed by the learned Subordinate Judge, instead of there being any reduction in these debts within a period of five years, they had swelled at least on paper to a lakh of rupees at the time of the execution of the bond in suit. Sheopal Singh executed bonds, hundis and promissory notes in quick succession, and died at the age of 24 leaving behind him a widow and no children. He had not any big family to support, and his relations with his mother also had been much strained. She did not live with him. The learned Subordinate Judge has recorded a finding that even if he had not been a drunkard or a debauchee he could very well be taken to be a profligate. On behalf of the plaintiffs an attempt was made to minimise the profligate habits of Sheopal Singh, while the oral evidence on behalf of the defendants went to show that he was in fact much worse than the evidence justified. But even the plaintiffs' own witness Ashrafi Lal, on whose evidence great reliance was placed by the Court below and also before us, had to admit in cross-examination that Sheopal Singh was a weak-minded man, and that he was incapable of managing his estate.

Shekher Prasad, the mortgagee, was a resident of the same place, and undoubtedly knew all about the habits of this young man. On his own showing Shekher Prasad advanced to him large sums of money aggregating to Rs. 88,700 principal between the 27th February 1912 and the 1st April 1915. These deeds together with the amounts borrowed are set forth in detail in a judgment on p.78.

This judgment was inter partes, and was delivered in a suit brought by the present plaintiffs against the defendants on the basis of one of these bonds, viz., the one dated 14th July 1915, which was ostensibly for Rs. 9,700. In the course of the judgment the learned Subordinate Judge in the case observed at pp. 78 and 79 that Kunwar Sheopal Singh was a profligate and drunkard of the first water, and he contracted the bad habit of prostitution and drinking, and used to hold dancing parties and drink heavily; he further held that Shekher Prasad himself pampered his evil habits by bringing prostitutes and wine to him, which fact was established by the old servants of the family, who showed that Shekher Prasad was indeed his evil genius. In view of the circumstances disclosed he held that the burden lay on the plaintiffs to prove that Shekher Prasad had paid the full consideration. At pp. 86 and 87 he found that Shekher Paasad was not in a position to advance a large sum like Rs. 88,000. His words were: "He had no means to lend one-hundredth part of the fabulous sum of Rs. 88,000." He accordingly dismissed the suit holding that the bond was entirely without consideration.

As it was fair to both the parties that we should look at the final judgment which was pronounced in that case we admitted in evidence the judgment of the High Court dated 9th December 1926, to which no objection was raised on behalf of the respondents. The High Court upheld the decree of the Court below substantially, but increased the amount of the principal sum by Rs. 864. There was a finding that in the deeds were included a fictitious item, as also sums which were not really due. Towards the close of the judgment the learned Judges remarked that Sheopal Singh was a drunkard and profligate, and it will be safe so hold that Shekher Prasad was in a position to dominate his will and exercise undue influence over him, and thereby to obtain from him terms of contract which would be inequitable.

In this connexion we may also refer to another judgment in a suit inter partes brought by the present plaintiffs against the defendants to recover the amount due on a hypothecation bond dated 10th April 1915. This judgment is dated 12th November 1927 and has become final. The Court found that more than half of the amount of Rs. 40,000 had not passed and decreed the claim for the balance only. There are similar remarks in the judgment as regards the extravagant and profligate habits of Sheopal Singh.

The other circumstances which have been strongly relied upon by the learned counsel for the defendants are as follows:

Neither Basdeo Prasad nor any of the other plaintiffs has gone into the witness-box and submitted himself to cross-examination. It cannot be suggested that Basdeo Prasad was unacquainted with the circumstances under which this hypothecation bond was executed, for in his deposition dated 10th April 1923, taken down in a previous case he admitted his presence at the time when the hypothecation bond in suit was executed. His previous deposition is admissible as an admission. The cross-examination on p. 72 discloses that besides Sheopal Singh's document there was no document executed by anybody in favour of Shekher Prasad for an amount up to Rs. 1,000 or Rs. 500. The highest amount for which a registered document existed was Rs. 200 only, of which also he was unable to give any details. He alleged that he did not keep an account book but only kept a memorandum and stated that about Rs. 200 used to be paid as income-tax on his business. He had to admit that the so-called memorandum book contained only 12 or 13 written pages and was not in the form of a regular account book. He held no receipts showing the payment of any income-tax as he stated that he did not keep any such record. It is inconceivable that a money lender, Vaish by caste, who professes to have advanced about Rs. 88,000 to only one borrower in the course of three years, would not keep any regular account books. The only inference that can be drawn is that such account books as existed have been withheld. He admittedly carries on a shop at which gold and silver are sold, and it is impossible to believe that he has got no regular account books.

It is a noticeable circumstance that so far as the amounts due on the four hundis and the promissory note which went to make up the total of Rupees 3,424-10-3 are concerned, there is absolutely no legal evidence on the record to prove the actual passing of consideration oral or documentary. The respondents rely solely on the presumption arising from the acknowledgments. Even as regards the acknowledgments it is curious, though it may not be of any very great importance, that even before the Sub-Registrar there was an omission on the part of Sheopal Singh to expressly acknowledge the receipt of consideration for these hundis and this promissory note. At p. 57 the endorsement only shows an acknowledgment of the receipt of Rs. 100 and Rupees 6,985-5-9 which were paid before the Sub-Registrar. There is no reference to any other acknowledgment. This might have been due to a mere slip, but the fact remains that apart from the fact that Sheopal Singh signed the deed he did not in express language acknowledge the receipt of consideration of Rs. 3,424-10-3 even before the Sub-Registrar.

We have already pointed out that it does not appear that the plaintiffs' father was in a position to advance such a large sum of money. It also appears that in the ordinary course there would have been no need for Sheopal Singh to borrow such large sums in quick succession. On 27th February 1912 he had executed a bond for Rs. 14,000 in favour of Shekher Prasad, and according to the oral evidence about Rs. 7,000 had been paid in cash under it, and yet Rs. 1,000 are said to have been borrowed in March, Rupees 400 in April, Rs. 500 in May, Rs. 500 in June and Rs. 550 again in July 1912. In April 1912, Rs. 3,490 are said to have been borrowed from Panna Lal under a hundi. These were followed by three more documents of the value of Rs. 60,000.

In view of all these circumstances we have no doubt in our minds that the initial presumption arising from the mere acknowledgments or the execution of the hundis and the promissory note has been sufficiently rebutted by the

circumstantial evidence. That such a presumption can be rebutted in this way is quite clear from the opinion expressed in the Madras High Court in *Sundaramma!* v. *Subramania Chettiar* (1) and *Sami Sah* v. *J. Parthasarathy Chetty* (2).

The defendants having led prima facie circumstantial evidence to rebut the presumption, the burden of proof shifted on to the plaintiffs to satisfy the Court that the consideration did actually pass. As remarked above the learned Subordinate Judge himself has held in this case the mere proof of the execution of the hundis and the promissory note will not be sufficient to decree the claim.

As regards the four hundis and the promissory note which went to make up the total of Rs. 3,424-10-3 there is absolutely no legal evidence on the record to prove the passing of consideration. The learned Subordinate Judge has accordingly disallowed the claim as regards the promissory note. But as regards the hundis he is of opinion that that there is corroborative evidence furnished by a slip which is printed at p. 53. This purports to have been written by Sheopal Singh to Mr. Asharfi Lal, a pleader, in August 1913 shortly before execution of the mortgage deed. Sheopal Singh appears to have made enquiries from this pleader whether there was any harm if the hundis of Shekher Prasad were received and the amount due under them included in the amount of the mortgage deed. One would think that the point was so simple that no legal opinion was required for the purpose. It is also a curious circumstance that this slip of 1913 addressed to the pleader has been preserved by him for 12 years. There was oral evidence led on behalf of the defendants which was directed to show that this letter was a forgery and was antedated, and that it was procured after the registration of the mortgage deed because Sheopal Singh had not acknowledged the receipt of the consideration of these hundis and the promissory note. It is not necessary for us to go to this length, but we are certainly of opinion that this letter is not of such great importance as to outweigh the other circumstantial evidence. The letter does not refer to the dates of the hundis, nor does it state the amounts under those hundis. As a matter of fact taking it strictly literally it refers to one hundi and not hundis in the plural. In any case it would not show that all the amounts due under the four hundis and the promissory note were actually due on that date. At best they would show the existence of such hundis. According to Mr. Asharfi Lal this letter was written in connexion with the transaction in dispute. If Shekher Prasad was in a position to dominate the will of Sheopal Singh, even this letter can have no greater weight than the other acknowledgments.

The learned counsel for the respondents has relied strongly on the evidence of Mr. Asharfi Lal, and has urged that the defendants have not rebutted his evidence. On the other hand the learned advocate for the appellant has very severely criticised his evidence, and has referred to the fact that in a former suit the High Court was not prepared to hold on his bare statement that a certain purchase in the name of the wife of Sheopal Singh was not for her benefit (pp. 63 and 67). On behalf of the appellant a copy of the judgment of the Full Bench of this Court dated 23rd January 1928, which was affirmed in part by their Lordships of the Privy Council in the case reported in *Asharfi Lal* v. *The Judges of the High Court of Judicature, Allahabad* (3), was tendered as additional evidence in order to show that their Lordships have found that the pleader concerned had been guilty of professional misconduct. We have refused to accept this fresh evidence in appeal, the sole object of which was to shake the credit of this witness. We have read the evidence of Asharfi Lal very carefully, and, apart from showing that the deceased admitted his liability to Shekher Prasad, that the mortgage deed in question was drafted by him, that the parties were staying at his place at the time, that he identified the mortgagor before the Sub-Registrar and the mortgagor acknowledged the receipt of consideration, and that in connexion with this transaction the letter of 31st August 1913 was written, his evidence

(1) [1915] 29 M. L. J. 236=30 I. C. 971.
(2) [1915] 31 I. C. 739.
(3) A. I. R. 1930 P. C. 60.

does not go to prove the actual passing of the consideration on these hundis and promissory note. It follows that the burden of evidence having shifted to the plaintiffs, and there being no legal evidence on the record on their behalf to prove the actual payment of the consideration of these hundis and promissory note, the claim as regards them must fail.

As to the hundis in favour of Panna Lal there is the oral statement of Panna Lal himself at p. 13. He has sworn that he advanced the amount on his hundi of April 1912 and Shekhar Prasad did pay him Rs. 3,490 in respect of that debt. No doubt there are many circumstances against Panna Lal. We need not refer to the fact that in the suit in which the judgment dated 12th November 1927 was delivered, another hundi in his favour executed by Sheopal Singh was held to be bogus. There is the fact that Panna Lal is himself a man of small means, and has no zamindari, and at the time of his deposition was actually indebted to the extent of Rs. 500. He has not produced any account books to show that he had advanced the money to Sheopal Singh, or that he had received the amount from Shekher Prasad. He asserts that he does not keep any bahi khata of the money-lending business, but he admits that he has bahi khatas in his shop in which the loan and its payment are not entered. His evidence was certainly very weak, but it was legal evidence. The learned Subordinate Judge who heard him has believed his evidence, and has considered that the points referred to above can be easily explained away. After having considered them he has come to the conclusion that this hundi was a genuine one and not a bogus one, and that the payment of it had been fully established by his evidence (p. 21). After considerable hesitation we have come to the conclusion that in appeal we should not differ from the view taken by the learned Subordinate Judge of this oral evidence. We would accordingly hold that the plaintiffs have established the passing of this item of consideration. As regards the cross-objections, they relate to the promissory note which stands on the same footing as the four hundis. The cross-objections must accordingly be dismissed. We accordingly allow this appeal in part, and modifying the decree of the Court below dismiss the plaintiffs' claim with regard to Rs. 3,424-10-3 principal and corresponding interest, but uphold the decree as regards the other items. The parties will receive and pay costs of this appeal in proportion to success and failure in both Courts and the defendant-appellant will have her costs from the plaintiffs in the cross-objections.

S.N./R.K. *Decree modified.*

A. I. R. 1930 Allahabad 573

SEN AND NIAMATULLAH, JJ.

Benares Bank Limited — Plaintiff—Appellant.

v.

Ram Prasad and *others*—Defendants—Respondents.

Second Appeal No. 1174 of 1927, Decided on 5th February 1930.

(a) Limitation Act, Art. 90 — Clerk in bank acting within scope of authority is agent—Principal and agent.

The clerk in a bank in charge of savings bank accounts, through whom alone money could be withdrawn, and who alone could report to the official concerned what a particular depositor desirous of withdrawing money has to his credit money in excess of what he desires to withdraw, so far as he acts within the scope of his authority, is an agent of the bank. [P 575 C 1]

(b) Limitation Act, Art. 48 — Money is specific moveable property.

Money is "specific moveable property" within the meaning of Art. 48 and where it has been lost, acquired by theft or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same, Art. 48 will apply : 5 *All.* 341 ; 29 *All.* 579 ; *A. I. R.* 1930 *All.* 397, *Foll.* ; 11 *C. W. N.* 862 and 11 *Bom.* 133, *Ref.* [P 575 C 1]

(c) Precedents—Subordinate Courts have to follow their High Court.

It is not proper for a Judge subordinate to the High Court to disregard its rulings which he cannot distinguish from the circumstances of the cases before him and to follow contrary opinions expressed by other High Courts. [P 575 C 2]

(d) Limitation Act, Art. 95—Bank alleging that one of its officials perpetrated fraud in collusion with other persons—Case is governed by Art. 95.

Where the allegations of the plaintiff, a bank, clearly amount to an averment of fraud perpetrated by certain persons in collusion with its official whose duty it was to bring it to the notice of the other officials of the bank that the sums sought to be drawn by them exceeded the amount to the credit of the depositor concerned and who for his own ends concealed that information inducing the other officials of the bank to part with the money which they would not have otherwise

paid, the case is governed by Art. 95, the mention of decree in the first part of the article not detracting in any way from the generality of the latter part thereof : 3 *Cal.* 504, *Expl.* and *Foll.* [P 576 C 1]

Damodar Das and *Govind Das*—for Appellant.

K. Verma, *Ambika Prasad* and *Kumuda Prasad*—for Respondents.

Niamatullah, J.—These two appeals arise out of two suits brought by the Benares Bank Limited, plaintiff-appellant, before the Munsif, Benares City, for recovery of certain sums of money. One of these suits was brought against (1) Ram Prasad, (2) Mahadeo Prasad and (3) Mahabali Prasad, the three defendants on the allegations that defendant 3 had a savings bank account with the plaintiff's bank; that there was collusion between him and Ram Prasad the clerk in charge of the savings bank account, and Mahadeo Prasad, another employee of the bank; and that though Mahabali Prasad had only Rs. 101-3-1 to his credit, not less than Rs. 800 were drawn, Rs. 200 on 3rd February 1924, by Mahadeo Prasad on the authority of a letter alleged to have been written by Mahabali Prasad, Rs. 200 on 23rd January 1924, Rs. 200 on 25th January 1924, and Rs. 200 on 13th February 1924, by Mahabali Prasad himself knowing that he had not enough money to his credit and that Ram Prasad the clerk in charge who was in complicity with the other two, allowed the four sums to be drawn to the detriment of the plaintiff. Ram Prasad was convicted of offences under Ss. 403 and 447-A, I. P. C. on 9th July 1924, by the Sessions Judge, Benares. The plaintiff claims Rs. 698-12-11 out of the Rupees 800 drawn in the manner already stated, being the amount overdrawn in the account of Mahabali Prasad. Second Appeal No. 1174 has arisen out of this suit.

The other suit which has given rise to the connected appeal No. 1175 of 1927 was brought against Ram Prasad, Harshankar Lal and Mahabali Prasad on similar allegations. It relates to a sum of Rs. 300 drawn by Mahabali Prasad on the authority of a letter alleged to have been written by Harshankar Lal, another depositor in the savings bank account. Ram Prasad is alleged to have allowed the withdrawal of this sum with full knowledge that Harshankar Lal had no money to his credit in his account. If the allegations contained in the plaints of the two suits briefly stated above are true, Ram Prasad, the clerk in charge of the savings bank accounts, who has been since convicted of serious offences of forgery and falsification of accounts, was principally responsible for the fraudulent transactions to which the plaintiff's claims refer.

The only defence which it is necessary to take notice of at this stage is one of limitation. Both these suits were brought within three years from the dates on which the sums claimed by the plaintiff-appellant were drawn. The defendants plead that the period of limitation for the suits brought by the plaintiff-appellant on the allegations contained in the plaints is two years. Both the lower Courts have held that Art. 36, Sch. 1. Lim. Act, which provides a period of two years, is applicable to the circumstances of these cases. The plaintiff bank has preferred these two appeals from the decrees of the lower Courts dismissing the two suits.

A reference to the terms of Art. 36 will make it clear that it is a residuary article providing a period of two years for suits :

"for conpensation for any malfeasance, misfeasance, or nonfeasance independent of contract and not herein specially provided for."

If, therefore, any other article is appropriate to the circumstances of the case, Art. 36 cannot apply. The learned District Judge has arrived at the conclusion that this is the proper article to be applied. The articles relied on by the plaintiff-appellant before him and before us are Arts. 48, 95 and 90. The learned District Judge was of opinion that Arts. 89 and 90 do not apply even as against Ram Prasad, the clerk in charge of the savings bank account, as, according to him, Ram Prasad was not the agent of the bank. He has correctly defined the agent as one "who is authorized to act for his principal." But the learned Judge is of opinion that as his duties were confined to preparing vouchers, checking the balance, and reporting for orders of his superior, the Assistant Manager, and as he had nothing to do with the actual delivery of the money he cannot be considered to be the agent of the bank. We are un-

able to agree with this view. It may be that the duty of making actual disbursements was entrusted to other officials, the clerk in charge, through whom alone the money could be withdrawn and who alone could report to the official concerned, whether a particular depositor desirous of withdrawing money had to his credit sums in excess of what he sought to withdraw. If he acted within the scope of his own authority, which he had to exercise in transactions of that kind, it cannot be disputed that he was the agent of the bank to that extent and if he misconducted himself in the exercise of that authority, Art. 90, Lim. Act, which provides a period of three years for suits by "principals against agents for neglect or misconduct" would be clearly applicable. Art. 90, however, will not meet all the requirements of the case because the other defendants were not the agents of the plaintiff.

Refering to Art. 48, Lim. Act, the learned District Judge has dealt with the cases of *Rameshwar Chaube* v. *Mata Bhikh* (1) and *Ram Lal* v. *Ghulam Husain* (2). Both of these cases are authority for the proposition that money is "specific moveable property" within the meaning of Art. 48 and that :

> "Where it has been lost, acquired by theft or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same, Art. 48 will apply."

It is true that in the second of the two cases referred to, it was observed that it may be open to argument whether a suit for money could properly be considered to be a suit for "specific moveable property," but we are bound by that decision, i. e. *Rameshwar Chaube* v. *Mata Bhikh* (1). In the alternative the learned Judge held Art. 90 to be applicable. The learned District Judge has made no attempt to distinguish these cases, and referring to the two cases decided by other High Courts *Agandh Mohta* v. *Khajan Aliullah* (3) and *Essoo Bhayaji* v. *The Steamship "Savitri"* (4) he observes as follows :

> "With all due deference to the earlier Allahabad rulings, I am of opinion that the interpretation of the Calcutta and the Bombay Courts is the correct one and I would, therefore, hold that the present suit cannot fall under Art. 48."

Mention of "earlier cases" would indicate that in some later case of this Court a different view has been taken. This, however, is not correct, nor has the learned Judge said so. It is not proper for a Judge subordinate to this Court to disregard its rulings which he cannot distinguish from the circumstances of the cases before him and to follow contrary opinions expressed by other High Courts. *Ram Lal* v. *Ghulam Husain* (2) which the learned Judge has himself quoted must have made it clear to him that a Bench of this Court considered itself bound by the pronouncement of another Bench which was responsible for deciding the earliest case on the subject, viz., *Rameshwar Chaube* v. *Mata Bhikh* (1). We have ourselves considered the case last mentioned as binding on us as recently as 13th January 1930 in *Jagganji* v. *Bandan* (5) and consider ourselves to be bound by that view so long as a larger Bench does not rule to the contrary. If, therefore, no other article of the Limitation Act is applicable and the choice lies between Arts. 36 and 48 we cannot but hold that the case is governed by Art. 48, Lim. Act, in so far as it is a suit "for compensation for wrongfully taking or detaining" specific moveable property, i. e., money.

But we are clearly of opinion that Art. 95, Sch. 1, Lim. Act, is appropriate to the circumstances of the present case. That article provides a period of three years for a suit :

> "to set aside a decree obtained by fraud, or for other relief on the ground of fraud."

The learned Judge has brushed aside this article by a reference to the case of *Chunder Nath Chowdhry* v. *Tirthanand Thakoor* (6). There is nothing in that case which makes that article inapplicable to the case before us. It was held that Art. 95, Lim. Act :

> "has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act and desires to be relieved from the consequences."

(1) [1883] 5 All. 341=(1883) A. W. N. 48.
(2) [1907] 29 All. 579=4 A.L.J. 671=(1907) A. W. N. 181.
(3) [1907] 11 C. W. N. 862.
(4) [1887] 11 Bom. 133.
(5) A. I. R. 1930 All. 397.
(6) [1877] 3 Cal. 504=2 C. L. R. 147.

The plaintiffs' allegations clearly amount to an averment of fraud perpetrated by certain persons in collusion with its official whose duty it was to bring it to the notice of the other officials of the bank that the sums sought to be drawn by them exceeded the amount to the credit of the depositor concerned and who for his own ends concealed that information inducing the other officials of the bank to part with the money which they would not have otherwise paid. The plaintiff seeks relief against those who were parties to the last fraud. This being so the dictum quoted above is applicable to the circumstances of the case before us, and far from being an authority to the contrary, as the learned District Judge thought, materially supports the plaintiff's case. Mention of a decree in the first part of the language of Art. 95 does not, in any way, detract from the generality of the latter part thereof. The article which follows (Art. 96) provides for relief on the ground of mistake just as Art. 95 provides for relief on the ground of fraud.

For the reasons stated above we hold that Art. 48, and in any case Art. 95, Sch. 1, Lim. Act, both of which provide a period of three years, are applicable to the case before us and that Art. 36 which provides a shorter period of two years is not applicable. The plaintiff-appellant having brought the two suits which have been dismissed by the Courts below within three years were not barred by limitation. Accordingly we set aside the decrees of the Courts below and remand the two cases for disposal on the merits. Costs incurred hitherto shall be costs in the suits.

P.N./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 576

MUKERJI AND BENNET, JJ.

Bhagwat Rai and *others*—Defendants—Appellants.

v.

Behari Rai and *others*—Plaintiffs and Defendants—Respondents.

Letters Patent Appeal No. 148 of 1927, Decided on 6th March 1930, from decision of Sulaiman, J., D/- 4th February 1927.

Practice—Pleadings—Suit for declaration of title and possession—Title can be based on adverse possession.

In a suit for declaration of title to and possession of land if title has been pleaded that title can be based on adverse possession extending over 12 years and going into this question does not mean making a new case : 24 *Mad.* 387, (*P.C.*), *Foll.* [P 576 C 2]

Haribans Sahai—for Appellants.

Jwala Prasad Shergona—for Respondents.

Mukerji, J.—This appeal must fail. The plaintiffs-respondents brought the suit out of which this appeal has arisen to obtain a declaration of title to a certain land, and in the alternative, they asked for possession. The suit was decreed in part by the Court of first instance and an appeal against that decree by the defendants was dismissed. The defendants filed a second appeal. The larned single Judge before whom the appeal came decided the question of res judicata in favour of the defendants but found that the plaintiff's allegation that he had all along been in possession of the property had not been gone into. Accordingly, the learned single Judge remanded an issue in the following language :

"Did Chit Bahal or his representatives subsequently acquire title by adverse possession extending over 12 years in respect of the one-eighth share which was given to Padarath and Bharosa under the decree of 1868, and prior to their recently obtaining the decree for profits from the revenue Court."

The lower appellate Court answered this issue in favour of the plaintiffs and the learned single Judge dismissed the appeal of the defendants.

In this Court it has been contended that the learned single Judge, really, made out a new case for the plaintiffs. We do not think that there is any force in this argument. Title had been pleaded and that title could be based on adverse possession extending for over 12 years. So it was not a new case that the learned single Judge considered: see *Vasudeva* v. *Maguni* (1).

The appeal fails and it is hereby dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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(1) [1901] 24 Mad. 387=28 I. A. 81 (P.C.).

A. I. R. 1930 Allahabad 577 (1)

DALAL AND BANERJI, JJ.

Syed Husain—Defendant—Applicant.

v.

Syed Hamid and *others*—Plaintiffs and Defendants—Opposite Parties.

Civil Revn. No. 264 of 1928, Decided on 6th February 1930, from an order of Dist. Judge, Benares, D/- 7th June 1928.

(a) Religious Endowments Act (20 of 1863), S. 18—No elaborate enquiry is essential.

Section 18 does not require any elaborate inquiry and it is specifically laid down there that the Court on a perusal of the application shall determine whether there are sufficient prima facie grounds for the institution of a suit. [P 577 C 1]

(b) Religious Endowments Act (20 of 1863), S.14—"Any mosque"—Meaning explained.

"Any mosque" must necessarily mean not only mosques which were in existence in 1863 but mosques which are now in existence and relating to which a civil Court could give relief. [P 577 C 2]

Mukhtar Ahmad—for Applicant.

M. Waliullah, *A. M. Khwaja*, *M. A. Aziz* and *S. Majid Ali* — for Opposite Parties.

Banerji, J.—This is an application in revision filed by Syed Husain, one of the trustees of a Mahomedan Trust relating to a mosque at Jaunpore. In the year 1927 an application was presented to the District Judge by seven persons for permission to institute a suit against the applicant and to others under S. 18, Act 20 of 1863. The learned District Judge holding that there was a sufficient prima facie ground for instituting the suit granted permission to the applicants.

Against that order the present revision has been filed and it is contended by the learned advocate for the applicant that as no prima facie ground has been made out, the learned District Judge should have held an inquiry and after coming to a conclusion on the evidence before him given his decision. We are of opinion that S. 18 does not require any elaborate inquiry and it is specifically laid down there that the Court on a perusal of the application shall determine whether there are sufficient prima facie grounds for the institution of a suit. The learned District Judge had sufficient materials before him to come to the conclusion that he did. The next point urged is that the wakf not having been created before the year 1863 the provisions of that Act did not apply to this wakf, and that under S. 14 of the Act the Court could not grant the reliefs which the respondent to this revision asked for. The provisions of S.14 of the Act in our opinion are generally applicable to a religious endowment of the nature relating to which sanction was sought by the opposite party. The reliefs claimed are reliefs which could be granted to the plaintiff under S. 14. In the case of *Sheratan Kunwari* v. *Ram Pargash* (1) and *Mohammad Sirajulhaq* v. *Imamuddin* (2) it was held that in the application for reliefs under S. 14 it is not necessary that the religious endowment should be one in which the property had been transferred by the Board of Revenue to the Trustees and that S. 14 applied generally to all trusts. The words used in the section are "Any person interested in any mosque . . . . ." "Any mosque" must necessarily mean not only mosques which were in existence in 1863 but mosques which are now in existence and relating to which a civil Court could give relief.

We are of opinion that there is no force in this application and we dismiss it with costs.

V.B./R.K. *Application dismissed.*

(1) [1896] 18 All. 227=(1896) A. W. N. 37.
(2) [1896] 19 All. 104=(1896) A. W. N. 189.

A. I. R. 1930 Allahabad 577 (2)

MUKERJI AND BENNET, JJ.

Rajkumar—Plaintiff—Appellant.

v.

Mangad Rai and *others*—Defendants—Respondents.

First Appeal No. 17 of 1927, Decided on 9th April 1930, against decree of Sub-Judge, Budaun, D/- 11th September 1926.

Civil P. C., S. 35-A—Order to pay costs under S. 35-A is covered by S. 35 and can be passed against next friend of minor.

What is awarded under S. 35-A is "costs" and nothing but costs, although those costs are to be awarded by way of compensation and the order to pay it is covered by S. 35 itself. An order under S. 35-A can therefore be passed against next friend of a minor. [P 578 C 2]

Hanuman Prasad Agarwal—for Appellant.

S. B. Johari—for Respondents.

Mukerji, J.—This appeal has no force and has been filed mainly in the interests of the next friend who was responsible for the suit.

The ostensible plaintiff to the suit was a minor Rajkumar on whose behalf the appeal is. His father Lachhman Das executed two mortgages in respect of the other defendants and on these mortgages decrees have been obtained by the mortgagees and the property has been advertised for sale. The plaintiff's case was that the property was the joint family property of himself and his father Lachhman Das and the mortgages having been executed without legal necessity, could not support the decrees and the property could not be sold.

The defence was that the property was the self-acquired property of Lachhman Das, that he got it under a settlement made by his maternal grandmother and the plaintiff had no interest in the property. The defendants also urged in the written statement that the suit was a frivolous one and had been brought only to harass the defendants. The learned Subordinate Judge found that there was no foundation for the suit, that the property was the self-acquired property of Lachhman Das, that the plaintiff had no interest in the property and that the suit was a frivolous and vexatious one. In the result, the learned Subordinate Judge dismissed the suit and awarded, besides ordinary costs, a sum of Rs. 500 as further costs, by way of compensation under S. 35-A, Civil P. C., and directed that the sum be paid by Jwala Prasad, the next friend of the minor Rajkumar.

The appellant has not printed the material documents in the case, although the value of the appeal exceeds Rs. 10,000. The reason is obvious. The appeal has no merits and the object of filing the appeal was two-fold: first, to obtain a stay of execution of the decree if possible and next, to get the reversal of the order by which Jwala Prasad was made to pay the costs.

On the merits it is abundantly clear that the property was the self-acquired property of Lachhman Das. The property was originally owned by a third person and was sold in an auction sale in 1909. It was purchased by Mt. Champa Kunwar, the maternal grandmother of Lachhman Das. Lachhman Das got the property under a deed executed by himself, his maternal grandmother and the husband of his mother's sister, Mt. Barni Kunwar. The only evidence that has been printed in the case is the evidence of a few witnesses. This evidence we have examined. It has no value. We hold that the property was the self-acquired property of Lachhman Das and the plaintiff had no interest in the property. As we have already said the appeal has no merits.

Coming to the award of extra costs under S. 35-A. The learned counsel for the appellant has argued that the minor might be made liable to pay the costs, but certainly not the next friend. His argument is based on the language of S. 35-A and is this. In S. 35-A a "party" has been made liable, while in S. 35 larger powers have been given to the Court and the Court is authorized to award costs against any person whom it finds liable to pay them. But this argument does not take account of the fact that what is awarded under S. 35-A is "costs" and nothing but costs, although those costs are to be awarded by way of compensation. The extra costs that were awarded under S. 35-A, being "costs," the order to pay it is covered by S. 35 itself. In this view, there can be no doubt that the Court below was justified in making the next friend of the plaintiff pay costs by way of compensation.

We hold that the appeal has no force and dismiss it with costs. The costs of the appeal will be paid by Jwala Prasad, the next friend of the minor.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 578

MUKERJI AND BENNET, JJ.

Chiraunji Lal — Defendant—Appellant.

v.

Ishwar Das—Plaintiff—Respondent.

Letters Patent Appeal No. 13 of 1928, Decided on 19th January 1930, from judgment of Kendall, J., reported in *A. I. R.* 1928 *All.* 169.

(a) Civil P. C., O. 21 R. 90—Party to suit seeking to set aside sale must do so under R. 90 and not by separate suit.

A party to the suit seeking to set aside a sale in execution of the decree in that suit, must do so by an application under O. 21, R. 90; a ssparate suit is not maintainable in such a case. [P 579 C 2]

(b) Civil P. C., O. 34, R. 5—Final decree for sale containing no exemption of particular property sold—Subsequent correction

of decree does not affect validity of sale—Civil P. C. O. 21, R. 90 : *A. I. R.* 1928 *All.* 169, *Reversed.*

Where the final decree for sale contains no exemption of a property, and consequently the property is sold, susbequent correction in that decree would not affect the validity of the sale: *A. I. R* 1926 *All.* 35 and *A. I. R.* 1926 *All.* 41, *Ref.* **A. I. R. 1928 All. 169, Reversed.**

[P579 C 2]

K. N. Katju—for Appellant.

Panna Lal—for Respondent.

Bennet, J.—This is a Letters Patent appeal brought by the defendant Chiraunji Lal against a decree of a learned single Judge of this Court, awarding the plaintiff a decree for possession of a grove. The suit was dismissed by the two lower Courts. The facts are as follows : One Mr. Gardner was the sole owner of the zamindari rights in a certain village, and in 1904 Ishwar Das, the plaintiff, bought a grove from Mr. Gardner. That sale deed clearly sets forth that Mr. Gardner was the owner in possession of that grove, and he sold the rights of ownership of the grove to Ishwar Das. Prior to this sale, on 9th October 1882, Mr. Gardner had executed a simple mortgage of his zamindari rights in this village. The sale deed of 1904 was therefore subject to this mortgage. In 1910 Baldeo Prasad, the mortgagee, brought a suit for sale on his simple mortgage to which he made Ishwar Das, the present plaintiff, a defendant, as he was the owner of this specific plot comprising this grove. A preliminary decree was passed on the 5th April 1911. In that decree there is a statement that the occupancy rights of Ishwar Das in the area sought to be sold shall not be affected by the sale. It has been argued that this exemption refers to the rights of Ishwar Das in the grove in question. There is no evidence at all to support such an argument. There is nothing to show that the occupancy rights which were exempted were not the occupancy rights of Ishwar Das in some tenancy holding in that village. It is clear that the rights which Ishwar Das had purchased in 1904 could not by any correct use of language be described as occupancy rights, and moreover if the reference was to the grove by an inaccurate use of language, we would expect that the exemption would have stated that the occupancy rights in the grove were to be exempted.

The next point which is to be noted is that in the final decree dated 7th September 1912 this exemption clause finds no place. Subsequently there was a sale on this decree, and the defendant Chiraunji Lal, the appellant before us, bought the village at an auction-sale on 20th April 1920 and the sale was confirmed and formal possession was delivered to Chiraunji Lal on 4th August 1921, and mutation was effected in his name. No objection under O. 21, R. 90 was made by Ishwar Das, and accordingly a suit would be barred. It is difficult to see on what ground the present claim of Ishwar Dass could be maintained. As the final decree contained no exemption of the grove even a subsequent correction of that decree would not affect the validity of the sale: see *Agha Husain* v. *Qasim Ali* (1) and *Pirthi Nath* v. *Kunji Koer* (2). We consider, therefore, that the claim of the plaintiff fails because it is not shown that the exemption in the preliminary decree applied to this grove, secondly because there was no exemption in the final decree, and thirdly because his remedy would not lie in a suit.

It was argued that, as alleged in para 2 of the plaint, from 1898 the plaintiff had the rights of a groveholder, and that subsequently in 1904 he acquired the rights of a proprietor in this grove. There is no evidence whatever on the record which would enable any Court to come to a finding that prior to 1904 the plaintiff had any rights in this grove. Further, if he had possessed any such rights, they would be merged with the proprietary rights, transferred in 1904. And the language of the sale deed of 1904 clearly states that Mr. Gardner was the owner in possession of the grove and this language is inconsistent with the plea that the plaintiff possessed any right of a grove-holder prior to 1904.

For these reasons we allow this appeal and dismiss the suit of the plaintiff with costs in all Courts.

V. B./R.K. *Appeal allowed.*

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(1) A. I. R. 1926 All. 35=48 All. 94.
(2) A. I. R. 1926 All. 41.

A. I. R. 1930 Allahabad 580 (1)

MUKERJI AND BENNET, JJ.

Sughra Bibi—Applicant.

v.

Gaya Prasad and *another*—Opposite Party.

Second Appeal No. 16 of 1929, Decided on 11th January 1930, from order of Dist. Judge, Cawnpore, D/- 8th August 1929.

Provincial Insolvency Act, S. 33 (1)—Deferred dower should not be included in schedule.

Deferred dower debt is incapable of being fairly estimated, and, therefore, should not be entered in the schedule of creditors : 21 *P.L.R.* 1919, *Ref.*; 8 *All.* 178, *Dist.* [P 580 C 2]

Mansur Alam—for Applicant.

Bennet, J.—This is a second appeal from an order brought by Mt. Sughra Bibi appellant, the wife of Abdul Mughni insolvent. Abdul Mughni was adjudged an insolvent on 3rd December 1927, and a previous transfer had been made by him to his wife on 21st February 1927, of all his property in lieu of her dower debt. That transfer was set aside as fraudulent, and that matter is not now before us. Subsequently the appellant Mt. Sughra Bibi applied to have her name entered in the schedule of creditors for the total amount of her deferred dower debt which was Rs. 5,000. The two lower appellate Courts have refused that application. The sole question before us is whether a Mahommedan wife is entitled to be entered in the schedule of creditors of her insolvent husband for the amount of her deferred dower debt. Deferred dower debt, as stated in para. 46 of Wilson's Mahomedan Law, Edn. 4, is payable only on the termination of the marriage by death or divorce. Neither of these contingencies has yet taken place, and it is not possible to say whether the husband will or will not divorce his wife, or whether he will or will not predecease his wife; nor is it possible to say at what date the husband would predecease or divorce his wife if either of the two contingencies did take place. Accordingly it is not possible for the insolvency Court to estimate what would be the present value of the deferred dower debt of Rs. 5,000 which was to be paid if either of those contingencies took place. S. 33, Provincial Insolvency Act, sub-S. (1) states:

"Provided that, if, in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt shall not be included in the schedule."

We consider that the present deferred dower debt comes within that proviso. It is not possible for the insolvency Court to arrive at any fair estimate of the value of this deferred dower debt in comparison with the debts of the other creditors who are entered in the schedule. The learned counsel for the appellant refers to S. 45, Insolvency Act, but that section refers to a debt payable at a definite future time and the present debt may not be payable at all in certain contingencies. We consider that the only remedy for the appellant under the Provincial Insolvency Act, lies under S. 63, and if in future her husband predeceases her or divorces her and the insolvency proceedings have not then terminated, it would be open to the appellant to apply under that section for a share of any assets which were still remaining with the receiver. In arriving at the present decision we agree with the ruling reported in *Mirza Ali* v. *Qadari Khanam* (1), where the Punjab Chief Court held that a similar deferred dower debt was incapable of being fairly estimated, and, therefore, should not be entered in the schedule of creditors.

Reference for the appellant was made to *Suba Bibi* v. *Balgovind Das* (2), but as specifically stated on p. 180 that ruling does not apply to insolvency cases.

We consider that the order of the lower appellate Court was correct, and we dismiss this appeal under O. 41, R. 11.

V.B./R.K. *Appeal dismissed.*

(1) [1919] 21 P. L. R. 1919=50 I. C. 774.
(2) [1886] 8 All. 178=(1886) A.W.N. 51.

A. I. R. 1930 Allahabad 580 (2)

NIAMATULLAH, J.

Sita Ram—Objector.

v.

Kishan Lal—Opposite Party.

Civil Revn. No. 248 of 1927, Decided on 7th March 1930, against order of Sm. C. C. Judge, Cawnpore, D/- 23rd March 1929.

Provincial Insolvency Act, S. 78—S. 78 does not apply unless debt is proved in insolvency—Protection order obtained by in-

solvent—Decree-holder can exclude period of protection order though his debt is not proved if he promptly applies for execution against insolvent's person—Prov. Insol. Act, S. 31, proviso.

No doubt the period from the date of the adjudication to the date of annulment cannot be excluded under S. 78 in case of an execution of a decree unless the debt to which the decree related was proved in insolvency. Where, however, the application for execution is directed against the person of the judgment-debtor and not against his property moveable or immovable the decree-holder will, if he applies promptly after the cessation of the protection order, be entitled to the exclusion of the period during which the protection order was in force.

[P 581 C 1, P 582 C 1]

S. N. Verma—for Applicant.

N. C. Vaish—for Opposite Party.

Judgment.—This is an application for revision against an order passed by the Judge of Small Causes at Cawnpore allowing execution of a decree passed in favour of the respondent on 9th May 1922. It is not disputed that an application for execution was made on 7th June 1925 and that it was within time. The last application for execution was made on 22nd December 1928, as to which the appellant pleads the bar of limitation. The lower appellate Court has overruled that plea on the ground that the applicant was adjudged insolvent on 6th March 1926 on his own application, dated 11th May 1925. The adjudication was annulled on 20th December 1928. The lower Court excluded the entire period between the 11th November 1925 and the 20th December 1928 apparently with reference to S. 78, Insolvency Act. It has been contended before me that the respondent is not entitled to exclusion of this period, because he did not prove his debt, a condition the existence of which is essential for attracting the provisions of S. 78, Insolvency Act. It is admitted on behalf of the respondent that the debt, to which the decree related, was not proved in insolvency proceedings. Under these circumstances I think the applicant's contention must prevail. S. 78, Insolvency Act, provides that where an order of adjudication has been annulled, on computing the period of limitation prescribed for an application for execution if a decree which might have been made but for the order of adjudication, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded; "provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act."

The order of the lower Court cannot, therefore, be supported on the ground on which it proceeds. It has been argued that the application for execution which is directed against the person of the judgment-debtor, and not against his property, moveable or immovable, must be considered to be unaffected by the law of limitation, having regard to the protection order obtained by the applicant under S. 31, Prov. Insol. Act. It is admitted by the parties that the applicant applied on 31st March 1926, after he was adjudged insolvent, for protection from arrest or detention. Such order was passed on 22nd January 1927, and continued to be in force till the 20th December 1928, when the adjudication was annulled. The present application for execution, as already stated, was made on 22nd December 1928. The proviso to S. 31, Prov. Insol. Act, lays down that:

"no such order shall operate to prejudice the rights of any creditor in the event of such order being revoked or the adjudication annulled."

It is argued with reference to these provisions that the application for execution of decree by arrest of the judgment-debtor, the applicant before me, could not have been made at any time between the 22nd January 1927, the date of the order of protection, and the 20th December 1928, the date of the order of annulment, and that the present application having been made only two days after the protection order ceased to be operative should not be thrown out on the ground of limitation, having regard to the proviso to S. 31 already referred to. The learned advocate for the applicant has argued that S. 31 cannot override the provisions of S. 78, which specifically deals with the question of limitation. It is true the latter section is not applicable and that S. 31 makes no reference to the question of limitation. At the same time effect must be given to the proviso to S. 31 so far as to relieve the decree-holder from the consequences of the order of protection, which was obtained by the applicant and which the proviso declares cannot in any way prejudice the rights of the decree-holder. To give effect to the contention of the applicant as regards

the question of limitation raised in the appeal would be to prejudice the applicant at least so far as his application to obtain execution by arrest of the judgment-debtor is concerned. But for the order of adjudication it is obvious that the decree-holder could have applied for a similar process at any time between the 22nd January 1927 and the 20th December 1928. Having been deprived of this opportunity within that time and having applied promptly after the protection order ceased to be operative, he should not be prejudiced by sustaining the plea of limitation raised by the applicant. Under the circumstances of the case, I am of opinion that the proviso to S. 31, Prov. Insol. Act, affords protection to the decree-holder against the plea of limitation which would otherwise have been successful.

In the view of the case that I have taken this application for revision is dismissed. Under the peculiar circumstances of this case I direct the parties to bear their own costs throughout.

V.B./R.K. *Revision dismissed.*

A. I. R. 1930 Allahabad 582

SULAIMAN AND KENDALL, JJ.

Umrao Singh—Plaintiffs—Appellants.

v.

Har Prasad—Defendant—Respondent.

First Appeal No. 404 of 1928, Decided on 21st March 1930.

(a) Civil P. C., S. 92—Failure to comply with order under S. 5 (5)—Charitable and Religious Trusts Act—Suit instituted for breach of trust under S. 6—District Judge can grant any reliefs under S. 92 (1)—Charitable and Religious Trusts Act, S. 6.

When the order of the District Judge for filing of accounts under S. 5, Charitable and Religious Trusts Act has not been complied with there is a breach of trust, by virtue of S. 6, which could be made the basis of a suit under S. 92, Civil P. C. Once such a suit is filed, the District Judge has jurisdiction to grant any or all the reliefs mentioned in S. 98 (1), Civil P. C. [P 583 C 2]

(b) Charitable and Religious Trusts Act, S. 6—Suit on basis of S. 6, Charitable and Religious Trusts Act filed—Accounts for whole period of trusteeship can be ordered.

Where a regular suit under S. 92, Civil P. C. is instituted on the basis of S. 6, Charitable and Religious Trusts Act, Court has jurisdiction to order a trustee to render accounts for the whole period of his trusteeship, if such accounts have not been rendered before. [P 584 C 1]

K. N. Katju and *B. Malik*—for Appellants.

Iqbal Ahmad and *S. N. Gupta*—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit under S. 92, Civil P. C., claiming many reliefs including the removal of the defendant trustee, the rendering of accounts of income and expenditure from 1902 when he took over charge, the appointment of new trustees and the vesting of the trust property in them, as well as other directions said to be necessary. It appears that the defendant took over charge as trustee of this endowed property in 1902 and was managing it without any objection on the part of the other members of his family. In 1915-1916 plaintiff 1, his younger brother, moved the Legal Remembrancer for sanction to file a suit against him. Some inquiry through the Collector was presumably made and the Legal Remembrancer declined to grant the sanction. No suit, therefore, could be instituted; but the defendant certainly became aware that his management was being questioned by his younger brother.

After the coming into force of Act 14, 1920 the present plaintiff filed an application in the Court of the District Judge on 7th March 1927 under S. 5 of that Act, praying that the trustee be ordered to file the accounts of the income of the trust property, and to refrain from cutting any trees; and that in case he was found incapable of managing the trust property, he should be removed from his office and the petitioner be appointed trustee in his place. The application was of course objected to by the defendant Umrao Singh. In the first instance the learned Judge issued a notice to the defendant on 30th March 1927, directing him to file account books by 2nd April. He also issued an injunction prohibiting him from cutting down any trees or removing any timber. The defendant filed certain abstract statements of income and expenditure but not regular accounts. On 21st November 1927 the petitioner applied to the Judge stating that the trustee had not filed any original accounts together with the receipt books and other papers, and that he had filed no accounts whatsoever for the year 1926-1927. On that application the learned Judge passed the following order:

"I have seen the accounts. They are worthless. Proper accounts including receipts and bahikhatas must be filed within two days."

On 23rd November 1927, the trustee filed an application stating that he had filed the account which was with him in compliance with the order of the Court and that he had got "no better account" and was therefore unable to comply with the order. The petitioner protested against this statement and alleged in his application of the same date that the trustee had not filed the original accounts and receipts, and that what he had filed were fabricated and unreliable. On this the learned Judge made this order:

"Yes, he must have the original. These are only abstracts."

He then proceeded to appoint a receiver temporarily and later on directed the petitioner to file a regular suit within two months. This was done. The propriety of this order is not in question before us. In the plaint filed in this case the plaintiff not only alleged disobedience to the order of the District Judge to file the accounts, but also other matters showing mismanagement, misfeasance, breach of trust and misconduct. These were all denied in the written statement, in which a further plea was taken that the suit without the previous sanction of the Legal Remembrancer was not at all maintainable.

The learned District Judge seems to be of opinion that he has no authority to remove the trustee until the plaintiff has applied for the permission of the Advocate-General to institute a suit under S. 92, Civil P. C., and that in any case the trustee cannot be legally removed in the suit. He is further of opinion that the plaintiff can ask for accounts for only three years. He has also expressed the opinion that the management had not been unsatisfactory, barring the fact that the defendant was not very careful in not keeping proper accounts for all these years, so that it is very difficult to know exactly how much was obtained from the estate and how much was spent on the worship of the temple and other necessary expenses. He has not removed the defendant from the trusteeship, but has ordered him to file accounts of 1334-F only and has also given him certain directions set forth in his finding on issue 4 for his future guidance.

The plaintiffs have pleaded and urged that a case has been made out for the removal of the defendant. In our opinion the learned Judge is wholly in error in thinking that he had no authority to remove the defendant from the trusteeship and that the defendant could not legally be removed in this suit. The facts which we have stated above leave no doubt in our minds that there was a disobedience of the order of the District Judge directing the defendant to file proper accounts in the former proceedings. Even in the proceeding the learned Judge was satisfied that the original accounts must have existed and had been withheld. In the present suit Har Prasad in the witness box offered the explanation that accounts used to be kept by his karinda, but they were taken away by him shortly before he filed the abstracts in the Court of the District Judge. He admits that he made no report to the police about this theft. It is also clear from his application dated 23rd November 1927 that he did not suggest at that time that these accounts had existed and had been stolen away from his possession. The story now told is utterly incredible and cannot be accepted, and the only conclusion at which we can arrive is that proper original account books must have existed and were not produced before the District Judge. There was therefore a clear disobedience of his order.

The application before the learned Judge was one for the filing of accounts and the order was made by him under S. 5, sub-S. (5), Act 14 of 1920. S. 6 of that Act provides that if a trustee without reasonable excuse fails to comply with an order made under sub-S. (5), S. 5, he shall be deemed to have committed a breach of trust affording ground for a suit under the provisions of S. 92, Civil P. C.; and any such suit may, so far as it is based on such failure, be instituted without the previous sanction of the Advocate-General. It is quite clear from this section that when the order of the District Judge had not been complied with, there was a breach of the trust, which could be made the basis of a suit under S. 92. Once such a suit was filed the District Judge had jurisdiction to grant any or all the reliefs mentioned in S. 92, sub-S. (1) of the Code. We fail to see why the learned District Judge thinks that he had no jurisdiction to remove the trustee. It

is also clear to us that the learned Judge is in error in thinking that he could not direct accounts and inquiries for a period of more than three years. He seems to be under the impression that although a regular suit under S. 92 has been instituted, the provisions of Act 14 of 1920 still govern the rights of the parties, and that, as provided in S. 3 of that Act, accounts for more than three years cannot be ordered. He is further in error in thinking that these three years would run from 1334-F. only.

We are of opinion that the Court has jurisdiction to order a trustee to render accounts for the whole period of his trusteeship, if such accounts have not been rendered before. At one time we felt inclined to order that the defendant should render accounts from 1917 onwards, when his younger brother challenged his management and applied to the Legal Remembrancer for sanction. But as at that time the authorities were apparently satisfied that no breach of trust was committed, we think it would be unfair to the defendant to direct him to render accounts for this long period. At the same time there seems to be no reason why he should not have been ordered to render accounts for the three years previous to the application of 7th March 1927, which accounts he had been ordered to file and which he had failed to file.

As regards the other questions of misconduct, mismanagement or negligence, we think that such an inquiry is wholly outside the scope of a suit which is instituted on the basis of S. 6 of the Act. The last part of the section quoted above shows clearly that it is only so far as the suit is based on such failure that the previous consent of the Advocate-General is dispensed with. We cannot therefore allow a wholesale inquiry into the general misconduct of the defendant or his negligence. All that should be assumed in this case is that he has committed a breach of trust inasmuch as he failed to comply with the order of the District Judge to file accounts. The question before us, therefore, simply is whether such omission on his part is sufficient to justify an order for his removal. After some hesitation we have come to the conclusion that the order of the learned District Judge in this respect should not be interfered with. We accordingly allow this appeal in part, and modifying the preliminary decree of the District Judge extend the period for which the accounts have to be rendered to the three years prior to 7th March 1924. We direct the parties to bear their own costs of this appeal. The time for filing the accounts is extended to one month from the arrival of the record in the Court below.

P.N./R.K. *Order accordingly.*

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MUKERJI AND BENNET, JJ.

Shanker Lal-Lachhmi Narain—Plaintiff—Appellant.

v.

Phul Chand-Fateh Chand and *another*—Defendants—Respondents.

First Appeal No. 564 of 1926, Decided on 19th February 1930, against decree of First Sub-Judge, Cawnpore, D/- 24th August 1926.

(a) Arbitration—Arbitrator giving no indication that his award was merely preliminary—Award impeached by plaintiff by suit — Subsequently arbitrator purporting to make final award and decree passed in its terms—Plaintiff's suit was not premature and subsequent conduct of arbitrator would not vitiate it—Decree passed in terms of his final award would not operate as res judicata—Civil P. C., S. 11.

An arbitrator gave no indication in his award that it was only a preliminary stage to the final decision to be given by him. On the other hand he framed issues and gave decision on them. And although he did not state that so many rupees were to be paid by one party to the other he gave sufficient indications as to how the liabilities were to be assessed. Plaintiff brought his suit impeaching this award; and after the institution of the suit the arbitrator purported to give his final award and a decree was made in terms of it.

Held: that the suit was not premature since the award could not be said to be merely a preliminary award, and the subsequent conduct of the arbitrator could not vitiate the suit already instituted.

Held further: that the decree passed in terms of the final award could not operate as res judicata. [P 586 C 2]

(b) Arbitration—Arbitration clause providing that in case one party fails to appoint arbitrator, decision given by arbitrator appointed by other party shall be binding—Clause covered case of appointment of fresh arbitrator when one already appointed had declined to act—Arbitrator appointed by other party could not act as sole arbitrator.

An arbitration clause provided as follows: "It is further agreed that if within 20 clear days . . . . . after being requested by letter addressed to his or their usual place of busi-

ness either party fail to appoint an arbitrator or surveyor ready and willing to act, the decision of the arbitrator or surveyor appointed by the other party shall be in like manner binding on both parties."

Held: that the clause covered the case of appointment of a fresh arbitrator when the arbitrator already appointed had declined to act and so the party whose arbitrator had refused to act should have been given a chance to appoint a fresh arbitrator. Hence the arbitrator appointed by the other party was not competent to give award acting as the sole arbitrator: *A. I. R.* 1922 *P. C.* 374, *Rel. on.* [P 587 C 1, 2]

(c) Arbitration Act, S. 9—Scope.

It is not proper to import S. 9 into the contract entered into by the parties themselves to refer disputes to arbitration. [P 587 C 1]

N. C. Vaish and *Amba Prasad Gupta*—for Appellants.

P. L. Banerji, *S. N. Mukerji* and *T. B. Banerji*—for Respondents.

Mukerji, J.—The appeal raises only two points, both of law, which arise under the following circumstances:

The plaintiffs, who are the appellants before us, gave the defendants an order for supply of three bales of dhotis of a certain kind. The order was accepted and the contract was drawn up in the terms laid down by the Delhi Mercantile Association. The agreement is printed at p. 27 of the record. It contained in para. 15, an arbitration clause. After the date fixed for delivery a difference arose between the parties. The defendants said that their goods were ready and they should be paid for. The plaintiffs demanded certain documents, and complained that they had not been delivered, and they were not bound to take the goods. We are, however, not concerned with the exact nature or the merits of the difference that arose between the parties. The defendants wanted that the difference that had arisen should be settled by reference to arbitration. They nominated one Mr. Dina Nath Kapoor of Delhi as their arbitrator, and called upon the plaintiffs to nominate an arbitrator. The agreement was that there should be two arbitrators, one nominated by each party and under certain circumstances a sole arbitrator nominated by one party could decide the matter in difference.

The plaintiffs nominated one Mr. Janki Nath as their arbitrator. This was about the end of August 1925. No award, however, was given by the arbitrators, and it is the complaint of Mr. Dina Nath that Mr. Janki Nath, at the instance of the plaintiffs, delayed the matter. We are not for the present concerned with this point. Ultimately, on 14th October 1925, Janki Nath informed the plaintiffs that owing to pressure of work and owing to his having lost his son he was not in a position to continue to be an arbitrator. The next day, the 15th October 1925, Janki Nath gave an intimation of his inability to proceed with the arbitration to Mr. Dina Nath. Thereupon Mr. Dina Nath wrote on 19th October 1925 to the plaintiffs, saying that he was going to decide the matter in difference between the parties as the sole arbitrator, and that he had fixed 30th October, Friday, 3 p. m., for hearing the case of the parties: see p. 101 of the record. The plaintiffs replied: see p. 102, on 25th October 1925 that Mr. Dina Nath had no jurisdiction to act as the sole arbitrator, and the plaintiffs were going to nominate another arbitrator, if Mr. Dina Nath gave up his attitude, which, as we have already stated, was that he was going to be the sole arbitrator in the matter. Mr. Dina Nath replied on 27th October 1925: see p. 103, that he re-affirmed his letter of 19th October 1925: see p. 101, and he asked the plaintiffs to appear before him. In this letter Mr. Dina Nath also stated that the plaintiffs could represent their case before him either themselves or through their "arbitrator." It is difficult to see exactly what Mr Dina Nath meant by asking the plaintiffs to be represented by their arbitrator. We, however, take it that Mr. Dina Nath declined to wait till the plaintiffs had appointed an arbitrator to act with him and not as a mere agent on the plaintiff's behalf. On 30th October 1925, in spite of receiving a telegram from the plaintiffs protesting against his acting as the sole arbitrator, Mr. Dina Nath wrote out a document which has been described as his award and which will be found printed at p. 105. By this award he said:

"I, therefore, award that the buyers are liable for payment of the invoice value of the three bales, of all charges incurred on them, interest and godown rent as usual to the date of the payment."

After having said that, Mr. Dina Nath proceeded to give what may be said a piece of advice to the defendants. It

was to the effect that the defendants should serve on the plaintiffs a ten days notice to enable them to take up the goods against payment of all dues and in default of the plaintiffs the defendants were again to give the ten days notice of sale and then they (the defendants) were to sell the goods. Mr. Dina Nath did not indicate that the matter was again to come up before him at a subsequent stage, and that he was ready to make what may be called a final award by stating how much the plaintiffs were to pay to the defendants or vice versa.

The defendants proceeded to act as directed by Mr. Dina Nath, and ultimately gave a notice of sale of the goods. The 10th January 1926 was fixed for sale, and on 9th January 1926 the suit, out of which this appeal arises, was instituted by the plaintiffs. The plaintiffs took various objections to the award of 30th October 1925 and prayed

"that a decree setting aside the award of Lala Dina Nath bearing date 30th October 1925 with costs of the suit be passed. . , . ."

The suit has failed in the Court below, on two grounds, namely it was premature, because the award of 30th October 1925 was not a final award, and secondly, Mr. Dina Nath, in the circumstances, was entitled to act as the sole arbitrator.

We have to see whether these two grounds for dismissal of the suit were correct. Coming to the first point, it appears to us that Mr. Dina Nath left nothing in his document which he himself called an award to indicate his own mind. He did not say that he would reconsider the matter again when his directions, which he was giving (which are more correctly, items of advice given to the defendants) would be carried out. We are told that as a matter of fact some time in April Mr. Dina Nath had before him the result of the sale and made a final award directing the plaintiffs to pay a sum of Rs. 2,000 odd to the defendants. That final award has not been printed. We have also been told that after the learned Subordinate Judge had dismissed the plaintiffs' suit, the final award was put before the District Judge and a decree was made in terms of the award.

The Court below was of opinion that the award, which was impeached by the plaintiffs, was nothing substantial and could not be called an award, and therefore the suit was premature. We are of opinion that this view is not sound. As already stated Mr. Dina Nath gave no indication in his "award" that it was only a preliminary stage to the final decision to be given by him. On the other hand, he framed two issues and gave decisions on them. It is true that he did not state that so many rupees were to be paid by one party to the other, but he had given sufficient indication as to how the liabilities of the parties were to be assessed. The letters at pp. 75 and 80 indicate the matters, the defendants wanted to be settled by arbitration, and this Dina Nath settled. In the circumstances we think that the plaintiffs were justified in instituting the suit, and the subsequent conduct of Mr. Dina Nath cannot vitiate the suit already instituted.

As regards the contention that the decree of the learned District Judge would operate as res judicata, it seems to us that, if the very basis of Mr. Dina Nath's award be taken away, the whole structure (namely the subsequent award) would also fall. It has been held that where a preliminary decree is appealed from and the final decree is not appealed from, the setting aside by the appellate Court of the preliminary decree, also demolishes the final decree, although there was no separate appeal against that decree. This was held under the old Civil Procedure Code (1832) and the new Civil Procedure Code has made it incumbent on a party to appeal against the preliminary decree if he wants to appeal at all.

Now we have to take up the second point, and this is whether Mr. Dina Nath was entitled to act as the sole arbitrator. The matter would not have been very easy to determine, but we have fortunately a guide in a decision of their Lordships of the Privy Council in *E. D. Sassoon & Co.* v. *Ram Dutt Ram Kissen Das* (1). Para. 15 of the contract (to be found at p. 30 (of 50 *Cal.*) reads as follows:

"It is further agreed that if within 20 clear days . . . . . after being requested by letter addressed to his or their usual place of business either party fail to appoint an arbitrator or

(1) A. I. R. 1922 P. C. 374=50 Cal. 1=49 I.A. 366 (P.C.).

surveyor ready and willing to act the decision of the arbitrator or surveyor appointed by the other party shall be in like manner binding on both parties. . . . ."

This rule, as it stands, contemplates one appointment and one appointment alone, that is to say, if both the parties have once, each, appointed one arbitrator, the rule does not take into consideration what was going to happen if one of the arbitrators died or declined to proceed with the arbitration. Both the arbitrators may have been when they were appointed "ready and willing to act" within the meaning of the contract. No party could possibly know that the arbitrator appointed by him might, later on, change his mind and decline to proceed with the arbitration. The contract cannot be read as meaning that the arbitrator appointed must be one who should not, under any circumstances decline to act later on. Reading a similar contract as to arbitration, their Lordships of the Privy Council said that in their opinion the clause covered the case of appointment of a fresh arbitrator when the arbitrator already appointed had declined to act. The language of the two arbitration clauses is not identical, but the effect of them is similar. Their Lordships say on p. 10 of the report.

"The effect of these provisions is that on a failure by either party to appoint an arbitrator which includes (in their Lordships' opinion) a failure to appoint a substituted arbitrator on the death or retirement of an arbitrator originally appointed, the appointment is to be made. . . . . ."

The clause, therefore, which deals with the initial appointment of an arbitrator may clearly be said as also dealing with the appointment of a fresh arbitrator on the retirement of a former one.

Reading, therefore, the arbitration clause at p. 30 in the light of the decision of their Lordships of the Privy Council, we are of opinion that the plaintiffs should have been given a chance to appoint a fresh arbitrator in place of Mr. Janki Nath. They were declined an opportunity to make their appointment, although under Cl. 15 they had 20 days within which to do it. It is not proper that S. 9, Arbitration Act (Act 9 of 1889) should be imported into the contract which was entered into by the parties themselves. The words "unless a different intention is expressed therein" in S. 9 clearly support this view. The plaintiffs, therefore, had 20 days time within which to appoint an arbitrator. Mr. Janki Nath having declined to act on 14th October 1925 at the earliest, the decision was given by Mr. Dina Nath within the 20 days time within which the plaintiffs could make a fresh appointment. We are therefore of opinion that Mr. Dina Nath had not the authority to make an award.

The result is that the appeal should succeed. As regards the costs, we are of opinion that the proceedings that have been printed indicate clearly that the plaintiffs have been guilty of delay. If they had proceeded diligently the matter in dispute would have been decided at a much earlier date. The object of the insertion of the arbitration clause in the contract was to avoid delay and expense, and the plaintiffs must be held guilty if they caused any delay. In the circumstances, we are of opinion that the plaintiffs should be awarded no costs, although they have succeeded on the technical point. In the result, we allow the appeal and decree the plaintiffs' suit in the terms prayed. Having regard to the circumstances of the case, the parties will pay their own costs in both the Courts.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 587

BOYS AND YOUNG, JJ.

Ram Dass and *another* — Plaintiffs—Appellants.

v.

Secretary of State and *another*— Defendants—Respondents.

Second Appeal No. 1753 of 1926, Decided on 23rd January 1930, from decree of Dist. Judge, Meerut, D/- 30th June 1926.

(a) Cantonment land—Ownership of cantonment land vests in Secretary of State subsequent to establishment of cantonment —Presumption as to compensation.

Where subsequent to the establishment of a cantonment the ownership of the land within the cantonment becomes vested in the Secretary of State and the prior owners of the land were compensated for the loss of such rights as they may have actually suffered, it is a fair presumption that the amount of compensation would vary according to whether the prior owner was deprived wholly of ownership and possession or whether he was deprived only of ownership and allowed to remain in possession as licensee without the payment of any rent. [P 589 C 1]

(b) **Evidence Act, S. 45 — "Expert" — Meaning.**

In law and as applied to a witness, the term "expert" has a special significance and no witness is permitted to express his opinion unless he is an "expert" within the terms of S. 45 or in special cases is permitted to express such opinion by some special law.

[P 591 C 1]

(c) **Cantonment land—Subsequent to establishment of cantonment possession of one enclosed plot of land with original owner described as "malik" in officia record who subsequently built on portion of land with permission of cantonment authorities and let out buildings for shops —Permission to build is not license with regard to site for shops only but original owner continued to be licensee of whole plot of land.**

Within the limits of the bazaar area of the Meerut Cantonment there was a plot of land of which although the ownership was transferred to the Secretary of State on establishment of the cantonment, possession continued to be of the original owner. Along portion of its sides were a number of shops which with the boundary walls made the area practically into an enclosure with open gate-ways. In the official records the original owner's possession was shown as that of "malik." The original owners let out the shops to tenants and collected rents for the same. Before these shops and enclosure were built, original owners obtained the permission of the cantonment authorities to build the shops as required.

Held: that the fact of the grant of the permission did not mean the grant of the license of the site only and the original owner had wide extent of rights in the whole enclosure and of which he was a licensee.

[P 591 C 1]

K. N. Katju—for Appellants.

U. S. Bajpai—for Respondents.

Boys, J.—This case is of considerable importance both to Government and owners or licensees of property in cantonment areas, as in many cases concerning rights in property in cantonment or civil station areas the documentary evidence as to the nature of the rights of the parties concerned is very scanty. Within the limits of the present bazaar area of Meerut Cantonment, there is a plot of land which has been known since 1870 as "Ehata Mandi." Along portions of its sides are a number of shops which together with some boundary walls make the area practically into an enclosure with open gate-ways. The plaintiffs are admittedly the owners of the shops and receive rents from their tenants. The cantonment authorities, in the two or three years immediately preceding the institution of this suit, had commenced letting out portions of the open space in the centre of the enclosure to various persons. The leases for these areas they auctioned and in view of the circumscribed nature of the spaces in dispute, it was to be expected, as proved to be the case, that the only persons willing to rent the land were apparently those who were already tenants of the shops. It is difficult indeed to see, in view of the existence of the shops, how anybody else could have made use of any portion of the area otherwise than by merely passing to and fro without prejudice to the rights of the tenants of the shops.

The plaintiffs apparently at first endeavoured to maintain their rights by negotiation with the cantonment authorities, for on 25th May 1923 they wrote a letter to the cantonment authorities claiming rights for themselves in the whole enclosure, including the area not built over and inviting the cantonment authorities to inspect their records, in which event, as the plaintiffs suggested, the justice of the plaintiffs' claim would become apparent. We are not informed what answer the cantonment authorities sent, if any. But the fact that this suit has been filed indicates sufficiently clearly that no result was arrived at by negotiation.

In their plaint, the plaintiffs claimed to be the proprietors or owners of the whole Ehata. Later, they conceded that when the cantonment was established Government acquired ownership in the whole of the land within the cantonment area, and the plaintiffs do not now claim to be more than licensees of the whole area. The case for the Secretary of State, who is represented by the cantonment authorities, is that the plaintiffs are licensees of so much of the area as is covered by their shops and that they have no right of any sort or description over land which is not actually covered by the shops. It is claimed for the Secretary of State that the whole area is owned by Government, that no license was ever granted to the plaintiffs in respect of the open area, that they were permitted to build the existing shops and thereby became licensees as to so much of the area only as is actually covered by the shops. We may say parenthetically that in any event, the claim of the cantonment

authorities as stated, could not be supported. The plaintiffs must at least have the necessary easements of access, light and air in respect of the open area. But in view of the opinion at which we have arrived, this need not be considered further.

As we have said, the evidence as to the nature of the rights in this area is scanty, but the following facts and law are now not in dispute. The cantonment was established in about 1810 or 1811. The whole ownership of the land within the cantonment area then became vested in the Secretary of State. The prior owners of the land were compensated for the loss of such rights as they may actually have suffered. It is not so expressly stated, but it is a fair presumption that the amount of the compensation would vary according to whether the prior owner was deprived wholly of ownership and possession or whether he was deprived only of ownership and given a lease or whether he was deprived only of ownership and allowed to remain in possesssion as licensee without the payment of any rent. It is not till 1860 that we have the first documentary evidence in the case. There is a map of that date showing the area in question as one single enclosure without any divisions or further indications of the nature of the enclosure. In 1870 an application for mutation was filed by Ram Prasad, grandfather of the present plaintiffs, in which he stated that, as he was getting old, the name of his son Sheo Paltan, might be substituted for his own name as "malik" in regard to all the shops and houses detailed in the following schedule within the cantonments of Meerut whether ancestral or self-acquired property. In the schedule, he described the property at present in suit as "baghicha No. 3203" and to that added the note that in the baghicha shops were in process of being built. Next, it is not disputed that the present plaintiffs Ram Das and Ram Saran Das are the sons of Sheo Paltan, grandsons of Ram Prasad, the applicant of 1870. It is not disputed that the shops were built with the permission of the cantonment authorities, nor that up to two or three years before the suit the plaintiffs and their predecessors-in-title were leasing the shops to tenants and receiving the rents therefor, there being no suggestion that any separate rent was taken from the tenants for the use which of necessity they had to make of the open space or part thereof in front of their shops.

The evidence, though scanty, gives rise in our opinion to no real difficulty once the case is approached from the proper standpoint. The learned Judge of the lower appellate Court declined to look at the history of this baghicha or ehata prior to the year 1870. He then dealt with the case as follows: All the land within the boundaries is owned by the Government. In 1870 the cantonment authorities gave permission to the predecesssors of the plaintiffs to build shops on a part of this area. That permission the lower appellate Court treats as the grant of a license to use the sites on which the shops were built, but in its view that did not confer any right of any sort on the plaintiffs over the open area of the enclosure in front of the shops.

If we were of opinion that it was not necessary to consider the history of the ehata prior to 1870 we should still have had to differ from the learned Judge's view that the permission to build the shops conferred no right of any sort or description on the plaintiff with regard to the open space in front of the shops. It is manifest, that the permission to build shops must have carried with it the right to the natural easements in respect of the adjoining area, rights of access, light and air. It would then have been necessary to determine whether anything that the cantonment authorities were now doing in regard to the open space interfered improperly with such rights. As however we view the case, it is not necessary to consider the plaintiffs' rights to such easements as against the cantonment authority or, at present, the tenants' rights as against the plaintiffs. Admittedly the plaintiffs were in possession of these shops and nobody other than the plaintiffs or their tenants was exercising up to two or three years ago any other rights, at any rate any other rights than those of passage over the open space. It was therefore most material to consider the original rights of the plaintiffs' predecessors-in-title in order to determine how much of those

rights they lost and how much remained to them.

It would have been permissible for us to send down an issue for determination as to the nature of the rights of the plaintiffs or anybody else over this open area prior to 1870. It is also permissible for us to arrive at a determination of this question on the evidence on the record, if we do not consider it necessary to send down an issue. We invited both sides to indicate to us whether there is any reasonable probability of any further evidence being available. Neither side could suggest that there is. If there was such reasonable probability, we should have had to consider whether either of the parties who wanted to produce such further evidence to justify the failure to produce it at the trial. Neither side was able to suggest to us that there was likely to be any further evidence forthcoming, and the evidence such as it is, being very simple in its nature, we thought it advisable, in order to terminate the litigation as speedily as possible, to determine the necessary questions for ourselves and gave both counsel time to consider the evidence produced.

The map of 1860 is not helpful to either side except so far as it helps the plaintiffs, in that it shows that the area was even at that date one single unit, apparently a compound, baghicha or enclosure of some sort. But the document of 1870, the application for mutation, is most illuminating. In that document Ram Prasad describes this whole baghicha, No. 3203, as belonging in respect of one-third to other persons. It is further not disputed that such rights as the other persons had in the two-thirds, the present plaintiffs or their predecessors bought from the owners of those rights. We may therefore treat the application of Ram Prasad of 1870 as the document by which rights may be tested in regard to the whole area and the whole of the rights in such area. Now the present plaintiffs are admittedly the grandsons of Ram Prasad and have all along been treated by everybody as his successors to such rights as he had and it is therefore a matter of fair presumption that that application of Ram Prasad was well founded and was allowed. In that application he referred to the existing entry in the records as being an entry of himself as "malik." It is admitted that after the cantonment area was formed, Ram Prasad could not be "malik," but it shows at any rate that according to him nobody had any rights to the ehata but himself and the other persons from whom he or his decendants later purchased the remaining two-thirds. It further shows clearly that the area in question was a garden or orchard. Further, the note attached to the item "bagicha" that shops were being built, shows how his compound came to be known as "Ehata Mandi." Ram Prasad's intention, and an intention carried out with the approval of the cantonment authorities, was to establish a grain market in this compound and such a grain market was in fact established and continued for many years. How could it possibly be then suggested even that Ram Prasad had no interest whatever in the open area of the compound. In our view, it is most manifest that while Ram Prasad's predecessors-in-title must be held to have lost their rights of ownership of the land in 1810, they remained licensees of the whole area with every right, consistent with any other law in force, except that of ownership. They were, then, in 1870 licensees of the whole area. It was at the beginning of 1870 in use as an orchard.

The authority by reason of which they were able to convert it into a grain market was in no sense the grant of a license, as they were already licensees of the whole area. But before they could build houses on that area or any portion of it the permission of the cantonment authorities was required and that permission, it is not denied, was given. There is nothing to show that from that period onwards, the position was in any way altered. The plaintiffs are licensees of the whole area. They have built houses on that area or a portion of it, with the permission of the cantonment authorities. There is no question of any grant of a license of the site of the houses in 1870. The application for mutation itself manifestly suggests that not only was Ram Prasad with his co-sharers, in possession of the whole area in 1870, but that he must have been in possession for at least some appreciable

time previously, for it is his own name which he desires to have removed as a result of that application. We have already noted that he describes himself as a "malik." He no doubt did not appreciate that rights of ownership no longer existed in his predecessors-in-title after 1810. But the fact that he was described in the official records as "malik" of the whole area itself indicates the wide extent of the rights which he still had got in the whole area and he could not possibly have been anything else than a licensee. The conclusions that we draw from this application are supported by the oral evidence of the plaintiffs and there is nothing to rebut those conclusions.

Holding as we do, that on the evidence on the record this is the manifest position of the plaintiffs, the suit must succeed.

We should not conclude this judgment without a reference to the evidence of Col. Knowles, Deputy Inspector and Adviser of Lands and Cantonment, in the Northern Command. He has apparently had very considerable experience for very many years and for many different provinces in cantonment matters and more particularly in matters concerning land and buildings in cantonments. Col. Knowles has stated in evidence that :

"The Government of India thinks that I am an expert in the matter of cantonment lands."

The lower appellate Court has been much impressed by Col. Knowles's qualifications as an "expert" and has decided the case almost wholly on the basis of Col. Knowles's dicta as to what the law and the situation in regard to this particular property is. We do not for a moment doubt the qualifications of Col. Knowles to advise Government in regard to cantonment lands. He has no doubt had very valuable experience and the Government of India may well be justified in regarding him as its expert outside the Courts. But in law and as applied to a witness, the term "expert" has a special significance and no witness is permitted to express his opinion unless he is an "expert" within the terms of S. 45, Evidence Act, or in special cases is permitted to express such opinion by some special law. Col. Knowles's evidence in regard to this case extends over no less than 18 manuscript foolscap pages and it is hardly an exaggeration to say that hardly one line in ten of it is admissible in evidence from the mouth of a witness in this case. We have no doubt that for purposes of advising counsel on the lines to pursue, Col. Knowles's views would be of great assistance, but as a witness, his statement carries the case nowhere, and we are constrained to note that as regards the merits of the particular case, he has apparently made no endeavour to search for any particular records. He suggests that there are records which possibly might be relevant, but he has admittedly made no attempt to search for and examine them if found.

The result is that we set aside the decree of the lower appellate Court and restore the decree of the trial Court with certain modifications. The trial Court declared the plaintiffs' ownership. In that it was in error. It also declared in unqualified terms the perpetual injunction for which the plaintiffs asked. That again must be modified. It further gave the plaintiffs a decree for damages. The damages were assessed at the amount of the rent which the cantonment authorities had admittedly levied from the plaintiffs' tenants. But in view of the plaintiffs' statement that they are still obtaining the same rent from their tenants that they obtained before the cantonment authorities took upon themselves to lease out some of the open land it is impossible to hold that he has suffered any damages on this basis from the action of the defendants. He will obtain his ordinary costs in the suit.

In the plaint, a further claim was made to a certain culvert or bridge over a drain, and a declaration was asked for that the bridge was the private property of the plaintiffs. There is nothing to indicate that the plaintiffs have any rights of ownership over the bridge at all. There is nothing to show that they have done more than build the bridge or culvert over a drain, which drain the plaintiffs cannot show to be within the property of which they are licensees. The mere building of the bridge can give them no rights of ownership in it. It is, however, not necessary, in view of our decision as to the open area, to deal with this matter any further. We have held the plaintiffs to be licensees of the whole area and we may, we feel with

confidence, trust that the cantonment authorities will view the matter of the bridge or culvert from a reasonable standpoint.

We feel that we may add one further suggestion. The cantonment authorities have admittedly collected the sum of Rs. 839 from the tenants of these shops in respect of the land leased in the open area. In view of our finding that the cantonment authorities had no right to lease this land to the tenants in question, we consider that in our opinion Government might well consider the propriety of returning the rent collected without the necessity of further litigation.

The result is that, setting aside the decrees of both the Courts below, we grant the plaintiffs a decree declaring that they are licensees of the whole area known as the "Ehata Mandi," and further a perpetual injunction restraining the cantonment authorities from interfering with their rights as licensees otherwise than in accordance with law. Other reliefs in so far as they are not granted by the above decree are dismissed. The plaintiffs are not however responsible for this litigation and as they have been in substance successful they will have their whole costs in all Courts.

V.B./R.K. *Decree set aside.*

A. I. R. 1930 Allahabad 592

MUKERJI AND BENNET, JJ.

Mohammad Khan—Defendant — Appellant.

v.

Mt. Nasiban and *others*—Plaintiffs.—Respondents.

Letters Patent Appeal No. 188 of 1928, Decided on 28th March 1930, against judgment of Sen, J., D/- 6th November 1928.

Mahomedan law—Succession—Execution of promissory note by son to pay debts of deceased father, in his own capacity and not as heir to estate — Decree obtained on such pro-note—Decree cannot affect shares of sharers and heirs of father in assets left by father.

Where a son of a Mahomedan executes a promissory note to pay the debts of his father subsisting on the date of his death, doing it in his own capacity and not in the capacity of the heir to the estate, the decree on the promissory note cannot affect the shares of other sharers or heirs in the property left by the father : 1 *All.* 57 (*F. B.*) and 7 *All.* 822, *Dist.*; 34 *All.* 296, *Ref.* [P 592 C 2]

S. S. Shastry—for Appellant.

Mukhtar Ahmad—for Respondents.

Mukerji, J.—We do not think that there is any force in this appeal. The facts are given in extenso in the judgment of the learned single Judge of this Court and briefly may be stated as follows : A Mahomedan Wahid died leaving him surviving one son and five daughters. He was in debt when he died. The son gave a promissory note in payment of one of the debts. The creditor on foot of the promissory note brought a suit against the son alone and having obtained a decree brought a house belonging to Wahid to sale. The five daughters of Wahid now ask for a declaration that they have got their share (five-sevenths) in the property. This decree they have got and the decree is unhampered by any direction that the plaintiffs must pay a proportionate share of the debt due on the promissory note, before they can obtain the declaration.

In this appeal the auction-purchaser of the house contends that the daughters of Wahid cannot get their share without contributing towards the debt of their father. The simple answer to this question is that there was no debt of the father to pay which the property was sold. The son of Wahid took upon himself the responsibility of executing a promissory note. It was on this promissory note that a decree was made and the property was sold to pay a personal debt of the son. It is true that the son by executing the promissory note paid the father's debt, but he did that in his own capacity and not in the capacity of the heir to the estate of his father. The two cases cited by the learned counsel for the appellant, *Hamir Singh* v. *Mt. Zakia* (1) and *Jafri Begam* v. *Amir Mohammad Khan* (2), are distinguishable. We may cite a more recent case than those two decided by their Lordships of the Privy Council : *Balwant Singh* v. *Maharaj Singh* (3). In this case Sheoraj Singh and Maharaj Singh were two brothers. On the death of their father Sheoraj Singh executed a mortgage of Rs. 3,00,000 in favour of the Bank of Upper India and executed a mortgage

(1) [1875] 1 All. 57 (F.B.).
(2) [1885] 7 All. 822=(1885) A. W. N. 248 (F.B.).
(3) [1912] 34 All. 296=14 I.C. 629=39 I.A. 109 (P.C.).

purporting to act for himself. When a suit was brought on foot of the mortgage Maharaj Singh was found to be not liable. Then it was contended that Sheoraj Singh had acted on behalf of the family and had paid up ancestral debts, and on that ground the brother Maharaj Singh and his share in the property should be held liable. Their Lordships of the Privy Council repudiated the contention.

We think that the judgment of the learned single Judge of this Court is right and no question of equity arises in the appellant's favour in the circumstances of the case. The appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 593

MUKERJI AND BENNET, JJ.

Bal Krishna Sharma — Plaintiff—Appellant.

v.

Paij Singh and *another*—Defendants—Respondents.

Second Appeal No. 668 of 1928, Decided on 31st January 1930 from a decree of Sub-Judge, Jhansi, D/- 19th January 1928.

(a) Transfer of Property Act, S. 6 (d)—Hindu transferring to *S* for her lifetime certain fields in lieu of maintenance—Deed not providing for any restraint on alienation—Usufructuary mortgage by *S* of the fields is valid.

A Hindu transferred to *S*, his stepmother, for her lifetime certain fields in lieu of her maintenance. The deed of agreement did not provide for any restraint on alienation. *S* executed a deed of usufructuary mortgage of the fields.

Held: that the fact that the transferrer did not put restrictions though it was open to him to do so led to the conclusion that the deed did not restrict the right of *S* to alienate the fields for the period of limited interest in them which was granted to her and so the mortgage must be held to be valid: 12 *C. L. J.* 145 and *A. I. R.* 1924 *Mad.* 22 (*F. B.*), *Rel. on.* [P 594 C 1]

(b) Hindu Widow's Remarriage Act (15 of 1856), S. 2—Hindu widow allowed to remarry by custom—Her remarriage is valid independently of Act and so there is no forfeiture of her rights to maintenance if she remarries.

If a Hindu widow is allowed to remarry by the custom of her caste, there is no need for recourse to the Act for the validity of her marriage and therefore there is no forfeiture under that Act of her right to maintenance if she remarries. On the other hand, if her remarriage is not permitted by the custom of her caste and is only valid under the Act, there would be a forfeiture of her right to maintenance: 31 *All.* 161, *Rel. on.* [P 594 C 2]

(c) Transfer of Property Act, S. 6 (e)—Scope.

The right to sue for mesne profits is not transferable: 38 *Mad.* 309; *A. I. R.* 1924 *Pat.* 551 and 2 *C. W. N.* 43, *Foll.* [P 595 C 1]

N. C. Vaish—for Appellant.

K. N. Laghate—for Respondents.

Judgment.—This is a second appeal by the plaintiff whose suit has been dismissed in full by both the lower Courts. The family tree is as follows:

Har Lal.

Rajrani	Mt. Sawai, Deft. 2
Paij Sing, Deft. 1	Asa Ram deceased.

Har Lal died first and after him his son Asaram died leaving Paij Singh as the sole survivor of the family. On 7th December 1921 Paij Singh, defendant 1, executed a deed of agreement by which he transferred for her lifetime and for her mintenance two plots to Mt. Sawai, his stepmother, defendant 2. She brought a suit, No. 529 of 1924, for possession and obtained a decree on 18th May 1925, and her name was entered, but she did not obtain possession. Subsequently she married, as is admitted in the written statement, a man called Badle in Gwalior, and after that, on 10th February 1926, she executed a deed of usufructuary mortgage of the two plots in favour of the plaintiff in this suit. On the same date she also executed a sale deed of her right to damages (that is mesne profits) for the years 1333 Fasli and 1334 Fasli in favour of the plaintiff. The consideration for the mortgage deed was Rs. 60 and the term was twenty years. We will first deal with the question of what rights arose under the usufructuary mortgage. It has been argued before us that the intention of the deed of agreement was to create a personal estate for life only in Mt. Sawai, and accordingly that she had no right to transfer her interest in that estate to the plaintiff, because S. 6 (d), T. P. Act, states that

"an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him."

Various rulings have been quoted before us, and we leave out of account those rulings which refer to attachment of property under decree under

S. 266, former Civil P. C. or S. 60, present Civil P. C., because the case of a voluntary transfer is not governed by the same principle as those sections. We may, however, note that in *Tara Sundari Debi* v. *Saroda Charan Banerji* (1) there is a very full discussion of the principles governing both classes of transfer. At p. 154 the following principle has been laid down with which we are agreed:

"From a review of the authorities to which reference has been made it is clear that, when a grant of land has been made and accepted in lieu of a right to maintenance and there is no restraint upon alienation, there is no divergence of judicial opinion that the interest of the grantee is liable to be seized and sold in execution of a personal decree."

The principles of voluntary alienation by a person entitled to maintenance have been well laid down by the Chief Justice in *Subraya Sampigethaya* v. *Krishna Baipadithaya* (2) at p. 669 (of 46 *Mad.*) as follows:

"I think that the view expressed above that this question must turn on the intention of the parties reconciles most, if not all, of the apparently conflicting decisions on this question."

In that particular case the ruling states that no general law was laid down, but that the case must be governed by its particular set of circumstances. Now in the present case the deed of agreement does not provide for any restriction on alienation. It was open to Paij Singh to enter in his deed restrictions on alienation. The fact that he did not do so leads us to the conclusion that the deed does not restrict the right of Mt. Sawai to alienate this property for the period of the limited interest in it which was granted to her. Accordingly in the present case and under the particular facts of this case we consider that Mt. Sawai was empowered to transfer her rights in these two numbers to the plaintiff by the usufructuary mortgage in question.

The next question which was argued is that there is a forfeiture under the Hindu Widow Remarriage Act, Act 15, 1856, S. 2, and therefore the plaintiff cannot receive any rights by his usufructuary mortgage which was executed after the remarriage of Mt. Sawai. The law on this subject has been laid down for this High Court in *Gajadhar* v. *Kausilla* (3) which states at p. 165:

"According to these rulings not only is Act 15, 1856, inapplicable in the case of a widow who is permitted by the custom of her caste to remarry, but she does not forfeit the property inherited by her from her husband."

That is, if a Hindu widow is allowed to remarry by the custom of her caste, there is no need for recourse to Act 15, 1856, for the validity of her marriage, and therefore there is no forfeiture under that Act of her right to maintenance. On the other hand, if her remarriage is not permitted by the custom of her caste and is only valid under Act 15 of 1856, there would be a forfeiture of her right to maintenance under S. 2 of that Act. Now in the present case the plaint naturally did not set forth the fact of remarriage but the written statement in para. 2 recited that

"before the execution of the mortgage deed dated 10th February 1926, Mt. Sawai took Badle as her husband and began to live with him in the State. Under the circumstances, the agreement dated 7th December 1921, and the mortgage deed and the sale deed dated 10th February 1906, are according to Hindu law and statutory enactments null and void and inoperative as against the defendant."

We do not find here any pleading that because the remarriage of Mt. Sawai was not allowed by the caste of Ahirs to which she belongs, therefore there was a forfeiture of her right to maintenance. Accordingly as it was never pleaded that remarriage was not permitted by the caste of Ahirs, no issue was framed on that point. It is, in our opinion, too late for the respondent to come forward now and allege that under the custom of Ahirs there is no right of widow remarriage. Further, we consider that the recital in para. 8 of the written statement that Mt. Sawai took Badle as her husband is an admission of the validity of such a widow remarriage among Ahirs. We consider, therefore, that the plaintiff is entitled to a decree for possession of these two plots as usufructuary mortgagee and we grant him a decree accordingly.

In regard to the claim for Rs. 50 as mesne profits for the year 1333 Fasli during which the plaint in para 3 admits that defendant 1 was in actual possession, the point taken is that the

(1) [1910] 12 C. L. J. 145=7 I. C. 80.
(2) A. I. R. 1924 Mad. 22 = 46 Mad. 659 (F. B.).
(3) [1909] 31 All. 161=1 I. C. 761=6 A. L. J. 107.

right to sue for mesne profits cannot be transferred because it is a mere right to sue under Cl. (e), S. 6, T. P. Act. This has been held by three High Courts in *K. Seetamma* v. *P. Venkataramanayya* (4), *Jai Narain Pandey* v. *Kishun Dutta Misra* (5) and in *Durga Chandra Roy* v. *Koilash Chandra* (6). We follow these rulings and hold that the right to sue for mesne profits is not transferable. There is also a claim for Rs. 50 for mesne profits for 1334 Fasli. The usufructuary mortgage in favour of the plaintiff was executed on 10th February 1926, and 1334 Fasli began on 1st July 1926. The plaint was filed on 22nd January 1927. The claim for mesne profits for 1334 Fasli is for a period after the plaintiff had become entitled to possession of the plots and consequently the claim is valid. There is no finding by the lower Courts as to the amount of mesne profits. But the sale-deed for 1333 Fasli shows that Rs. 50 was paid by the plaintiff for mesne profits for that year. We consider that Rs. 50 is a correct figure for mesne profits for1334 Fasli. In the result we allow this appeal to the extent that we grant the plaintiff a decree for possession as usufructuary mortgagee of the two numbers in suit and Rs. 50 (fifty) mesne profits for 1334 Fasli with proportionate costs in al Courts. We dismiss the claim for mesne profits for 1333 Fasli with proportionate costs.

P.N./R.K. *Order accordingly.*

(4) [1913] 38 Mad. 308=25 M. L. J. 410=21 I. C. 337=(1913) M. W. N. 918.
(5) A. I. R. 1924 Pat. 551=3 Pat. 575.
(6) [1898] 2 C. W. N. 43.

A. I. R. 1930 Allahabad 595

DALAL, J.

Banarsi Das—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 40 of 1930, Decided on 27th March 1930, against order of Addl. Sess. Judge, Pilibhit, D/- 6th November 1929.

United Provinces Prevention of Adulteration Act (6 of 1912), S. 4—Scope.

Possession of adulterated food or drug is not made a crime under the Act. [P 596 C 1]

G. S. Pathak—for Applicant.

M. Waliullah—for the Crown.

Judgment. — This application must succeed on both the grounds raised on behalf of the applicant. The applicant has been convicted of an offence under S. 4, United Provinces Prevention of Adulteration Act 6 of 1912 (Local). There is a mandatory injunction in S. 15 (2) of the Act that every summons issued in a prosecution under S. 4 and S. 10 shall specify particulars of the offence charged and the name of the prosecutor besides other information. In the summons no particulars were given; nor was the name of the prosecutor given. The particulars were essential in this case because even now I have not understood the exact reason or rather the exact charge on which the applicant has been convicted. If the particulars had been stated in the charge a Court of revision would have had an opportunity to test the particulars and discover whether they amounted to an offence under S. 4. What the learned Judge says I am afraid I am unable to understand. What happened in this case was that, according to the Magistrate, 21 canisters of ghee were found in a store-room of the applicant who sells ghee ordinarily as his business. The trial has been so perfunctory that I cannot discover whether every one of the 21 canisters contained adulterated ghee or only one canister. An observation of the Magistrate at the end of the judgment that ghee which was not found adulterated had been detained for a long time makes me believe that the entire quantity was not adulterated. It is very unfortunate that in summary trials no proper care is taken to record evidence and facts in a way to give an accurate idea of facts to the Court of revision. What the learned Judge says is this :

"It is clear from the evidence as found by the Magistrate that the adulterated ghee was meant for sale and anybody who sells such ghee does commit an offence under S. 4."

The section, however, makes no mention of storage of adulterated ghee. It will not be profitable to spend any time in solving the puzzle of the language of the Sessions Judge. The Magistrate makes no positive statement at all as to what was the crime that the applicant committed. He has entered into generalities as to the adulteration business going on in a very large number of cities and his belief is that the accused would not have tested the ghee before

offering it for sale. He also does not trouble himself to decide whether the storing of adulterated ghee is an offence, and in what words he would have framed the charge if it had been necessary to frame a charge in this particular case. The task of a Court of revision becomes very difficult when subordinate Courts refuse to disclose what in their opinion was the specific charge on which an applicant has been convicted. For this reason the omission to mention the charge in the summons was highly prejudicial to the applicant and the Sessions Judge could not have thought carefully of this matter when he made the observation that the applicant knew very well what the charge against him was and that the omission of particulars from the charge was merely an irregularity. When this Court after all its training fails to understand the charge the Sessions Judge's statement is incorrect that the applicant knew very well what the charge against him was. Possession of adulterated food or drugs is not made a crime under the Act. In the present case there was no sale, nor was the substance offered for sale or exposed for sale ; nor is it said that the applicant manufactured the articles himself for sale. If there had been any evidence that the applicant purchased pure ghee and adulterated it himself his act would have been covered by the words :

"manufactures for sale any article of food which is not of the nature, substance or quality which it purports to be."

The prosecution has been entirely misconceived. I set aside the conviction and sentence and order the fine, if any recovered from the applicant, to be refunded.

P.N./R.K. *Conviction set aside.*

A. I. R. 1930 Allahabad 596

BOYS, J.

Chhotay and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 977 of 1929, Decided on 14th April 1930, from an order of Addl. Sess. Judge, Etah, D/- 7th September 1929.

Penal Code, S. 99 — Right of private defence.

An amin assisted by a karinda, the karinda's master and accompanied by the police and some servants who were probably employed as lathials of the zamindar went to attach a crop. The party went in some force because they had information that the attachment would be resisted with violence and was in fact resisted with violence. The zamindar was struck to the ground and received several injuries. Thereupon and practically instantly, the zamindar's men rushed on his assailants and severely beat two, with some minor injuries to one or more. The two men severely beaten were the man whose crop was to be attached and his father, they being also the two who were said to have commenced the attack on the attaching party. Both these two severely injured men died.

Held : that the fact that the assailants did not actually succeed in assaulting anyone but the zamindar did not show anything by way of intention of assailants in the light of the fact that the counter-attack by the zamindar's men in defence of the zamindar was probably instantaneous and zamindar's men were entitled to plea of right of private defence. [P 597 C 1]

Saila Nath Mukerji and *Shakir Ali*—for Appellants.

Sankar Saran—for the Crown.

Judgment.—Six men appeal from a conviction under S. 304, I. P. C., and a sentence thereunder of three years' rigorous imprisonment. The facts briefly are that an amin assisted by a karinda, the karinda's master and accompanied by the police and some servants who were probably employed as lathials of the zamindar went to attach a crop. The party went in some force because they had information that the attachment would be resisted with violence and was in fact resisted with violence. The zamindar was struck to the ground and received several injuries. Thereupon, and I have no doubt practically instantly, the zamindar's men rushed on his assailants and severely beat two, with some minor injuries to one or more. The two men severely beaten were the man whose crop was to be attached and his father, they being also the two who are said to have commenced the attack on the attaching party. Both these two severely injured men have died, and the question is what is the right view to take of the responsibility of the present appellants. The Judge has held that they committed their acts on grave and sudden provocation. He

has refused them the benefit of a plea of the right of self defence because he says that there is nothing to show that the attacking party were going on to do anything further. With that view I do not think that I should agree. The whole of the circumstances would indicate that the fact that the assailants did not actually succeed in assaulting anyone but Azhar Husain, the zamindar, does not show anything in the light of the fact that the counter-attack by the zamindar's men in defence of the zamindar was probably instantaneous. I should, therefore, have been inclined to give the accused the full benefit of their plea but for the fact that they have undoubtedly exceeded their right in view of the number of injuries inflicted on Chhattar. But taking all the facts into consideration I do not think that a sentence of three years' rigorous imprisonment was called for. It is in my view always desirable to make every effort to discover who was responsible for the initiation of violence and to punish such person heavily while dealing more leniently with the man whose violence was provoked, even if he exceeded the limits of his rights. In this case I would have given a sentence of six months' rigorous imprisonment. The accused have already suffered that and a little more. I, therefore, while maintaining the conviction, reduce the sentence to the period already undergone. The six appellants will be forthwith released.

V.B./R.K. *Sentence reduced.*

A. I. R. 1930 Allahabad 597

NIAMATULLAH AND KISCH, JJ.

Zahurul Hasan and *others*—Objectors—Appellants.

v.

Badri Narain and *others* — Decree-holders—Respondents.

Execution Second Appeal No. 1211 of 1928, Decided on 10th April 1930, against decree of Dist. Judge, Mainpuri, D/- 5th April 1928.

(a) Civil P. C., O. 34, R. 5 — Final decree for sale on foot of mortgage obtained—Then mortgagor made wakf of mortgaged property directed to be sold—It is not necessary that beneficiaries under wakf should be made parties to application for execution—Civil P. C. S. 47.

Where after the mortgagee obtains a final decree for sale on foot of the mortgage, the mortgagor makes a wakf of his property without permission of the Court, the wakf cannot affect the right of the decree-holder to obtain sale of the mortgaged property under final decree and so it is not necessary that those who acquired a beneficial interest under the deed of wakf should be impleaded as parties to the application for execution of the decree.

[P 599 C 1]

(b) Limitation Act, S. 22 (1) and (2)—Transferee pendente lite acquiring interest coming in conflict with rights of decree-holder under decree cannot claim benefit of S. 22 (1)

A transferee pendente lite who acquires an interest which may come in conflict with the rights of the decree-holder under the decree cannot plead limitation on the ground that the suit or proceedings should be deemed to have been instituted or taken against him only on the date he was impleaded as a party.

[P 599 C 1, 2]

A. M. Khwaja—for Appellants.

Baleshwari Prasad—for Respondents.

Niamatullah, J.—This is an execution second appeal arising out of an objection made by the appellants to the rights of the decree-holders to have certain property sold in execution of their decree. The objection has been dismissed by both the Courts below; hence the present appeal by the objectors. One Nurul Hasan executed a mortgage deed on 15th October 1914 in favour of Ghasi Ram, Badri Narain and others, the decree-holder-respondents, for a certain sum of money, hypothecating a house. By a deed of even date his mother Muradbee executed a bond hypothecating another house belonging to herself as collateral security for due payment of the money secured by the deed executed by her son. The mortgagees obtained a preliminary decree on 9th November 1917 on foot of the mortgage deed and the security bond. Nurul Hasan and Muradbee were parties to the suit. On 24th June 1918 a final decree was passed against the aforesaid two persons. The decree-holders applied on 9th August 1918 for execution of the decree. In course of the execution proceedings which followed, a compromise was arrived at between the decree-holders on the one side and the judgment-debtors on the other. It was agreed that the decretal amount would be paid by certain instalments and that on failure to pay four of the instalments the whole of the decretal amount would become payable. It was also agreed that the house belonging to Muradbee, which had been hypothecated under the security bond should not be sold till the

house hypothecated in the mortgage deed executed by Nurul Hasan was sold and the sale proceeds proved to be insufficient for satisfaction of the decretal amount. On 17th April 1920 Muradbee executed a deed of wakf in respect of certain properties including the house which she had hypothecated under the security bond. Subsequently Muradbee died. By an order dated 18th July 1921 the decree-holders certified payment by the judgment-debtors of a sum of Rs. 600 towards part satisfaction of the decree.

On 29th February 1924 the decree-holders made an application for execution of their decree praying for sale of both the houses. In column 2 of the application, that is the one in which the names of the parties are to be set forth, she mentioned, inter alia, the names of Nurul Hasan, the son of Mt. Muradbee, and of certain other persons who are the heirs of Muradbee under the Mahomedan law. The names of the objectors who are beneficiaries under the deed of wakf were not mentioned in the array of parties. The application was dismissed for certain reasons which it is not necessary to state. On 12th October 1925 another application which gave similar particulars was filed. The array of the parties was the same as before. In 1926 the objectors instituted a regular suit for a declaration that the house which Muradbee had hypothecated as security was not liable to sale in execution of the decree obtained by the respondents. One of the defences was that the regular suit was barred by the provisions of S. 47, Civil P. C. This plea succeeded and the suit was dismissed on 22nd October 1926. An application was made by the appellants on 15th December 1926 to the Court executing the decree raising the same question as was raised in the regular suit. It was also pleaded that the application dated 12th October 1925 was barred by limitation. The decree-holders controverted these pleas and urged that an application of the kind made by the appellants was not maintainable under S. 47, Civil P. C. This latter objection has been overruled by the Courts below. No attempt has been made to revive it before us. We need not, therefore, take any further notice of it. The only two questions which were seriously considered by the Courts below and which have been argued before us are :

1. Whether the application dated 12th December 1925 is barred by limitation,
2. Whether the house to which the objection relates is not saleable in execution of the decree obtainced by the respondents.

As regards the first question the argument addressed to us is that S. 22, Lim Act, is applicable to execution proceedings, though in terms it refers only to a suit. It is, therefore, argued that the application dated 12th October 1925 should be considered to have been made against the objectors when they were impleaded as parties to it. Now they were not impleaded as parties to that application till at any rate 5th April 1928 when the learned District Judge ruled in deciding the appeal before him that the objectors were necessary parties and should be impleaded as such. It is contended that the application for execution should be considered to have been made against the objectors for the first time on 5th April 1928 which is more than three years from the date of the final decree. Consequently it is said to be barred by limitation. We are unable to accede to this contention. As the question whether an application for execution of a decree is barred by limitation should be determined with reference to the provisions of Art. 182, Lim. Act., Cl. (5) of that Article gives a fresh start to limitation from the date of

"the final order passed on an application made in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order."

If the application dated 29th February 1924 be considered to have been made in accordance with law so as to attract the provisions of Art. 182 (5), the subsequent application dated 12th October 1925 which is in question before us will be likewise a good application being in all respects identical with the former. It has been vehemently argued before us that the objector-appellants not having been impleaded as parties to either of these applications, they cannot be considered to have been made against them and that, therefore, the application for execution against the objectors was barred by time on 5th April 1928 when it should be considered to have been made against them

there being an interval of more than three years between the last mentioned date and 18th July 1921 which is assumed to be the last starting point for limitation. From the statement of facts already set forth it will appear that the deed of wakf was executed subsequent to the final decree obtained by the respondents. It was, therefore, affected by the rule of lis pendens. S. 52, T. P. Act, clearly provides that the property directly and specifically in question, as it is in a suit brought on foot of a mortgage deed cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court and on such terms as it may impose. It is not suggested that the authority of the Court was obtained by Mt. Muradbee in making the wakf which cannot, therefore, affect the right of the decree-holders to obtain a sale of the mortgaged property as directed by the final decree. This being so it is not necessary that those who acquired a beneficial interest under the deed of wakf should be impleaded as parties to the application for execution of the decree. No authority has been cited before us to substantiate the contention put forward by the learned advocate for the appellants to the contrary. S. 22, sub-S. (1), Lim. Act, provides that:

"where, after the institution of a suit a new plaintiff or defendant is substituted or added the suit shall as regards him be deemed to have been instituted when he was so made a party."

Assuming that this part of the section applies to execution proceedings as is contended on behalf of the appellants, sub-S. (2) of that section clearly disposes of the argument which is based on sub-S. (1). Sub-S. (2) (the former) runs thus :

"Nothing in sub-S. (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff."

In other words a transferee pendente lite who acquires an interest which may come in conflict with the rights of the decree-holder under the decree cannot plead limitation on the ground that the suit or proceedings should be deemed to have been instituted or taken against him only on the date he was impleaded as a party. It is not necessary for the decree-holder to take notice of transfers in (his) favour of such transferee because S. 52, T. P. Act, declares the parmount right of the decree-holder to proceed against the property specifically directed to be sold by his decree. Reverting to the language of Art. 182 (5), Lim. Act, we entertain no doubt that the applications dated 29th February 1924 and 12th October 1925 were in all respects in accordance with law and should, therefore, be considered to be within limitation, the first having been made within three years of 18th July 1921 when part payment of the decree was certified. For these reasons we repel the contention of the appellants as regards the plea of limitation.

We have not been addressed any substantial argument on the merits. It has not been shown to us why the property had been hypothecated by Mt. Muradbee as security should not be liable to sale in execution of the decree obtained by the respondents against her. The lower appellate Court has rightly ruled that it should not be sold till the house hypothecated by the principal debtor Nurul Hasan is sold and the proceeds of the sale prove to be insufficient for the satisfaction of the decree.

It was argued by the learned advocate for the appellants that in so far as the two applications dated 29th February 1924 and 12th October 1925 pray for sale of both the houses the compromise dated 24th August 1919 should be deemed to have been repudiated by the decree-holders. We are clearly of opinion that this contention has no force. There is nothing in the aforesaid application which may amount to any repudiation of the compromise. The learned advocate for the respondents has clearly stated before us that he sticks to the compromise. Even if any statement which could be considered as repudiation of the compromise had been made in the applications, which is not the case, it could be withdrawn. In any case the question of limitation which we have disposed of has no reference to the existence or otherwise of the compromise. In either view of the

matter the decree-holders' last application dated 12th October 1925 is unaffected by any rule of limitation. For the reasons stated above we uphold the order of the lower appellate Court appealed from. The appeal is accordingly dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 600

SULAIMAN AND KING, JJ.

Peerji Muhammad Nazir and *others*—Plaintiffs—Appellants.

v.

Nasimuddin Ahmad and *others*—Defendants—Respondents.

First Appeal No. 317 of 1926, Decided on 16th April 1930, against the decree of the Sub-Judge, Meerut, D/- 22nd March 1926.

Specific Relief Act, S. 42—Plaintiffs and defendants in joint possession—Suit for declaration of title without consequential relief is incompetent.

Where defendants are in joint possession of the properties in the same manner as plaintiffs are, a suit for a declaration that the plaintiffs are owners and in possession of those properties and that defendants have no proprietary right in them is incompetent and the plaintiffs are bound to ask for some consequential relief by way of ejectment or injunction: 26 *Cal.* 11 (*P. C.*), *Expl.* and *Dist.*; 33 *All.* 799 (*F. B.*), *Rel. on.* [P 600 C 2]

Iqbal Ahmad and *Mukhtar Ahmad*—for Appellants.

K. N. Katju and *Shiva Prasad Sinha*—for Respondents.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for a declaration that the plaintiffs are owners and in possession of the properties specified in the plaint and that the defendants have no proprietary right in them. The properties in dispute consist of certain houses occupied by raiyats on lands said to be appertaining to a dargah; open ground as well as certain lands comprised in khewat No. 48 and measuring about 10 bighas and 13 biswas. The plaintiffs' case as put forward in the plaint was that these properties had been granted to their ancestor and had devolved upon them exclusively but the defendants who had no title to these properties were actually offering obstruction to the collection of rents by the plaintiffs and alleging themselves to be co-owners of the said properties and were trying to make collections of rent as well as of offerings to the shrine. The plaintiffs did not ask for any specific consequential relief by way of ejectment or injunction, but added the general prayer for such other relief as the Court may consider beneficial. The claim was contested by the defendants, who can be classified into three groups, and one of the pleas taken was that a mere declaratory relief was barred by S. 42, Sp. Rel. Act. The learned Subordinate Judge has not gone into the merits of the case so far as the title to the property is concerned but has considered the evidence relating to the possession of the respective parties. He has come to the conclusion that the defendants and the plaintiffs are in joint possession of the properties and that therefore

"the plaintiffs were bound to sue for possession and the declaratory relief will be inefficacious for the purposes of this suit."

The plaintiffs have come up in appeal to this Court and on their behalf it is urged that they were not bound to ask for possession or any other consequential relief. (Here his Lordship considered the evidence and concluded as follows). On this state of the evidence we must affirm the finding of the Court below that both the parties are in joint possession of the properties and that the plaintiffs are not in exclusive possession of the same. The learned advocate for the appellant has next contended that even on that finding the plaintiffs were not bound to ask for any consequential relief. The point taken by him is that this is not a case of actual physical possession of the property, but that the actual possession is in the hands of tenants who only pay rents to the proprietors. It is therefore urged that a declaratory decree would suffice, for after the passing of such a decree, the tenants and raiyats would pay rents to the plaintiffs and would decline to pay rents to the defendants.

The fact, however, remains that the defendants are in joint possession of these properties in almost the same way as the plaintiffs are. A mere declaratory decree would not be capable of execution. It would leave the position of the parties just as it is at present. Unless therefore the defendants are either ejected from these properties

or the plaintiffs are given exclusive possession over the same or an injunction is granted against the defendants restraining them from interfering with the possession of the plaintiffs, the declaratory decree would be wholly infructuous and futile. This is not a mere case of a scramble for possession, where it is doubtful whether a party is in possession, nor is it a case where tenants have declined to pay rent until the title of the real owner is determined. Both parties being in possession we are of opinion that a mere declaratory decree would be wholly insufficient to meet the needs of this case.

It is unnecessary for us to discuss in this case the rulings which seem to lay down that in a suit for a declaration that a decree is void or voidable on the ground of fraud a consequential relief in the nature of an injunction is necessary. Nor is it necessary for us to discuss the cases cited on behalf of the appellants which seem to lay down that in cases where the actual possession is with third parties and there is a mere scramble for possession a mere declaration will be sufficient. We must, however, refer to the case of *Nirmal Chander Banerji* v. *Mahomed Siddik* (1), which was decided by their Lordships of the Privy Council. In that case both parties claimed to derive their title from a lady, Saidunnissa Bibi, under certain conveyances executed by the assignees and lessees of portions of her property. The plaintiff had applied to the Collector for the registration of his name under the Bengal Land Registration Act on the ground of his title as purchaser but his application was refused on an objection having been raised by the defendant. He accordingly brought a suit for a declaration of his ownership of the property as well as of his right to registration under the said Act. The property consisted of houses and parcels of land which had been let out to tenants. Obviously there had been some irregular and indirect litigation between the rival claimants each suing a tenant of some portion of the property for rent till that suit was instituted to put the whole title directly in issue between the two claimants. Their Lordships remarked that no objection could be taken to the form of the suit which was obviously maintainable as it was the most convenient and strictly regular way of bringing the dispute to a close. It is noteworthy that in that case the name of neither party was recorded in the Collector's register and no one was on the strength of such an entry entitled to maintain a suit as of right. In the present case the names of the parties are entered in the khewat with regard to the revenue paying land and both are entered as cosharers. On the date when the suit was instituted, and even when it was disposed of by the Court below, the Tenancy Act of 1901 was in force, under which the entry of names in the revenue papers was to be in the first instance on the basis of possession. Further, under S. 201, Agra Tenancy Act, if a party was recorded as having such proprietary right then the revenue Court in a suit for profits had to presume that he had such right. It was held by a Full Bench of this Court that that presumption was absolute and conclusive and not only rebuttable: *Durga Prasad* v. *Kuar Hazari Singh* (2). The revenue Court, therefore, could not ignore the entry of the names of the defendants and would have had to decree suits for profits in their favour as well as suits against tenants for arrears of rent. The defendants' joint possession therefore was real and substantial and not merely symbolical. The present case is accordingly distinguishable from the case which was before their Lordships of the Privy Council. We think that the plaintiffs are bound to ask for some consequential relief which, in case they establish their title, would place them in exclusive possession without further interference by the defendants. Therefore they were bound either to ask for the defendants' ejectment or an injunction. We think that is what the Court below meant although the language used by it is to the effect that the plaintiffs are bound to sue for possession. There is no prayer before us for permission to amend the plaint and add a relief for ejectment or injunction. We accordingly dismiss this appeal with costs in both Courts.

P.N./R.K. *Appeal dismissed.*

(1) [1899] 26 Cal. 11=25 I.A. 225=7 Sar. 383 (P. C.).

(2) [1911] 33 All. 799=11 I. C. 116.

A. I. R. 1930 Allahabad 602

SULAIMAN AND KENDALL, JJ.

Balwant Singh—Plaintiff—Appellant.

v.

Collector of Saharanpur and *another*—Defendants—Respondents.

First Appeal No. 461 of 1926, Decided on 23rd January 1930.

(a) U. P. Court of Wards Act, S. 16—Scope.

Under S. 7 the whole of the moveable and immovable property of a ward is deemed to be under the superintendence of the Court of Wards. It is immaterial whether as a matter of fact the Court of Wards has discovered or taken possession of the entire estate or not.

[P 603 C 1]

(b) U. P. Court of Wards Act, S. 55—S.55 is not restricted to suits regarding property over which superintendence has been taken.

Section 55 is not confined to suits relating to properties over which superintendence has been taken. The ward has no locus standi to institute a suit in his own name even in respect of properties over which superintendence has not been taken and the real party to the suit is the Collector himself : 19 *O.C.* 306, *Rel. on.*; 36 *All.* 331 and *A. I. R.* 1922 *All.* 408, *Expl.*; 40 *Cal.* 635 (*P.C.*); 5 *C. L. J.* 434 and 5 *Pat. L. W.* 92, *Dist.* [P 603 C 1, 2]

P. L. Banerji, N. Upadhya, M. A. Aziz and *A. M. Gupta*—for Appellant.

U. S. Bajpai—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for recovery of possession of properties in lists *A*, *B* and *C* of the plaint and for a declaration of title as regards the properties in lists *C* to *G*. It appears that the plaintiff succeeded to what is called Landhaura estate in 1913, and in 1916, 1917 and 1918 he executed deeds of gifts and exchange in favour of his wife relating to properties *A*, *B* and *C* which he now says were fictitious transactions, the title never having passed to his wife. The bulk of the property in list *C* was acquired at public auction by a sale which the plaintiff alleged was benami. The property in list *D* was acquired by a pre-emption suit, and those in *E*, *F* and *G* under private deeds. All these were alleged by the plaintiff to belong to him and not to his wife. In 1923 the plaintiff himself applied that his estate should be taken by the Court of Wards under its own superintendence, and in his declaration expressly excluded the properties in dispute in the suit on the ground that they belonged to his wife. The Court of Wards took over the superintendence of his property, excluding those now in suit. Later on the Court of Wards also took over the management of the estate of the plaintiff's wife Mt. Ram Kunwar in 1924, and in that connexion took possession of these properties which are now in dispute in the suit.

The plaintiff himself filed this suit on his behalf and impleaded the Collector as representing Mt. Ram Kunwar. The suit has been thrown out by the learned Subordinate Judge on the preliminary ground that it was not maintainable. The main questions of fact have not been tried. Nor has the Court had any occasion to consider the effect of S. 66, Civil P. C., with regard to the properties purchased at auction.

The plaintiff has preferred this appeal from the decree, and it is urged on his behalf that inasmuch as the properties now in dispute had never been taken possession of by the Court of Wards, his suit relating thereto is not barred by the provisions of S. 55, Court of Wards Act. In support of this contention strong reliance is placed on the judgment of their Lordships of the Privy Council in the case of *Krishna Prasad Singh* v. *Moti Chand* (1), which turned on the provisions of the Bengal Court of Wards Act 9 of 1879. This case was naturally followed in *Krishna Parsad Singh* v. *Gosta Behari Kundu* (2) and *Mohammad Abduz Salam* v. *Rani Kamalmukhi* (3).

In our opinion these cases can be no guide to us when considering the provisions of the U. P. Court of Wards Act. There are two main distinctions which cannot be lost sight of. Under S. 7, Bengal Act (referred to by Lord Moulton in the course of the argument at p. 519), the Court is given power to take charge of all the property of the disqualified proprietor but it is not expressly provided that it is bound to do so. The language of S. 16 of our Court of Wards Act, is specific, and is to the effect that the whole of the moveable and immovable property of a ward shall be deemed to be under the superintendence of the Court of Wards. The only exception is with regard to properties acquired subsequently by the ward otherwise than by inheritance.

(1) [1913] 40 Cal. 635=19 I. C. 296=40 I. A. 140 (P.C.).
(2) [1907] 5 C. L. J. 434.
(3) [1918] 5 Pat. L. W. 92=46 I. C. 316.

That is not the case here. In the second place, there is a still more important difference in the provisions of the two Acts. Ss. 51 to 55, Bengal Court of Wards Act, make it quite clear that the real party to the suit is the ward himself, and the suit is to be brought by him, but that the manager or the Collector is to act as his next friend or guardian. The sections in Chap. 7, U.P. Court of Wards Act, on the other hand, show that the ward himself has no locus standi to institute the suit, and that the real party to the proceeding is the Collector himself. The latter is not appearing as a next friend or a guardian of the ward, but is the real party to the suit. It would thus appear that in Bengal the omission of the Collector from the array of the parties would be a serious irregularity inasmuch as the proper guardian or next friend would be absent. In our provinces the omission of the Collector would amount to an absence of the real party to the litigation. It is, therefore, quite clear that we cannot allow ourselves to be influenced by the judicial pronouncements under Act 9 of 1879.

As pointed out above, the whole of the moveable and immovable property of a ward is deemed to be under the superintendence of the Court of Wards. It is immaterial whether as a matter of fact the Court of Wards has discovered or taken possession of the entire estate or not. The definition of the word "ward" in S. 3 (3) also shows that a disqualified proprietor, any part of whose property is under the superintendence of the Court of Wards, is a ward within the meaning of the Act. It cannot, therefore, be contended for a moment that Balwant Singh, whose main estate is under the superintendence of the Court of Wards, is not a ward within the meaning of the Act.

Now S. 55 provides:

"No ward shall sue or be sued, nor shall any proceedings be taken in the civil Court otherwise than by and in the name of the Collector in charge of his property or some other person as the Court of Wards may appoint in this behalf."

That section is in no way confined to suits relating to properties over which superintendence has been taken. The section is quite wide in its scope and there is no good ground for restricting its meaning. It prohibits all suits by all wards otherwise than by and in the name of the Collector. The present suit undoubtedly is a suit by a ward and was not properly instituted.

The other cases relied upon by the learned advocate for the appellant are easily distinguishable. In the case of *Lal Singh* v. *Collector of Etah* (4), S. 48 (now corresponding to S. 54) was held inapplicable inasmuch as the property in dispute did not belong to the ward at all, and the validity of the decree in his favour was not at all challenged, so that the suit did not relate either to the person or property of the ward. All that was held in *Sri Thakurji* v. *Hira Lal* (5), was that the disability of a disqualified proprietor extends to the property which he owns and not to that which he holds as a trustee. In that case the ward was not suing in his own capacity, but was merely acting as guardian or sarbarehkar of the idol who of course was not a ward. The disqualified proprietor was himself not personally interested in the property which was the subject-matter of litigation. He merely happened to be the manager of an endowed property and was, therefore, held not to have been disqualified from acting on behalf of the idol. While we are pronouncing our judgment our attention is drawn to the case of *Lalta Singh* v. *Chattar Singh* (6), where the same view of S. 55 has been taken as has been expressed by us. We must, therefore, hold that the decree of the learned Sub-Judge was correct.

The learned advocate for the plaintiff has urged before us that a great hardship would be caused to his client if the Court of Wards does not allow the question of his title to these properties to be litigated, as his rights may become extinguished by lapse of time. The Court of Wards Act makes ample provisions for such contingencies. Under S. 57 where any question arises as between two wards of the same Court it is lawful for the latter to appoint a separate representative on behalf of each ward who can file a statement in a civil Court for being heard and disposed of. We have no doubt that if all the cir-

(4) [1914] 36 All. 331=25 I. C. 393=12 A.L.J. 485.
(5) A. I. R. 1922 All. 403=44 All. 631.
(6) [1916] 19 O.C. 306=37 I. C. 186=3 O.L.J. 552.

cumstances are brought to the notice of the Collector, and he is satisfied that there is a bona fide claim of the plaintiff to some or all of the properties in dispute in this case, he may be induced to take action under S. 57 of the Act, unless there has been some conduct of the plaintiff which amounts to an estoppel in law against him or any specific statutory provision like S. 66, Civil P. C., creates a bar. We accordingly dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

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*A. I. R. 1930 Allahabad 604 (1)

MUKERJI AND BENNET, JJ.

Niader—Judgment-Debtor—Objector.

v.

Khazan and *others*—Opposite Parties.

Letters Patent Appeal No. 174 of 1928, Decided on 3rd April 1930.

*** (a) Decree—Execution — Decree-holder dying while decree in actual execution—His sons need not freshly apply for execution but can continue after substitution of their names—Civil P. C. S. 47.**

Where a decree-holder after putting his decree in execution, and while the decree is in execution, dies, his sons need not make a fresh application but after applying for substitution of their names can continue with the previous execution : *A. I. R.* 1928 *All.* 299, *Ref.*; *A. I. R.* 1927 *All.* 165 (*F. B.*) *Expl.* [P 604 C 2]

(b) Civil P. C. O. 22 R. 10—Decree-holder dying after applying for execution--Whether his representatives can apply for substitution of names under O. 22 R. 10 ?—(*Quaere.*)

(*Quaere*)—Whether after the death of a decree-holder, dying pending an application in execution, his representatives in title by succession can apply for substitution of names under O.22, R. 10 ? [P 604 C 2]

L. M. Ray—for Appellant.

Vishwa Mitra—for Respondents.

Mukerji J.—This is an appeal against a judgment of a learned single Judge of this Court and the point for decision is very short and simple.

It appears that one Harkesh obtained a decree for possession which was to be executed on the death of a certain lady, Mt. Roopo, if defendant 1 omitted to do something within one month of the death of the aforesaid lady. The contingency contemplated did happen and Harkesh put his decree into execution. While the decree was in execution, Harkesh died and his sons made an application for substitution and were substituted in place of Harkesh and the execution was proceeded with The judgment-debtors took several exceptions to the execution of the decree and one of these was that the sons were bound to make a fresh application and the execution application by Harkesh could not be continued and should bedropped.

The contention did not find favour with the lower appellate Court and did not find favour with the learned Judge of this Court. It was contended before the learned single Judge of this Court that the lower appellate Court had relied on the case of *Mohan Singh* v. *Jagat Singh* (1), but that case was contrary to a Full Bench case of this Court decided earlier viz : *Baijnath* v. *Ram Bharos* (2). The learned single Judge seems to have accepted this contention, but he did not follow the alleged Full Bench decision on the ground that the passage on which the appellant's counsel relied was mere obiter dictum.

We have considered both the cases and are of opinion that there is really no conflict between the two decisions, In the Full Bench case it was pointed out that the application on the part of the sons of the deceased decree-holder was not a fresh application, but it was really an application to continue the father's execution application, with themselves on the record. If that be so the Full Bench never said that when a decree-holder died, his sons must make a fresh application and could not continue the previous application.

The learned single Judge expressed the opinion that when a decree-holder died after having made an application in execution, his representative-in-title by succession could apply for substitution of names under O. 22, R. 10, Civil P. C. It is not necessary really to discuss how far this opinion is correct and therefore we leave the matter undecided. In the result, the appeal fails and it is hereby dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(1) A. I. R. 1928 All. 299=50 All. 621.
(2) A. I. R. 1927 All. 165=49 All. 509 (F.B.).

A. I. R. 1930 Allahabad 604 (2)

SULAIMAN AND NIAMATULLAH, JJ.

Bani Madho Ram—Defendant—Applicant.

v.

(*Pandit*) *Mahadeo Pandey*—Plaintiff—Opposite Party.

Civil Revn. No. 45 of 1929, Decided on 23rd April 1930, against order of Munsif, Saidpur, D/- 20th June 1928.

Civil P. C., S. 115—Scope of words "in which no appeal lies thereto" is not restricted to cases where no appeal lies from order sought to be revised.

There is no ground for restricting the scope of ths words "in which no appeal lies thereto" to cases where no appeal lies from the order sought to be revised. So long as the party has a right to come up to the High Court by way of an appeal and has failed to avail himself of that opportunity by first going up to the District Judge and then coming up to the High Court, he cannot ask the High Court to interfere in revision. [P 605 C 1, 2]

A. P. Pandey and A. M. Gupta—for Applicant.

Ram Nama Prasad—for Opposite Party.

Sulaiman, J.—This is an application in revision from a decree of the Munsif in a suit for ejectment of the defendant from a house and for recovery of rent. The defendant in his written statement had taken a number of pleas, but on the date fixed for hearing he got the case adjourned to another date. On this date although the plaintiff and his pleader were present, the defendant and his pleader were absent. This was not a case where the pleader appeared and applied for adjournment and then withdrew when the adjournment was refused but a case where the pleader did not appear at all. The learned Judge examined the plaintiff and passed an ex parte order against the defendant. The defendant did not choose to appeal from this decree to the District Judge but applied to the Munsif for setting aside the ex parte decree. This application was refused. He then appealed from the order refusing to set aside the decree to the District Judge and his appeal failed. He now applies to the High Court for revision from the original decree passed by the Munsif.

It seems to us that no revision lies under S. 115, Civil P. C. It was clearly a case of a decree which could have been appealed against to the District Judge from whose decree a second appeal could have been filed to this High Court. It is therefore not a case in which no appeal lies to the High Court at all although no appeal could have been filed from the original decree of the first Court direct. In our opinion there is no ground for restricting the scope of the words "in which no appeal lies thereto" to cases where no appeal lies from the order sought to be revised. So long as the party has a right to come up to the High Court by way of an appeal and has failed to avail himself of that opportunity by first going up to the District Judge and then coming up to the High Court, he cannot ask the High Court to interfere in revision.

It also appears to us that there is absolutely no ground for interference in revision. It is not a case where the Munsif acted without jurisdiction or failed to exercise jurisdiction or acted with any illegality or material irregularity in the exercise of his jurisdiction. The application is accordingly dismissed with costs.

P.N./R.K. *Revision dismissed.*

A. I. R. 1930 Allahabad 605

MUKERJI AND BENNET, JJ.

Mohammad Qadir Ali Khan and *others*—Appellants.

v.

Mohammad Ghulam Imam Khan and *others*—Respondents.

First Appeal No. 10 of 1927, Decided on 6th March 1930, against decree of Addl. Sub-Judge, Agra, D/- 20th October 1926.

(a) Practice — Pleadings — Objection to validity of deed creating transfer or relinquishment can be taken even after period for its cancellation has run out if it is fundamental.

An objection to the validity of a deed of transfer or relinquishment does not become inadmissible merely by reason of the fact that the period for cancellation had run out, if the person impeaching the validity of the same does so on the fundamental ground of its execution. [P 607 C 2]

(b) Evidence Act, S. 114—Deed executed and admitted to be so before Registrar by person executing it who was of full age—Presumption.

Where a person executing a deed required by law to be registered is of full age when appearing before the Registrar, and admits the execution of the deed, the presumption is that the transaction to which the deed relates is valid. [P 608 C 2]

S. K. Dar and *N. P. Asthana* — for Appellants.

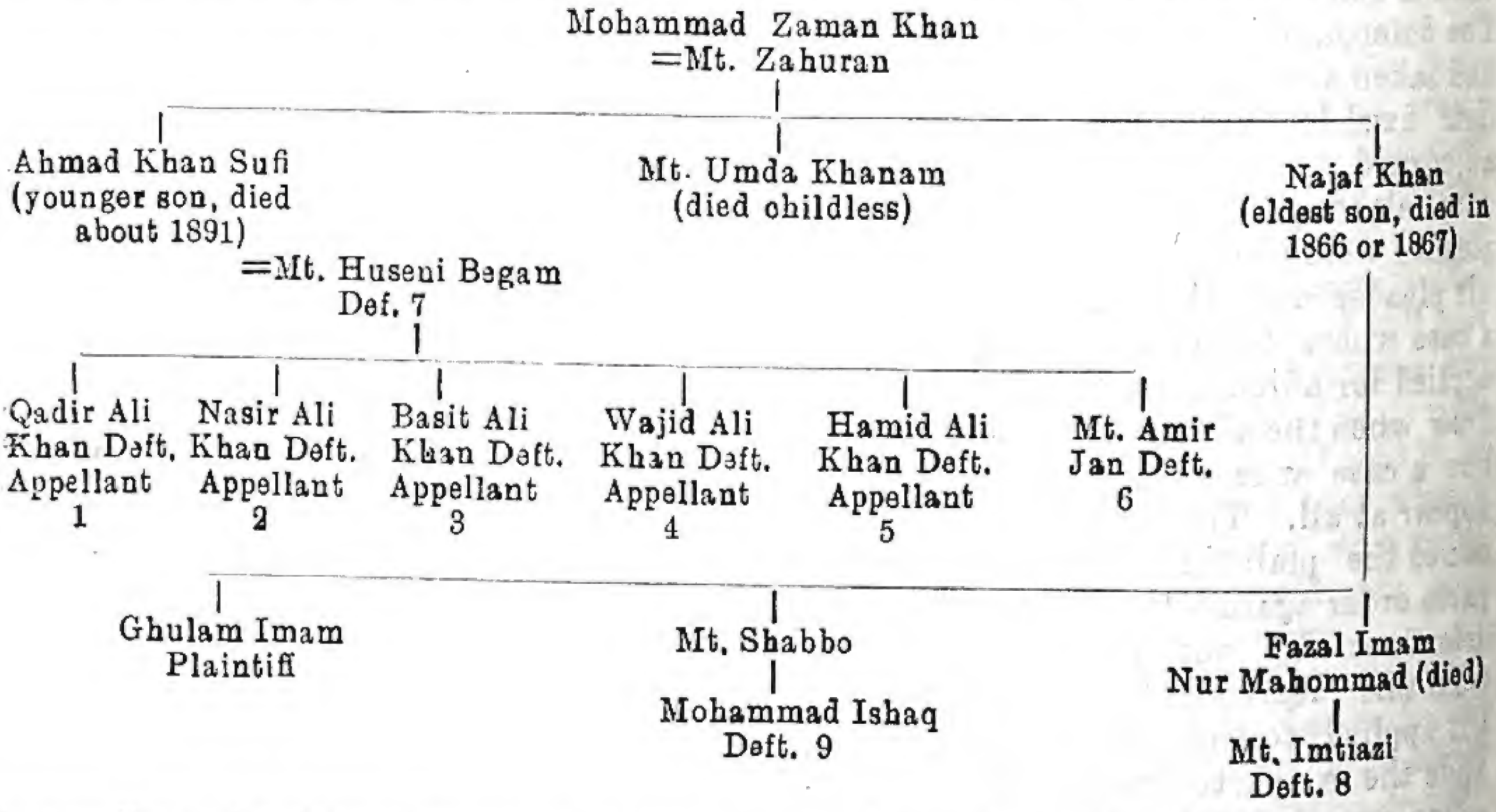
Mukhtar Ahmad and *Shiva Prasad Sinha*—for Respondents.

Bennet, J.—This is a first appeal by five defendants against a decree of the learned Subordinate Judge of Agra passed in a suit for partition. The family tree is as follows:

(See Table on p. 606)

The property in the plaint of which plaintiff Ghulam Imam asks for a share

on partition consists of four houses. List A comprises three houses which really form one house, and of these houses No. 1 is called bara haveli and house No. 2 is called middle house and house No. 3 is called the diwan khana. List B comprises the 4th house which is called the chhapakhana. All these houses are adjacent and all bear the same number in the Municipal Register No. 2507. The case for the plaintiff in the plaint is that Mohammad Zaman Khan, his grandfather, and the grandfather of the five appellants, purchased the property in list A, and that the house in list B now known as chhapakhana was purchased by Mt. Zahuran, the widow of Mohammad Zaman Khan. The first question which has been urged before us on appeal is in regard to this



house No.4, the chhapakhana or printing press. The appellants allege that although his house was purchased by a sale deed of 8th December 1855 in the name of Mt. Zahuran, still that purchase was only benami, and the property was bought really for the father of the appellants Ahmad Khan, who provided, according to the appellants, the consideration of Rs. 500 for this sale deed. There is no direct evidence for the appellants that Ahmad Khan did provide this consideration, or that the sale deed was benami for Ahmad Khan. The only witness approximately on this point and of this period is Mulla Mohammad Amir whose evidence was taken on commission in Gwalior. This witness states that he knew Ahmad Khan, and that there was a Rais of Gwalior called Musahib Khan, who was the patron of Ahmad Khan. He further states that Ahmad Khan came to Gwalior four or five years before the Mutiny, and that would be in 1852 or 1853, and left Gwalior a year or two after the Mutiny. He alleges that during his stay in Gwalior Ahmad Khan compiled "a book Fasun Babul and Mina Bazar" received a reward of Rs. 5,000 from his patron for this book or books. A copy of one of these books the Fasun Babul is produced by this witness. This book was printed at Cawnpore in the year 1855, but it does not state anything which would support the allegations of the witness that the author received Rs. 5,000 for this work from his patron.

The further evidence on which the defence rely to prove that this sale deed was benami, consists of three deeds of relinquishment in each of which members of this family who do not descend from Ahmad Khan have stated that they have no claim to this part of the property. These three relinquishments are as follows: A deed of 5th January 1900 by Mt. Umda Khanam, sister of Ahmad Khan; a deed of 3rd January 1912 by Nur Mohammad Khan, nephew of the plaintiff and grandnephew of Ahmad Khan; a deed by Mohammad Ishaq another nephew of plaintiff, defendant 9, dated 25th January 1912.

The first point which is to be noted in regard to these three deeds is that in each case the family of the appellants gave a monetary consideration to the person executing the deed of relinquishment, and this was stated in the deeds

to be in lieu of the sale by the executant of the rights which he possessed in certain portions of the family property, namely, in the bara haveli and diwankhana. Then follows a sentence stating that the executants have no rights in other parts of the property, specifying the chhapakhana, and the recital is made that this chhapakhana was purchased by the wife of Zaman Khan Sufi for Rs. 500. We consider from a perusal of these documents that the most natural conclusion is that the executants sold all their rights in the family property and the statement in regard to the printing press house was merely introduced because the appellants desired to have evidence to use against Ghulam Imam, the present plaintiff. We are further strengthened in this view by a postcard from the plaintiff dated 20th January 1912, printed at p. 83 of the paper book. This is addressed to one of the appellants, Nasir Ali Khan, and states that the appellant Qadir Ali Khan was attempting to deprive the plaintiff of his rights and that Qadir Ali Khan had forcibly and unlawfully induced his aunt Mt. Umda Khanam to execute one deed of relinquishment, and that now he had obtained another deed of relinquishment from Nur Mohammad. The plaintiff asserted that although he had remained silent till now, he would now make a stand for his rights.

We consider that this evidence from the deed of relinquishment is by no means of any weight in favour of the appellants as regards their allegation that the sale deed of 1885 was benami in the name of Mt. Zahuran. The oral evidence of their witness from Gwalior amounts to nothing. Accordingly we consider that the appellants have altogether failed to prove their case in regard to this deed of 1855 being benami. We might briefly note that the ancestor of the family Zaman Khan, was the jamadar of the Collector of Agra, and that he died about the year 1840. He was admittedly a man of considerable age, and it is not impossible for a man in his position to have left his widow sufficient funds to purchase an adjoining house for Rs. 500. We may also note that it was not until 1869 that a printing press was established in this house. It would not be likely, therefore, that in 1855, at the time of purchase, Ahmad Khan would have any particular interest in this house. We may also note that in the deed of sale of 1855 in question the eastern boundary gives the land of the house of Najaf Khan, that is the house known as the bara haveli and diwan khana. The family house was, therefore, at that time known by the name of the elder brother Najaf Khan and not by the name of the younger brother Ahmad Khan, who, according to the appellants, was at the time living in Gwalior at a considerable distance from Agra and earning his living by composing verses. We think, therefore, that the appellants have failed to prove this ground of appeal.

The next point which was argued for the appellants before us was that the dastbardaris of Nur Mohammad and Mohammad Ishaq should be taken to include the middle house (house No. 2). The learned Subordinate Judge has held the contrary. It is true that these dastbardaris do not specify the middle house, that is, they say that the executant relinquishes his rights in the bara haveli and the diwankhana. From an inspection of the map we find that this middle house is really a portion of the bara haveli and the diwankhana. It has in fact at present only a few rooms and originally consisted of a cook-house and a latrine. The deed of partition amendment of 1925 states that these rooms should be enjoyed by five of the appellants in common. This portion according to this deed of partition now consists of two latrines and a bath-room. This cannot be said in any sense to be a separate house. We consider that the deeds of relinquishment must be construed to include this middle house (house No. 2) and accordingly we find for the appellants on this point.

The third point which was argued for the appellants was that the deed of relinquishment executed by Mt. Umda Khanam was valid. It was argued with considerable ingenuity that this question was now time barred, because the period of limitation for Mt. Umda Khanam to sue for declaring such a deed invalid had elapsed. But the objection taken by the plaintiff to the validity of this deed is fundamental and the objection is that it is not proved that Mt. Umda Khanam did execute

this deed. On p. 62 of the paper book the endorsement by the Sub-Registrar is printed, and this states:

"The lady admitted the completion and the execution of this document and stated that she did not intend to sell the property, and that after her death the children of both the brothers might get shares, and that she had affixed her mark to this document."

This endorsement is further borne out by the evidence of the attesting witness Mohammad Ali, who states that Mt. Umda Khanam had admitted execution to the Sub-Registrar, but subsequently denied execution. The scribe and the other attesting witnesses have not been examined, and the motive for not examining them has not been explained, except in the case of one of them who is alleged to be dead. The single attesting witness Mohammad Ali who was examined is a person who is closely connected with the appellants. Under these circumstances. we consider that the appellants have failed to prove that Mt. Umda Khanam did execute a deed of relinquishment. As the deed which she stated she intended to execute to the Sub-Registrar was a deed entirely different from this deed which purports to be a sale deed of her rights in the bara haveli and diwankhana, we consider that the Sub-Registrar made an error when he registered this document and he did so contrary to the clear provisions of the Registration Act, which state that the Sub-Registrar must not register a document when the executant denies execution of that document. Accordingly we find that the appellants have failed to prove their case on this point.

The fourth point urged on behalf of appellants was in regard to certain accounts for the years from 1899 to 1925 produced by the appellants. It is admited that these accounts are not very businesslike. The appellants desire these accounts to be taken as evidence in order to prove what proportion the plaintiff ought to pay to the appellants when the plaintiff is awarded a share of the property in suit. It is admitted that the appellants had been paying the municipal water-rate and also had made additions to the property in question. The accounts produced by the appellants, however, admittedly relate to a large number of bungalows owned by the appellants and there is no detail given in these accounts as to which items relate to the property in suit. It is therefore impossible for the Court to use these accounts for the purpose of arriving at any conclusion on the point in question.

We next take up the cross-objections of which there are two sets. The cross-objections of the plaintiff related first to the point that the relinquishment by Nur Mohammad deceased was invalid, and therefore that the plaintiff ought to inherit a fractional share in the property in question from Nur Mahommad. We see no reason to hold that this deed of relinquishment was invalid. Nur Mohammad was a person of full age and he appeared before the Sub-Registrar and admitted execution of the document.

The next point in the cross-objection of the plaintiff is that in his evidence the Court wrongly took down that Rs. 2,500 had been expended by the appellants in the construction of a verandah of house No. 1, whereas the cross-objection alleges that the figure should have been Rs. 250. There is no affidavit on this point and nothing in confirmation of it was shown by the learned counsel for the appellants. It is admitted that the record contained the figure of Rs. 2,500, and it was for the plaintiff to apply to the lower Court to correct that record and not to make it the subject matter of a cross-objection in appeal. We therefore dismiss the cross-objection of the plaintiff with costs.

The next cross-objection was filed on behalf of Mt. Imtiaz Begum, defendant 8, and Mohammad Ishaq, defendant 9. These two defendants ask that shares of the family property should be allotted to them, and that it should be held that the deeds of relinquishment by the father of Mt. Imtiaz Begam and by Mohammad Ishaq should be considered invalid. Both these deeds were executed by persons of full age and admitted to have been executed before the Sub-Registrar. We see no reason to hold that these deeds were invalid. Accordingly we dismiss this cross-objection also with costs.

It now remains to consider one other matter. The decree of the lower Court was the subject of an application for review and the learned Subordinate Judge has amended his decree by deduc-

ting Rs. 1,550 from the total costs which he held that the appellants had expended on the family buildings. This (Rs. 1,550) was the sale price of a house sold by Khwaja Ghulam Imam, and the appellant Qadir Ali stated that he had included portion of the site of this house in the bara haveli. The decree at first directed that the plaintiff should pay his full share of this Rs. 1,550, but on review the learned Subordinate Judge held that the plaintiff should not pay any part of this sum, because it was not shown what part of the site had been included. In the absence of definite evidence on the point by the appellant we consider that the order in review is correct. Amendment was also made in review in regard to the amount for house-tax and water-rate, and we consider that this amendment was correct.

Now the effect of our finding on appeal is that the deed of relinquishment of Nur Mohammad includes house No. 2. Accordingly no distinction should de drawn in regard to the share of the different houses and the four houses all stand on the same footing. Accordingly we allow this appeal to this extent that the share of the plaintiff in house No. 2 will be 10/50 instead of 11/50 and we allow proportionate costs to the appellants. We allow also proportionate costs to respondent 1. Both the cross-objections are dismissed with costs.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 609

MUKERJI AND BENNET, JJ.

Mt. Phool Kuer and *others*—Defendants—Applicants.

v.

Rewari Singh and *others*—Plaintiffs—Opposite Parties.

First Appeal No. 186 of 1928, Decided on 24th January 1930, from order of Sub-Judge, Budaun, D/- 2nd August 1928.

Civil P. C., O. 5, R. 20—Substituted service to show cause why one should not be appointed guardian is improper— Service should be by ordinary notice—Civil P. C., O. 32, R. 3.

It is not correct to order substituted service on a person to show cause why he should not be appointed guardian. A mortgagor in order to recover mesne profits after the deposit of mortgage money in Court has to see that a proper guardian is appointed for minor mortgagees. Therefore it is necessary to issue proper notice by ordinary service on a person who is capable of becoming a guardian and who agrees expressly or by indication to become a guardian : 24 *All.* 383; 28 *All.* 137: and *A. I. R.* 1926 *All.* 665, *Rel. on.*; 30 *Cal.* 1021, *Dist.*

[P 609 C 2, P. 610 C 1, 2]

Prem Mohan Lal Verma — for Applicants.

Mushtaq Amad—for Opposite Parties.

Bennet, J.—This is a first appeal by the defendants from an order of remand by the lower appellate Court. The plaintiffs sued for redemption of a usufructuary mortgage and mesne profits and the Court of first instance decreed redemption but dismissed the suit for mesne profits. The lower appellate Court has granted the claim for mesne profits and remanded the case to the Court of first instance for the determination of the amount of damages payable to the plaintiffs from Jait 1925 to Jait 1928. It was pointed out by the learned counsel for the appellants that in any case the claim for those three years, i. e., up to Jait 1928, is in excess of the claim in the plaint. The plaint was filed on 25th May 1927 and the claim for mesne profits therefore would only be put to Jait 1927 and not up to Jait 1928.

The main question before us is whether the plaintiff is entitled to mesne profits in view of the fact that when the plaintiff made his deposit under S. 83, T. P. Act, no formal order was passed appointing guardians for three minor defendants. The order sheet shows that the plaintiff did apply for the appointment of guardians and notices were issued to the mothers of these minor defendants to show cause why they should not be appointed guardians. At the same time that that notice issued, another notice also issued addressed to the mothers as guardians under S. 83, T. P. Act, to withdraw the deposit and hand over possession of the property. The notices on the mothers were not served and eventually the Court ordered service by proclamation. The service by proclamation was made but no formal order was recorded appointing the mothers as guardians.

We consider that it is not correct to order substituted service on a person to show cause why he should not be appointed guardian. In fact, under a more recent rule of this Court, it is now provided in O. 32, R. 4-A (3) that refusal to accept notice shall be presumed

to be refusal to act as guardian. Accordingly, when summons was returned unserved, the plaintiff should have applied for other persons to be appointed guardian. It is always open to a plaintiff to ask the Court to appoint an officer of the Court or a vakil of the Court to act as guardian and pay the necessary fees.

We have been referred for respondents to *William* v. *Banke Behary* (1) where there was no formal order appointing the mother to act as guardian-ad-litem of her minor sons. But in that case the mother of the minor defendants appeared throughout the proceedings and acted as their guardian. The case therefore is widely different from the present case where the mothers did not appear and did not act for the appellants. We are referred by appellants' counsel to various rulings among which we may mention the case of *Bhura Mal* v. *Har Kishan Das* (2) where a notice was issued for appointment of guardians to a minor but there was no formal order. It was held that in default of a formal order the minors were entitled to get the decree set aside. A similar rule was laid down in *Hanuman Prasad* v. *Mahomed Ishaq* (3) and *Champi* v. *Tarachand* (4). In another set of rulings *Kannu Mal* v. *Indarpal Singh* (5) and *Gokul Kalwar* v. *Chandar Sekhar* (6) it was held that a mortgagor to save the payment of interest after the deposit of mortgage money in Court has to see that a proper guardian is appointed for minor mortgagees. We consider that the case of a claim for mesne profits should be governed by the same rules as the case of the saving of interest. Therefore we consider that it is necessary for a proper guardian to be appointed, that is for notice to be served not by substituted service, but by ordinary service on a person who is capable of becoming a guardian and who agrees expressly or by indication to become a guardian.

Accordingly, we allow this appeal and we set aside the order of remand of the lower appellate Court and we restore the decree of the Court of first instance. The defendants will receive costs in the lower appellate Court and in this Court.

V.S./R.K. *Appeal allowed.*

(1) [1903] 30 Cal. 1021=30 I. A. 182=7 C. W. N. 774 (P. C.).
(2) [1902] 24 All. 383=(1902) A. W. N. 76 (F.B.).
(3) [1905] 28 All. 137=(1905) A. W. N. 229=2 A. L. J. 615.
(4) A. I. R. 1924 All. 892=46 All. 744.
(5) A. I. R. 1923 All. 183=45 All. 273.
(6) A. I. R. 1926 All. 665=48 All. 611.

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* A. I. R. 1930 Allahabad 610

SULAIMAN AND KENDALL, JJ.

Ram Das and *others*—Defendants—Appellants.

v.

Debu and *others*—Plaintiffs—Respondents.

Second Appeal No. 1693 of 1927, Decided on 31st March 1930, against decree of Sub-Judge, Benares, D/- 1st August 1927.

*** Transfer of Property Act, S. 53—Presumption arises in cases of future creditors also.**

The presumption under S. 53 arises in cases of future creditors also and it is not necessary that man should be actually indebted at the time he makes the transfer, for if he does so with a view to being indebted at a future time his conduct may be equally fraudulent. While, therefore, a litigation is actually pending and the defendant has every reason to believe that he will be made liable to pay the mesne profits, if in order to evade such payment he puts the property in possession of another under a document which is wholly without consideration, the presumption under S. 53 arises as to the intention being fraudulent : 39 *Bom.* 507, *Dist.* [P 611 C 1]

Hem Chandra Mukerji—for Appellants.

Ambika Prasad—for Respondents.

Kendall, J.—This is a defendants' appeal arising out of a suit for a declaration that a deed of gift dated 10th December 1924, was not fraudulent and had not been executed with intent to defeat or delay the claim of the creditors of the donor. It appears that a suit was brought against Mt. Sundra for possession of a house and mesne profits, and the house in question was attached before judgment, .but that suit was withdrawn on 9th December 1924, with liberty to sue afresh. The second suit was filed on 10th December 1924. On this last mentioned date the deed of gift was executed by the defendant Mt. Sundra. Both the Courts below have found as a fact that it was executed with a fraudulent intention to defeat the claim of the plaintiffs.

The learned advocate for the appellants .contends that inasmuch as on the date of this gift the claim of the plaintiff was only for mesne profits which were in the nature of unliqui-

dated damages, he could not be considered a creditor of the vendor, and S. 53, T. P. Act, would therefore not apply. In support of this contention he relies on the case of *Vasudeo Raghunath Oka* v. *Janardan Sadashiv Apte* (1). That case is clearly distinguishable, for there the person who was trying to take advantage of S. 53 was an auction purchaser of the property. The Bombay High Court held that he was not a creditor of the vendor. They further held that he had no interest in the property at the time of the previous transfer.

It seems to us well settled that all future creditors are within the scope of this section. It does not appear to be necessary that a man should be actually indebted at the time when he makes the transfer, for if he does so with a view to being indebted at a future time his conduct may be equally fraudulent. In the present case a litigation was actually pending and the defendant had every reason to believe that she would be made liable to pay the mesne profits. If in order to evade such payment she put the property in possession of another under a document which was wholly without consideration the presumption under S. 53 arose and the Court below was justified in recording a finding that the intention was fraudulent. The appeal is accordingly dismissed with costs including in this Court fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

(1) [1915] 39 Bom. 507=29 I. C. 497=17 Bom. L. R. 522.

A. I. R. 1930 Allahabad. 611

MUKERJI AND BENNET, JJ.

Kashi Prasad—Plaintiff—Appellant.

v.

Ambika Prasad and *others*—Defendants—Respondents.

Letters Patent Appeal No. 68 of 1929, Decided on 7th March 1930, against the judgment of Boys J., D/- 2nd January 1929 and reported as *A. I. R.* 1929 *All.* 165.

(a) U. P. Land Revenue Act (3 of 1901), S. 42—Terms "class" and "tenure" and scope explained.

The "class" shows whether a tenant is a fixed rate tenant or an occupancy tenant or a non-occupancy tenant. The "tenure" would indicate the terms under which a particular tenant holds land. It might be that he is holding under service tenure or for a particular term of years or as a permanent lessee and so on. The scope of S. 42 therefore is very limited and is limited to the case of a dispute relating to class and tenure, and consequently where the question is who is the tenant, S. 42 has no relation to such a dispute. It is only in the case of a named tenant, that the question of his class or tenure would arise.

[P 614 C 1]

(b) U. P. Land Revenue Act (3 of 1901), Ss. 39, 40 and 42—Settlement of dispute between rival tenants by Assistant Collector—Civil Court's jurisdiction is not ousted.

A. I. R. 1929 *All.* 165 *Reversed.*

Since in a proceeding under Ss. 39, 40 and 42 a dispute has to be settled on the basis of possession and possession alone, the decision of an Assistant Collector under those sections does not oust the jurisdiction of civil Court with regard to the dispute between the rival tenants: *A. I. R.* 1927 *All.* 780, *Dist.*; *A. I. R.* 1929 *All.* 165 *Reversed.* [P 614 C 1]

(c) U. P. Land Revenue Act (3 of 1901), S. 233—Suit between rival claimants to tenancy is not cognizable by revenue Court.

A suit between rival claimants to a tenancy is not cognizable by the revenue Court.

[P 614 C 2]

M. L. Agarwala—for Appellant.

N. P. Asthana, B. N. Sahai and *Uma Shanker*—for Respondents.

Mukerji J.—This is an appeal against a judgment of a learned Judge of this Court and the only question for the decision is what is the legal effect of the decision said to have been given under S. 42, Land Revenue Act?

The facts which have given rise to this appeal, briefly, are as follows: One Mahesh Prasad was recorded in the revenue papers as the occupancy tenant of certain holdings. He was a first cousin of the plaintiff Kashi Prasad and his brother Bindeshri Prasad. In the lifetime of Mahesh Prasad his sister's three sons, Ambika Prasad, Bhagwati Prasad and Kedar Prasad who were the first three defendant in the suit, out of which this appeal has arisen, made an application to the revenue Court to have their names recorded along with that of Mahesh Prasad, on the ground that they were Mahesh Prasad's sister's sons and were joint in cultivation with him. Bindeshri Prasad, defendant 4 in the suit, who is the elder of the two brothers, namely himself and Kashi Prasad, filed an objection in the revenue Court. Before any decision could be arrived at Mahesh Prasad died. Then the question arose as to whose name should be recorded in the revenue

papers in place of Mahesh Prasad. The case of Bindeshri Prasad was that Mahesh Prasad was only nominally a tenant, but as a matter of fact, Bindeshri Prasad and his brother Kashi Prasad were the tenants of the holding and they alone were in possession of the same. On behalf of Ambika Prasad and his brothers, the contention was that they, as the nephews of Mahesh Prasad and as persons who were jointly cultivating the holding, should be entered in the revenue papers. The zamindar, a lady, Roshna Khatun was made a party to the proceedings. It appears that she, to start with, denied that either of the parties was entitled to be entered in the village papers in place of Mahesh Prasad, but, later on she received a nazrana of Rs. 100 from Ambika Prasad and his brothers and she agreed to the entry of these persons' names in the village papers. The Assistant Collector took up the matter and came to the conclusion that Mahesh Prasad was the real tenant of the holding and that Bindeshri Prasad and Kashi Prasad were not the tenants. He also held that although Bindeshri Prasad and Kashi Prasad were collateral relations of Mahesh Prasad they could not succeed to him because they were not in joint cultivation during the lifetime of Mahesh Prasad. As regards Ambika Prasad and his brothers the Assistant Collector was of opinion that they too could not suceeed. They were not among the heirs enumerated in S. 22, Tenancy Act of 1901, although they were cultivating the holding jointly with Mahesh Prasad. In the result, the Assistant Collector, having found that Ambika Prasad and his brothers were actually in possession, directed that their names should be recorded as non-occupancy tenants, holding for a period of one year. He rejected the application of the zamindar that Ambika Prasad and his brothers should be recorded as occupancy tenants of the holding.

After this litigation in the revenue Court, Kashi Prasad filed the suit in the civil Court and he prayed for the following reliefs. He asked that it might be declared in favour of himself and his brother defendant 4 that they were the tenants of the several holdings in suit. Failing this declaration he asked for possession of the holdings jointly with his brother Bindeshri Prasad. Lastly, he asked for costs.

The defence raised by Ambika Prasad and his brothers was that the holding belonged to Mahesh Prasad alone and that the suit was barred as res judicata owing to the decision of the revenue Court. The zamindar is no party to the suit. The Munsif dismissed the suit.

On appeal by the plaintiff, the learned Subordinate Judge who heard the appeal came to the conclusion that the decision of the revenue Court was a bar to the maintenance of the present suit. But the learned Judge held, on the merits, that as regards one holding, namely No. 142, it was the property of the plaintiff's father Madho Prasad, although the name of Mahesh Prasad alone had been recorded in the revenue papers. In the result the appeal failed on the point of law and it was dismissed.

The matter came up before a learned single Judge of this Court on plaintiff's appeal and the learned Judge had decidided that the decision on the point of law arrived at by the learned Subordinate Judge was correct.

Before us this decision has been assailed. The judgment of the revenue Court is on the record. The Assistant Collector gave his decision on 25th March 1925. There was an appeal to the Collector, but his judgment is not on the record. There was a second appeal to the Commissioner, and he dismissed the second appeal on 27th August 1925 on the ground that the finding of the Assistant Collector was a finding of fact and therefore no second appeal was maintainable.

Now we proceed to examine the judgment of the learned Assistant Collector and to see what was the legal effect of that judgment. The Assistant Collector does not say under what section of the Tenancy Act, 1901 or the Land Revenue Act of the same year, he was investigating the claim. It has been, however, conceded by the learned counsel for the parties before us that the proceedings started under S.39, Land Revenue Act, on the death of Mahesh Prasad. The original application of Ambika Prasad and others for being entered as joint tenants with Mahesh Prasad fell through. Natu-

rally, on the death of Mahesh Prasad, the question was, who was entitled to be entered in place of Mahesh Prasad as occupancy tenants of the several holdings. Although we gather from the judgment of the Assistant Collector that the zamindar appeared on the scene we do not find that he was taking any active interest in the matter beyond what we have already stated. The Court framed three issues, and they were as follows:

1. Are Ambika Prasad and his brothers the daughter's sons of Munna Lal and did they share in cultivation with him at the time of his death, and are they in possession of the land in suit with occupancy rights ?.

2. Did Bindeshri Prasad share in cultivation with Mahesh Prasad, the last occupancy tenant of the land in suit, as his nearest collateral and is he in possession of it with occupancy rights ?

3. What should be the entries in the village papers ?

It will be noticed that the Assistant Collector entirely misconceived the application of Bindeshri Prasad. Bindeshri Prasad never claimed to succeed to Mahesh Prasad. His claim was that he and his brother Kashi Prasad were the occupancy tenants of the holding and it was immaterial whether Mahesh Prasad died or was alive. Bindeshri Prasad never claimed as successor to Mahesh Prasad. The Assistant Collector, however, did go into the question of title and came to the conclusion that Bindeshri Prasad's ancestors and Mahesh Prasad's ancestors had separated and there was nothing in common. He came to the conclusion, as already stated, that Ambika Prasad and his brothers were sister's sons of Mahesh Prasad, but they had no right to succeed to the occupancy tenancy, although they were joint in cultivation with Mahesh Prasad. The Assistant Collector negatived the right of Bindeshri Prasad and in the result made the order already quoted.

It is claimed on behalf of the respondents, that this judgment operates as res judicata on the present controversy. In this Court, it has been over and over again held, that a suit between rival tenants is cognizable by the civil Court. It is to be remembered that the present suit was instituted before the Tenancy Act of 1926 came into force. It must, therefore, be taken for granted that the suit, as framed, and the suit to which the zamindar was not a party, was prima facie cognizable by the civil Court. Then, the question is, whether the decision of 25th March 1925 given by the Assistant Collector ousts that jurisdiction of the civil Court.

It is claimed for this judgment of the Assistant Collector that it was given under S. 42, Land Revenue Act, although there is no indication in the judgment itself that the Assistant Collector was proceeding under S. 42. But we may assume that he did so. We are, however, of opinion, that the scope of S. 42 is very much limited.

Section 39, Land Revenue Act of 1901, and Ss. 40 and 42 are all to be read together. S. 39 starts with the procedure to be observed in the case of transfers and charges affecting interest in land other than those referred to in S. 34. This means that where the question of transfers and charges relating to non-proprietary rights, in respect of which a register under Cl. (e), S. 32, is to be maintained, arises, this section indicates the procedure. S. 40 lays down that in case of a dispute regarding entries in the annual registers (which include the register under Cl. (e) S. 32), the dispute shall be decided on the basis of possession. To start with, therefore, possession and possession alone is the criterion for entry of names in the revenue papers. S. 40 also lays down, although we are not concerned with this aspect of the case, that where possession cannot be ascertained, a summary enquiry would be held as to the person best entitled to the property and that person shall be put in possession. Now, a dispute having arisen on the death of Mahesh Prasad (for it does not matter whether Mahesh Prasad was really dead or alive) that dispute was to be settled on the basis of possession and possession alone. Then we come to S. 42. It runs as follows :

"In case of any dispute respecting the class of tenure of any tenant, the Collector shall decide according to the principles laid down in the North-Western Provinces Tenancy Act, 1901, or the Oudh Rent Act, 1866, as the case may be."

It will be noticed that it is only in the case of a dispute of a particular kind that the Collector is directed to proceed to decide in accordance with certain principles mentioned therein. That dispute relates to "the class or tenure of

any tenant." On a natural reading of the words, this means that where the question is, who is the tenant, S. 42 has no application at all. Given the tenant, the question must be, what is the class to which he belongs, or what is the nature of his tenure? The word "tenure" is not defined in .the Land Revenue Act, 1901. We have looked into Murray's New English Dictionary and we find the following meaning given in it :

"The conditions of service etc., under which a tenement is held of a superior."

The 'class' shows whether a tenant is a fixed rate tenant or an occupancy tenant or a non-occupancy tenant. The 'tenure' would indicate the terms under which a particular tenant holds land. It might be that he is holding under a service tenure or for a particular term of years or as a permanent lessee and so on. The scope of S. 42, therefore, is very limited and is limited to the case of a dispute relating to class and tenure. We need not repeat that and consequently where the question is: Who is the tenant S. 42 has no relation to such a dispute. It is only in the case of a named tenant that the question of his class or tenure would arise. It would be a mistake to read into S. 42 all the provisions of S. 95, Tenancy Act 1901. S. 95 Tenancy Act mentions six items as to which a declaration may be obtained either by the landholder or the tenant. S. 42 is confined probably to only two of these items. But in any case it excludes Cl. (a) which relates to "the name and description of the tenant of the holding." Cl. (b) will come under the word "class" under S. 42 and the Cls. (c) to (f) may come under the word "tenure," namely the conditions of holding. But in no case Cl. (a), namely name and description of the tenant can come under the provisions of S. 42.

This being our opinion, on the scope of S. 42, assuming that the judgment was given under that section, it seems to follow clearly that the Assistant Collector's decision, namely the plaintiff's brother or the plaintiff himself, was not entitled to the tenancy cannot operate as res judicata in the present proceedings. The Assistant Collector had to decide the case only on the basis of possession and he had no doubt that Ambika Prasad and his brothers alone were in possession. He gave effect to this finding by recording their names.

A large number of cases has been cited before us, but they were decided on the peculiar facts involved in them. The only case that has some bearing is the case of *Sheomber Singh* v. *Sheomber Singh* (1), because it contains a mention of S. 42, Land Revenue Act. But that case is clearly distinguishable, inasmuch as it was a suit in the civil Court between the zamindar and the person declared to be the tenant whereas the present case is a suit between rival tenants. There may be, in this judgment some observations in the latter part of the case, with which we may find ourselves unable to be in agreement But for reasons already given we need not discuss the matter.

It was next argued that as the landholder was not a party to the present proceedings, he might take effectual steps to eject the plaintiff. On this ground it was further argued that this Court should refrain from making a decree which might be ineffectual or which might be disregarded by the revenue Court eventually. But we are not concerned at all with this aspect of the case. As already stated, in cases after cases, this Court has held that a suit between rival claimants to a tenancy is not cognizable by the revenue Court and we have no reason to decide otherwise. It .would not necessarily follow that our judgment would be useless to the party in whose favour it would be pronounced.

In the result the suit should succeed partially. The lower appellate Court has found .that the plaintiff and defendant 4 are the real tenants of the holding No. 142 only. Defendants 1 to 3 must be assumed to be in possession because their names have been entered in the revenue papers on the basis of possession.

In the result we set aside the decrees of the Court below, including the judgment of this Court and grant to the plaintiff a decree for possession over No. 142 jointly with defendant 4 Bindeshri Prasad. We grant a declaration to the plaintiff that the holding No. 29 belongs to him and defendant 4 jointly, their title to it being undisputed by the defendants. The rest of the claim

(1) A. I. R. 1927 All. 780.

stands dismissed. The appellant will have his costs of both of his appeals in this Court. As regards the costs in the Court of first instance and the lower appellate Court parties will pay their own, as they have succeeded almost equally.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 615

SEN AND NIAMATULLAH, JJ

Co-operative Company, Ltd., Saharanpur—Defendants—Appellants.

v.

Bhagwan Das & Co.—Plaintiffs—Respondents.

Second Appeal No. 727 of 1927, Decided on 11th April 1930, against decree of Addl. Sub-Judge, Saharanpur, D/- 19th January 1927.

(a) Company — Company with limited liability undertaking to sell shares belonging to shareholder—Position of Managing Director is of fiduciary character—Advantage obtained by him must go to owner of shares—Trusts Act, S. 88.

Where a company with a limited liability undertakes to sell the shares belonging to one of its share-holders, the position of itsManaging Director in negotiating and completing the sale is clearly one of a fiduciary character. Utmost good faith should be expected and should be insisted upon in transactions of this description. If any advantage was obtained by the Managing Director as the fruit of the sale, whether the purchase was made in his name, or in the name of his minor sons, the benefit must go to the owner of the shares. [P 616 C 1]

(b) Evidence Act, S. 91—Document embodying only some terms of contract—Oral evidence of other terms is admissible.

Where there is a document in writing which does not contain the entire agreement between the parties but embodies only some of the conditions, oral evidence to prove certain other terms which had been agreed upon and which are not inconsistent with the written instrument is clearly admissible in evidence. [P 616 C 2]

(c) Vendor and Purchaser — Ordinarily purchaser of shares is entitled to dividends declared subsequent to purchase—But if there is contract to the contrary to sell only the shares without dividends accrued, anterior to sale, purchaser cannot deprive seller of his right to such dividends.

Ordinarily and in the absence of a contract to the contrary, a purchaser of shares is entitled to all the dividends, which may have been declared after the date of the purchase. There is nothing in law to preclude a shareholder from selling the shares only and reserving the dividends to himself. Where shares are sold, no matter whether by private treaty or by public sale and it is definitely understood that the shares and not the dividends on the shares are the subject of bargain, the purchaser cannot deprive the original owner of his right to the dividend of a period anterior to the sale, even though the dividend may have been declared subsequent to the date of the purchase : *Black* v. *Homersham*, 4 *Ex. D.* 24, *not Appl.* [P 617 C 1, 2]

N. P. Asthana—for Appellants.

G. S. Pathak—for Respondents.

Sen, J.—This is an appeal by the defendants from the judgment and decree of the learned Additional Subordinate Judge of Saharanpur affirming the decree of the City Munsif in a suit for recovery of dividends on certain shares with interest. The plaintiff claimed a decree for Rs. 1050 principal and Rs. 34 interest against the defendant company. Messrs. Bhagwan Das & Co., owned seven shares in the Co-operative Company Ltd. Lala Nemidas is the banking and managing proprietor of the plaintiff firm. Dr. Brijbehari Lal is the Managing Director of the defendant company. The financial year of the defendant company begins with 1st April and ends with 31st March of the following year.

On or about 13th April 1925, Lala Nemidas intimated to the defendant company that he was desirous of selling his seven shares. He constituted the defendant company as his agent for selling the same. The company could have refused to take up this business and could well have asked the plaintiff to sell the shares without the mediation of the Co-operative Company Ltd., or its Managing Director. The company, however, agreed to act for the plaintiff and to negotiate and complete the sale. The plaintiff alleges that he authorized the sale of the shares only but not the dividends on the shares which had accrued due for the financial year ending with 31st March 1925. The plaintiff avers that the defendant was cognizant of these terms and had agreed to sell the shares upon those terms. The powers of the Managing Director of the defendant company are not clear from the papers on the record. Neither the Articles nor the Memorandum of Association has been produced in this case.

In the negotiation between the parties, Dr. Brijbehari Lal represented the defendant company. He does not appear to have ever been approached in his personal capacity. Indeed, the identity of Dr. Brijbehari Lal with the Co-operative Company Ltd., has not

been denied in the course of the suit. The two are indissolubly connected and intermixed. This identity has not been either repudiated or even controverted by the defendant in the Courts below. The shares in question have been purchased by the minor sons of Dr. Brijbehari Lal. This matter, however, was studiously withheld from the plaintiff. Where a company with a limited liability undertakes to sell the shares belonging to one of its shareholders, the position of its Managing Director in negotiating and completing the sale is clearly one of a fiduciary character. Utmost good faith should be expected and should be insisted upon in transactions of this description. If any advantage was obtained by the Managing Director as the fruit of the sale, whether the purchase was made in his name, or in the name of his minor sons the benefit must go to the owner of the shares. The suit, however, is not directed against Dr. Brijbehari Lal and no decree has been passed against him.

On the 22nd April 1925, the defendant sent to the plaintiff a cheque for Rs. 2,800 as the price of the seven shares sold. The dividend of the shares had not been declared by that time. The dividend was declared on the 20th July 1925. It may be noticed here that although the transaction was between business people, the entire contract between the parties was not reduced to writing. The terms of the negotiations which ultimately matured into the contract had to be collected partly from the depositions of Babu Nemidas and partly from certain letters which are on the file. Babu Nemidas was positive that he had authorized the sale of the shares but not the dividends thereon. He has been believed by the Courts below. The letters referred to above are corroborative.

On the 10th July 1925 Dr. Brijbehari Lal wrote to the plaintiff as follows :

"With reference to your letter No. 6909, dated the 8th July 1925 we beg to inform you that no dividend has been declared and the matter of the dividend will be decided by the company in its general meeting to be held on the 20th instant. If any dividend is declared to the year 1924 to 1925 then it will be sent for you."

After purchasing the shares in the names of his minor sons, Dr. Brijbehari Lal appears to have been very active and sedulous in devising means and projects with a view to appropriate the dividend himself and to deprive the plaintiff of the same. The first step taken was to ignore the letter dated the 10th July 1925. When the plaintiff asked for the payment of the dividend, he was told that the matter was to be determined by a reference to the Registrar of the Joint Stock Companies. It is difficult to understand how the Registrar of Joint Stock Companies could be treated as an arbitrator in the matter between the plaintiff and the defendant as regards the claims to the dividend on the shares sold. The next step taken was to refer the matter to a general meeting of the shareholders. The plaintiff had already sold his shares and was no longer a shareholder. Behind his back, a resolution was passed that the purchaser and not Babu Nemidas was entitled to the dividends in controversy. This resolution of the share-holders could not override the contract between the parties.

Lastly, it was urged that the shares were sold unconditionally on the 13th April 1925 without any reservation in favour of Lala Nemidas as regards the right to the dividends. This document dated the 13th April 1925 was not a formal instrument and did not contain the terms of the entire contract. There was nothing to preclude the plaintiff from showing that some additional supplementary agreement had been arrived at contemporaneously with the principal one, the terms of some of which were set out in the letter dated the 13th April 1925.

The point was vigorously argued that it was not within the competence of the trial Court to let in oral evidence deviating from the terms contained in the letter above mentioned. It was contended that the statement of Babu Nemidas that there was a contract to sell the shares but not the dividend sought to have been ruled out as inadmissible in evidence. Where there is a document in writing which does not contain the entire agreement between the parties but embodies only some of the conditions, oral evidence to prove certain other terms which had been agreed upon and which are not inconsistent with the written instrument is clearly admissible in evidence. The

trial Court therefore was justified in admitting evidence to prove the terms of the original contract and the oral evidence so admitted was not in contravention of S. 91, Evidence Act.

The concurrent findings of the Courts below are against the defendant-appellant. It has been definitely found that the plaintiff authorized the sale of the shares but not the dividends of the same which had already fallen due. It is contended, however, that as a matter of law, the sale of the shares necessarily involves the sale of the dividends which had already fallen due. This appears to us to be too wide a proposition which lacks the support of either principle or authority.

Both in this country, and at the Stock Exchange, the price of shares is subject to constant fluctuation. In this rise and fall, one of the determining factors in fixing the price of the shares is that dividend is taken into account and treated as an integral part of the shares sold. There can, however, be no legal bar to a contract to sell the shares only to the exclusion of the dividends which had already become payable. We have no doubt that ordinarily and in the absence of a contract to the contrary, a purchaser of shares is entitled to all the dividends, which may have been declared after the date of the purchase. The general rule, however, may be modified by a special stipulation. In *Black* v. *Homersham* (1) the facts were that on 1st August certain shares of a company were sold by auction and a deposit was paid. The transfers were signed on 29th August. The conditions of sale were silent as to the dividends. On 24th August a dividend was declared in respect of a period antecedent to the sale by auction. It was held that the dividend belonged to the purchaser. Kelly, C. B., was of opinion that the completion of the sale had relation back to the time when the contract was made, which vested from the moment the right to that share in the purchaser. Clearby, C. B., also took the same view, but his opinion was founded principally upon this reason that the value of the shares invariably fell immediately after the payment of the dividend :

> "The purchaser bought at the value before dividend, and if he does not receive it he will be paying so much more for his share than he bargained for."

Dr. Brijbehari Lal had bargained for the purchase of the shares to the exclusion of the dividends due thereon. There is nothing in law to preclude a share-holder from selling the shares only and reserving the dividends to himself. Where shares are sold no matter whether by private treaty or by public sale and it is definitely understood that the shares and not the dividends on the shares are the subject of bargain, the purchaser cannot deprive the original owner of his right to the dividend of a period anterior to the sale, even though the dividend may have been declared subsequent to the date of the purchase.

The defendant company therefore had no right either to withhold the payment of the dividend from the plaintiff or to pay the same to the purchaser. We are clearly of opinion that the plaintiff's claim was rightly decreed. We dismiss this appeal with costs including in this Court-fees on the higher scale.

S.N./R.K. *Appeal dismissed.*

(1) [1878] 4 Ex. D. 24=48 L. J. Ex. 79=39 L. T. 671=27 W. R. 171.

A. I. R. 1930 Allahabad 617

YOUNG, J.

In the matter of the *Sonardih Coal Co., Ltd.*

Misc. Case No. 567 of 1926, Decided on 21st March 1930.

(a) U. P. Court of Wards Act (4 of 1912), S. 17—Application.

Section 17 only applies to any claim existing at the date of the publication of the notice. [P 618 C 2]

(b) Companies Act, S. 156—Liability of contributories as regards balance of share money becomes claim only when Court is satisfied that call is necessary.

When a company goes into liquidation and an official liquidator is appointed, the contributories are only liable to pay up the balance of their share money then uncalled as and when the Court is satisfied that the financial condition of the company is such that a call is necessary to discharge the liabilities of the company. The shareholder is not liable to pay one farthing of the uncalled share money until the Court has made such an order and the call then becomes a claim on the contributory. [P 618 C 2]

(c) Companies Act, S. 184—Application for varying list of contributories—There is no conflict for placing Collector on list between Companies Act and U. P. Court of Wards Act.

There is nothing in the Court of Wards Act which conflicts with the Companies Act in the

matter of allowing an application for the varying of the list of contributories by placing upon it the name of the Collector in lieu of the name of person whose estate has been taken over by the Court of Wards. [P 619 C 1]

P. L. Banerji—for the Company.

U. S. Bajpai—for the Collector of Mirzapur.

Judgment.—This is an application of the official liquidators of the Sonardih Coal Co., Ltd. in liquidation, to place the Collector of Mirzapur upon the list of contributories in lieu of Mahant Permanand Gir, who was placed upon the list of contributories on 20th January 1928. On 22nd June 1928, a call of Re. 1-4-0 was ordered by this Court. On 6th August 1928, the contributory not having paid the amount of the call a decree was passed by this Court for the amount, namely Rs. 1,250. Execution proceedings were taken in the Munsif's Court of Mirzapur, and on 17th June 1929 Rs. 735 was collected by way of execution. This left a balance of Rs. 553-8-0, including costs of execution, due from the contributory to the official liquidators. On 24th June 1929, the estate of the contributory was taken over by the Court of Wards and on the 29th June a notice was published in the Gazette under S. 15, Court of Wards Act. In the month of August 1929 notice was given to the Collector of the existence of the claim for the balance of the call under S. 17 (1), Court of Wards Act, and in the month of March 1930 the Collector has paid the balance of this call to the official liquidators.

The official liquidators, however, finding that the amount of the first call has not been sufficient to satisfy the debts of the company, contemplate applying to this Court to order another call upon the contributories. It is clear that as Mahant Permanand Gir is now under the Court of Wards the Collector in the ordinary course of events would represent Permanand Gir and, subject to the argument of the Government Advocate who appears for him, to which I shall allude hereafter, he ought to be in the list of contributories in place of Mahant Permanand Gir. The official liquidators have in this application applied that the list of contributories should be varied under S. 184, Companies Act, and that the name of the Collector of Mirzapur should be placed upon the list of contributories in lieu of Mahant Permanand Gir.

The Government Advocate, who appears for the Collector, objects to an order being made and relies upon S. 17, Court of Wards Act. That section is as follows :

"On the publication of a notification under S. 15 the Collector specified in the order of assumption, or any other Collector whom the Court of Wards may appoint in this behalf, shall publish in the Gazette a notice and in the vernacular calling upon all persons having claims, including decrees for money, whether secured by mortgage or not, against the ward or his property to notify the same in writing to such Collector within six months from the date of publication of the notice."

He also relies on S. 18 of the same Act which provides :

"Subject to the provisions of S. 20 every claim of the nature specified in S. 17 ..... which is not notified under S. 17, shall be deemed for all purposes .... to have been duly discharged provided that if the claimant can show sufficient cause for failure to comply with the provisions of S. 17, the Collector shall receive his claim, and the claim so received shall be deemed to have been notified under S. 17."

The learned Government Advocate argues that this application is in the nature of a claim, that the claim has not been notified under S. 17 within six months of the publication of the notice and that, therefore, the application is barred under S. 18, Court of Wards Act.

I am satisfied that the argument is based upon a misapprehension of the effect of S. 17. That S. 17 only applies to any claim existing at the date of the publication of the notice. Even at the present moment there is no claim, in my opinion, existing against Mahant Permanand Gir by the official liquidators. When a company goes into liquidation and an official liquidator is appointed, the contributories are only liable to pay up the balance of their share money then uncalled as and when the Court is satisfied that the financial condition of the company is such that a call is necessary to discharge the liabilities of the company. The shareholder is not liable to pay one farthing of the uncalled share money, until the Court has made such an order and the case then becomes a claim on the contributory. There could not then be, in my view, any claim whatever by the official liquidators against Mahant Permanand Gir until such a call has been sanctioned by the Court. On the date of the notice

in the Gazette in this case the only claim then in existence was notified by the official liquidators under S. 17 to the Collector and that claim has been satisfied. If and when the official liquidators apply to this Court for an order for a call, they have to satisfy this Court that such a call is necessary. If they do satisfy the Court that such a call is necessary the Court will make an order sanctioning a call. On that date, and on that date alone, whenever it may occur the official liquidators will have a claim against Mahant Permanand Gir or any representative of his within the meaning of S. 17, Court of Wards Act. That being so, the objection of the Government Advocate on behalf of the Collector is without force. Further the notice to the Collector in the month of August 1929 was in my opinion sufficient to fix the Collector with notice that Mahant Permanand Gir was a contributory in this company in liquidation, and that therefore he might be liable for further calls. Even if, therefore, the argument of the learned Government Advocate is sound, I am of opinion that this notice would be sufficient notice of a "claim" within the meaning of S. 17, Court of Wards Act. The official liquidators could in any event claim the benefit of the proviso to S. 18.

There is nothing in the Court of Wards Act which conflicts with the Companies Act in the matter of allowing this application for the varying of the list of contributories by placing upon it the name of the Collector of Mirzapur in lieu of the name of Mahant Permanand Gir. I order, therefore, that the list of contributories be varied accordingly. This order will carry costs of Rs. 150, that being the amount of fee which I have allowed the official liquidators to pay Mr. Piare Lal Banerji, who appeared on their behalf.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 619

MUKERJI AND BENNET, JJ.

Ishri Prasad—Defendant—Appellant.

v.

Munna Lal—Plaintiff — Respondent.

Letters Patent Appeal No. 77 of 1929. Decided on 15th April 1930, against the judgment of Dalal, J., D/- 22nd January 1929.

Civil P.C., S. 11, Expl. 5 — Compromise in which parties have omitted part of dispute—Explanation does not apply.

Explanation 5 apparently has a reference to what has been adjudicated by the Court and not to the result arrived at by a compromise, in which the parties have omitted to settle a part of their dispute. [P 619 C 2]

S. C. Das—for Appellant.

G. S Pathak—for Respondent.

Mukerji, J.—Three points have been argued in this appeal, namely, the respondent's suit was barred as res judicata, that it was barred under O. 2, R. 2 Civil P. C., and that on the merits the plaintiff was not entitled to possession as that amounted to a dispossession of a cosharer.

It appears that the plaintiff brought a suit, No. 219 of 1925, for possession of a certain plot No. 419 and for injunction with respect to two plots, namely, 415 and 421, against the present appellant who was the defendant in the case. The parties came to terms. The plaintiff's suit for possession of plot 419 was dismissed. His claim for injunction with respect to plot 415 was decreed. Nothing was said about plot 421. The plaintiff brought the suit, out of which the present appeal has arisen, to recover possession of plot 421. It has been found that at the date of the institution of suit No. 219 of 1925 the plaintiff was out of possession. The question is whether the present suit is barred on any of the first two grounds taken by the appellant.

As regards the application of S. 11, Civil P. C., it is clear that no adjudication was arrived at by the Court. The parties agreed to settle their differences, and they kept silent as regards plot 421. It is said that by Expl. 5 any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of S. 11 be deemed to have been refused, but no copy of the decree has been filed. The only document which is on the record is the compromise. The appellant therefore is not in a position to take advantage of the decree for the simple reason that it is not on the record. Again Expl. 5, apparently, has a reference to what has been adjudicated by the Court and not to the result arrived at by a compromise, in which the parties have omitted to settle a part of their dispute. In our opinion the suit is not barred by S. 11, Civil P. C.

As regards the second point, our opinion is that it is not also barred under O. 2, R. 2, Civil P. C. The causes of action in the two suits are different. The cause of action for a suit for injunction or declaration is something different from that of a suit for possession.

As regards the third point, it is concluded by the finding of fact arrived at by the lower appellate Court. The lower appellate Court found that the plaintiff, who is a cosharer of the land was in possession, and he was, therefore, entitled to turn out even the lambardar if he interfered with his possession. That being the case, the lambardar's licensee could not take possession by turning out the plaintiff who was entitled to possession by virtue of being a cosharer who was actually in possession. The appeal fails and is hereby dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 620

NIAMATULLAH AND KISCH, JJ.

Ishri Prasad Misir—Defendant—Appellant.

v.

Ram Krishan Das—Plaintiff—Respondent.

Second Appeal No. 951 of 1927, Decided on 15th April 1930, against decree of Addl. Sub-Judge, Benares, D/- 1st December 1926.

(a) Hindu Law—Religious endowment—Endower appointing himself first shebait with power to appoint successor—Right to appoint successor is not sxhausted by exercise of power and endower can revise his decision.

Where a person by a deed of endowment of his property to religious institution appoints himself the first shebait and reserves to himself the power of appointing a suitable successor to himself, the power so reserved is not exhausted after being exercised once but it entitles the person to make repeated nominations. His choice remains unfettered and he is at perfect liberty to revise his views. Further, like all testamentary dispositions, his nomination is to speak as on his death and his last direction is to cancel all previous declarations on the subject. [P 621 C 1]

(b) Practice — Discretion — Relief for declaration is discretionary and High Court will not interfere in second appeal with that discretion.

A relief of declaration is discretionary with the Court which should be granted with due regard to all circumstances of a case and a High Court will not be justified in interfering with the discretion in second appeal : 14 *I. C.* 81 and 41 *All.* 154, *Ref.* [P 621 C 1, 2]

N. Upadhiya—for Appellant.

K. N. Laghate—for Respondent.

Niamatullah, J.—This is an appeal from the decree of the learned Additional Subordinate Judge of Benares reversing that of a Munsif of that district in a suit brought by the plaintiff-respondent for a declaration that an agreement dated 21st May 1925 executed by him in favour of the defendant is ineffectual. In substance the suit was one for the cancellation of the aforesaid document.

The plaintiff-respondent owned a house No. 12/8 situate in the city of Benares. By a deed dated 7th May 1924 he dedicated it to Sri Ram Chandraji and constituted himself a shebait for life. The deed appointed five persons including one Moti Lal as manager. Subsequently on 21st May 1925 he executed the agreement which is now sought to be cancelled by which he appointed the defendant-appellant as a shebait to hold office after him and to be in possession of the dedicated property generation after generation.

Two suits were instituted, one by Moti Lal and another by the plaintiff, the present respondent, which has given rise to this appeal impugning the validity of the agreement dated 21st May 1925. Both the suits were disposed of by the same judgment. No appeal has been preferred in the suit of Moti Lal which has been dismissed by both the Courts below. As regards the plaintiff's suit the Court of first instance dismissed it. The lower appellate Court has cancelled the agreement dated 21st May 1925 so far as it related to the appointment of a shebait in succession to the plaintiff after his death. No relief was granted as regards the present position of the defendant-appellant which, according to the lower appellate Court, the defendant held at the pleasure of the plaintiff under whose supervision he is to discharge certain duties in consideration of a right of residence in a part of the dedicated house. The question we are called upon to decide is whether the decree of the lower appellate Court cancelling the agreement dated 21st May 1925 so far as it affects the defendant's right to suc-

ceed the plaintiff as shebait thereunder is correct.

The learned advocate for the appellant has addressed two main arguments before us which seem to us to be mutually destructive. Firstly, he urges that the declaration granted by the lower appellate Court is in respect of a truism. He, however, proceeds to contend that the defendant-appellant is entitled to succeed the plaintiff under the agreement of 21st May 1925 which in that respect is a valid and irrevocable document. We have carefully considered the terms of the so called agreement dated 21st May 1925 and agree with the lower appellate Court that in so far as it nominates the defendant as the plaintiff's successor in office it is of a testamentary character. By the deed of endowment dated 7th May 1924 the plaintiff reserved to himself the power of appointing a suitable successor to himself. It is not a power which is exhausted after being once exercised. In our opinion it enables the plaintiff to make repeated nominations necessitated by death, incompetency or other cause. His discretion in making a choice as regards his successor in office is unfettered and he is perfectly at liberty to revise his views on that matter from time to time. Like all testamentary dispositions his nomination is to speak as on his death and his last direction is to cancel all previous declarations on the subject. The plaintiff was, therefore, competent to cancel the nomination of the defendant which he did by executing another document dated 6th March 1926.

As regards the argument that a declaration of what is palpably true should not be granted, reference has been made to two cases, *Narendra Bahadur Singh* v. *Basudeo Misra* (1) and *Ganga* v. *Kanhai Lal* (2), both of which are only authorities for the proposition that the relief of declaration is in the discretion of the Court, which should be granted with due regard to all the circumstances of the case. The view there expressed is unquestionably right. Each case, however, depends upon its own facts. If the document impugned in a suit is of such a character that if left standing it may be a fruitful source of litigation, the Court may well grant a declaration to the plaintiff. The lower appellate Court considered the present one as a fit case in which the declaratory relief should be granted in the exercise of its discretion. In second appeal we will not be justified in interfering with the exercise of that discretion. The fact that the defendant-appellant has contested the plaintiff's claim on the merits and maintained that the nomination of the defendant-appellant once made by the agreement dated 21st May 1925 could not be subsequently questioned by the plaintiff was a justification for the lower appellate Court to have considered it to be a fit case in which all doubt as regards the defendant's right to succeed to the plaintiff on foot of that document should be negatived if he is not entitled so to succeed. In substance the question has reference to the power reserved by the plaintiff in the deed of endowment to nominate his own successor as shebait. It is clear to us that the nature and extent of that power is an important question in the case.

In the view of the case that we have taken this appeal is dismissed with costs, including counsel's fee in the Court on the higher scale.

V.B./R.K. *Appeal dismissed.*

(1) [1912] 14 I. C. 81.
(2) [1919] 41 All. 154=47 I. C. 222=17 A.L.J. 44.

A. I. R. 1930 Allahabad 621

MUKERJI AND BENNET, JJ.

Pittam Singh and *others*—Defendants—Appellants.

v.

Hukum Singh and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 176 of 1929, Decided on 4th April 1930, against judgment of Boys, J., D/- 19th April 1929.

Civil P. C., O. 47, R. 1—Two connected appeals, one before single Judge and other before Bench filed by opposite parties—Bench deciding question of importance to appeal before single Judge, but appeal having been decided under O. 41, R. 11, appellant before single Judge was not aware of decision at hearing of his appeal and hence applied for review of decision in light of that fact—Held case came within O. 47, R. 1.

There were two connected appeals between the same parties one before a Bench of two Judges and the other before the single Judge of the High Court. The respondent in one was

the appellant in the other and the matter at issue was practically connected. The appeal before the two Judges was dismissed under O. 41, R. 11 and no notice was issued to respondent. The other appeal was heard and decided, the appellant was till then unaware of the dismissal of the connected appeal. The judgment was delivered but subsequently the appellant applied for review as the point on which the appeal was decided adversely to appellant was decided in favour of the appellant by the Bench.

Held : that the case came within the purview of O. 47, R. 1. [P 622 C 1]

A. P. Pandey—for Appellants.

Bennet, J.—This is a Letters Patent appeal by Pittam Singh and others, defendants, against the judgment of a learned single Judge of this Court passed on 19th April 1929, in review of his former judgment in second appeal passed on 6th November 1928. The facts are that there was a dispute in regard to two khasra numbers between the parties, Hukum Singh on the one side and Pittam Singh on the other. Hukum Singh brought a suit No. 109 of 1925 in the Court of the Munsif and obtained a decree, but the Court of first appeal dismissed the suit of Hukum Singh and the learned single Judge of this Court dismissed the appeal of Hukum Singh on 6th November 1928. Meanwhile Pitam Singh had brought a suit in the Court of the Subordinate Judge for the same two numbers, suit No. 599 of 1925, in which he obtained a decree but the lower appellate Court dismissed the suit and there was a second appeal filed by Pittam Singh, No. 913 of 1927. That second appeal of Pittam Singh came before a Bench of two Judges of this Conrt on 18th July 1927 and was dismissed under O. 41, R. 11. Of that proceeding no notice was necessary to Hukum Singh. Consequently, when the appeal of Hukum Singh was argued before the learned single Judge of this Court in November 1928, Hukum Singh being unaware of the dismissal of Pittam Singh's appeal as disclosed in his affidavit, did not bring the fact to the notice of the learned single Judge. It has been suggested that the affidavit of Hukum Singh is false on the point and that he must have known that the appeal of Pittam Singh was dismissed. If that had been so, we cannot conceive of any reason why Hukum Singh would not have brought the fact of the appeal of Pittam Singh having been dismissed to the notice of the learned single Judge.

Accordingly we consider that the learned single Judge was correct in accepting the affidavit of Hukum Singh on this point. The learned single Judge following the decision of a Bench of this Court that the facts alleged did not constitute adverse possession on the part of Pittam Singh, allowed the appeal of Hukum Singh in the judgment which is now under Letters Patent appeal.

It was urged by the learned counsel for the appellants Pittam Singh etc. that the facts alleged in his affidavit by Hukum Singh would not bring his case under O. 47, R. 1. We consider that the grounds which he alleged did come under the words of that order:

"from the discovery of new and important matter which by the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed and the order made."

Accordingly we consider that the judgment of the learned single Judge of this Court in review was a correct judgment and we dismiss this Letters Patent appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 622

MEARS, C. J., AND SEN, J.

Salig Ram—Defendant—Appellant.

v.

Lachmi Prasad and *others*—Plaintiffs—Defendants—Respondents.

Letters Patent Appeal No. 104 of 1927, Decided on 17th July 1929, from a judgment of Sulaiman, J., D/- 25th July 1927.

Provincial Insolvency Act (3 of 1907), Ss. 18 (3) and 47—Liability of third person, in position to realize decretal amount on behalf of another but embezzling the money—Breach of trust to recoup does not amount to being in possession or custody of insolvent's property so as to entitle receiver to obtain decree for same, and insolvency Court has no jurisdiction to pass decree for same.

Where a third person, who has been placed in a position to realize certain decretal amounts on behalf of another, upon the understanding that the money realized should be held for the use of the original creditor, embezzles the said money, he places himself under a legal liability to recoup the amount. The liability springs from a tortious breach of an obligation and the breach is actionable. The liability of such a person to recoup the money cannot be treated as amounting to his being in possession or custody of any property belonging to the insolvent, and the insolvency Court has no jurisdiction to initiate proceedings against such

third person in case of the insolvency of the original decree-holder, in order to recover money due from him for breach of obligation to the insolvent. [P 624 C 1, 2]

P. L. Banerji—for Appellant.

A. P. Bagchi—for Respondents.

Mears, C. J.—Ramanand and Naurangi held two decrees against Abdur Rahman and Chhabraji Kuer in suits Nos. 144 and 38 of 1910. The decree-holders were in considerable financial difficulty about this time. They sold the decrees to Ram Charan defendant 1, who is the father of the plaintiffs on 31st August 1911. This assignment was clearly a cloak to defeat or delay creditors and was not intended to be a genuine sale for consideration. The decrees were put into execution and in July 1912 Ram Charan intimated that he had received the decretal amounts in their entirety and prayed that the execution cases be struck off in full satisfaction.

Ramanand and Naurangi applied for bankruptcy on 8th October 1913. They were adjudicated insolvents on 26th August 1914.

The Official Receiver applied to the learned District Judge in insolvency that the assignment of the decrees was a colourable transaction, that it was fictitious, was without consideration and was a mere device to defraud the creditors. He prayed for the annulment of the transfer. On 3rd July 1916 the learned District Judge granted the application, holding that the sale was a fictitious transaction and he further directed that the property should be transferred to the receiver. There was an appeal to this Court from the order of the District Judge, but the appeal was dismissed and the order upheld: *Jagrup Sahu* v. *Ramanand Sahu* (1).

It appears that the receiver came to know some time in 1918 that Ram Charan, the assignee, had realized the decretal amounts from the original debtors of the insolvents. He applied for process against Ram Charan for recovery of Rs. 1909 with interest. Notwithstanding due service of notice, Ram Charan did not appear and the result was that an ex parte decree was passed against Ram Charan for Rs. 1,969-10-9 from the insolvency Court on 28th May 1919.

The Official Receiver sold this decree to Salig Ram, defendant-appellant, for Rs. 1,000 on 17th March 1921. Salig Ram got the decree transferred to Azamgarh. In execution of this decree he got some property attached.

The present suit was instituted by Lakshmi Prasad and Bishun Ram, the two sons of Ram Charan, for a declaration that the property sought to be attached was joint ancestral property, that the decree sought to be executed was collusive and fraudulent and that the two-thirds share of the plaintiffs was not liable to sale in execution of the simple money decree obtained by the Official Receiver from the Court of the insolvency.

The Official Receiver was no party to the suit. The main contestant was Salig Ram, the defendant-appellant, who pleaded that the decree was validly passed and could be enforced against the property in dispute.

The primary Court held that the decree, dated 28th May 1919, passed by the insolvency Court was ultra vires and therefore a nullity. It decreed the plaintiffs' suit.

On appeal to this Court the Bench which heard the appeal differed. One of the learned Judges was of opinion that the insolvency Court had wide and extensive powers and it was within the competence of that Court to pass the decree which is now impugned by suit and that there was no valid ground for setting aside the decree at the instance of the sons of the judgment-debtor. He was for allowing the appeal and dismissing the suit.

Sulaiman, J., agreed with the decision of the Court below that the decree was passed by a Court without jurisdiction. The result was that his judgment prevailed and the appeal was dismissed.

The present appeal is under S. 10, Letters Patent, from the judgment of Sulaiman, J.

We are clearly of opinion that the judgment appealed against is correct and ought to be affirmed. The sole and vital question in the case is whether the Court of insolvency had jurisdiction to pass the decree dated 28th May 1919 against Ram Charan, the father of the plaintiffs.

The question has to be determined with reference to the provisions of the Pro-

(1) [1917] 39 All. 633=40 I. C. 373.

vincial Insolvency Act (Act 3 of 1907) which was then in force.

Under the aforesaid Act the Court of Insolvency had a limited jurisdiction and did not possess the same powers as a civil Court of ordinary jurisdiction. It ought to be remembered that Ram Charan was a stranger to bankruptcy. It is a debatable question whether the bankruptcy Courts in this country possessed any jurisdiction under Act 3 of 1907 over any person who was a stranger to bankruptcy. The insolvency Court in passing a decree against Ram Charan presumably acted under S. 18, Insolvency Act, which enacts :

"(1) The Court may at the time of order of adjudication, or at any time afterwards appoint a receiver for the property of the insolvent, and such property shall thereupon vest in such receiver. . . . . .

(3) Where the Court appoints a receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof :

Provided that nothing in this section shall be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so as to remove."

The position of affairs is this. The insolvent transferred certain decrees to Ram Charan in August 1911. The latter realized the decretal amount in 1912. It is admitted by Salig Ram appellant in his deposition dated 9th October 1924 that Ram Charan after realizing the amount applied it partly towards the payment of debt incurred in the marriage of his daughter, partly towards his business and partly towards the payment of revenue. The insolvent may charge Ram Charan with a flagrant breach of trust and with misappropriation of the money which belonged to him. The remedy of the insolvent lay by a suit against Ram Charan in the civil Court of ordinary jurisdiction for the refund of the money which Ram Charan had converted to his own use. It is clear, however, that in 1919 Ram Charan had not "in his possession or custody any property belonging to the insolvent."

Where a third person, who has been placed in a position to realize certain decretal amounts on behalf of another, upon the understanding that the money realized should be held for the use of the original creditor embezzles the said money, he places himself under a legal liability to re-coup the amount. The liability springs from a tortious breach of an obligation; and the breach is actionable. The liability of a person to recoup the money cannot be treated as amounting to his being in possession or custody of any property belonging to the insolvent.

The Court of insolvency therefore was not competent under S. 18, Cl. 3, to pass a decree against Ram Charan.

It has been contended, however, that the insolvency Court had under S. 47 of the Act the power to pass the decree now in controversy. S. 47, Cl. (1), provides as follows :

"Subject to the provisions of this Act, the Court in regard to the proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction."

As we have indicated above the jurisdiction of the insolvency Court is narrow and limited. It is "subject to the provisions of this Act" which means that it is subject to the provisions of the restricting sections including S. 18, Cl. 3. Further, its powers have got to be exercised "in regard to proceedings under this Act." A proceeding initiated against a stranger to the bankruptcy for recovery of money due from him for breach of obligation to the insolvent is not a proceeding under this Act. S. 47 of the Act is therefore not helpful to the appellant but goes against him.

It follows that the insolvency Court had no jurisdiction to pass any decree against Ram Charan under O. 20, R. 10 or O. 21, R. 31, Civil P. C. Our attention was called to numerous rulings. We do not think it necessary to refer to them because they do not touch the point in issue. We hold that the decree dated 20th May 1919 was passed by a Court without jurisdiction and that in the execution of the said decree the property in dispute cannot be touched. We dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 624

SULAIMAN AND KENDALL, JJ.

Hari Ram and *others*—Defendants—Appellants.

v.

Gokul Prasad and *another*—Plaintiffs—Respondents.

First Appeal No. 347 of 1927, Decided on 25th March 1930.

(a) Hindu Law—Debts— Mortgage suit—Mortgagor pleading want of legal necessity —Mortgage containing no recital showing purpose of debt—Mortgagee's evidence that it was for family expenses believed by trial Court—All adult members were executants —Mortgage being old document and mortgagee being dead—Mortgagors not entering witness-box—Trial Court's view that it was for legal necessity was not interfered with.

In a suit on the basis of a mortgage, the defendant mortgagors pleaded want of legal necessity for part of the mortgage debt. The mortgage deed contained no express recital showing the purpose for which the amount was required. Plaintiff's evidence that it was for family expenses was believed by the trial Court. The mortgage itself was an old document, and all the adult members of the family had joined in its execution. The mortgagee was dead and the mortgagor did not enter the witness-box.

Held: that taking into consideration all these circumstances there was no reason to differ from the trial Court which held that there was legal necessity. [P 626 C 1]

(b) Trusts—Legal heirs of founder of trust succeed.

In the absence of any proof that some other person is the trustee after the death of the founder of a trust, the legal heirs of the founder would have a right to administer the trust. [P 626 C 1]

(c) Mortgage— Construction — Mortgage reciting payment of interest every year and in default mortgagee to enter into possession —No recital showing that no interest would be payable after mortgage period of seven years—Mortgagor would be liable to pay interest subsequent to seven years period.

The mortgage deed provided that interest would be paid every year during the fixed period of seven years and in case of default the mortgagee would enter into possession, and that there would be redemption after the period of seven years. There was no express covenant in the document which specifically stated that interest would be recoverable even after the period of seven years had expired. On the other hand, there was no clear recital which would show that no interest after that period would be due.

Held: that in the absence of any express recital to the contrary it must be presumed from the terms of the document that subsequent interest was contemplated and that the mortgagors were liable for the same: 19 *All.* 39 (*P. C.*) and *A. I. R.* 1923 *All.* 7, *Rel. on.* [P 627 C 1]

N. C. Vaish and *K. D. Malaviya*—for Appellants.

P. L. Banerji, *Shiva Prasad Sinha*, *Vishnu Nath* and *Rudra Narain Srivastava*—for Respondents.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for sale on the basis of a mortgage deed dated 12th September 1907 for Rs. 8,000 executed by defendants 1, 2 and 3 in favour of Mathura Prasad. Defendants 4, 5 and 6 are the sons of the mortgagors. The plaintiffs are members of Mathura Prasad's family, who has died since, and are his heirs under the Hindu law. The defence of the mortgagors was that the amount had been advanced not by Mathura Prasad in his personal capacity but as a trustee of an endowment, and the present plaintiffs who were heirs to his personal estate were not entitled to recover this amount; that there was no right given to the mortgagee to recover interest, his only remedy being to enter into possession; that there was no stipulation to pay interest after the fixed period of seven years; and lastly that the claim for foreclosure was barred by S. 10, Bundelkhand Alienation of Land Act, (Act 2 of 1903). The other defendants denied the execution of the mortgage deed and also pleaded want of legal necessity. The Court below has found that the Bundelkhand Alienation of Land Act applied to this case, and in view of the provisions of S. 10 of that Act it has held that the condition intended to operate by way of conditional sale was null and void, and that the only decree to which the plaintiffs could be entitled was one for sale. He has found all the other issues in favour of the plaintiff. The defendants have accordingly appealed to this Court.

The execution of the document cannot be seriously disputed. It has been fully proved by the evidence adduced by the plaintiffs. The plea as to want of legal necessity is of no avail in respect of Rs. 6,000 out of Rs. 8,000, inasmuch as this sum represented the antecedent debts of the fathers of the contesting defendants and they were bound to pay the amount unless it were shown that the debt was tainted with illegality or immorality. This is not suggested here. The balance of Rs. 2,000 was paid in cash before the Sub-Registrar and there is no express recital in the deed itself showing the purpose for which this amount was required. We have only the facts that all the three brothers who were the adult members of the family had joined in the document and the amount was paid to all of them. The plaintiffs produced two witnesses, Madan Mohan Lal and Har Charan Lal, who deposed that this amount was required by the mortgagors for their household expenses. This evidence has been believed by the learned

Subordinate Judge, who has also strongly relied on the circumstance that all the adult members of the family who were then alive had joined in this transaction. Having regard to the facts that the transaction is a very old one, that the mortgagee Mathura Prasad who could have given direct evidence is dead, that none of the three mortgagors has gone into the witness box and submitted himself to cross-examination and that all the adult members of the family had joined in the transaction, we see no reason to differ from the view taken by the learned Subordinate Judge who heard these witnesses. On the question whether the amount was advanced by Mathura Prasad out of the trust funds we need not express any final opinion. There is plenty of documentary evidence to show that a trust and a temple mentioned in the mortgage deed did exist, and the oral evidence of the plaintiffs to the effect that no such temple existed does not appear to be consistent with such documentary evidence. There is also the fact that in the mortgage deed itself as well as in one of the receipts subsequently granted Mathura Prasad was described as the manager of the funds of the temple of Janki Ballabh, Lanka Kalpi. It is, however, an admitted fact that Mathura Prasad himself was the founder of this endowment and the present plaintiffs are his legal heirs. In the absence of any proof that some other person is the trustee after the death of Mathura Prasad, the legal heirs of the founder would have a right to administer the trust. Indeed, an agreement dated 17th January 1901 provides that the mukhia of the family shall be the head manager of the endowed property. We therefore think that the plaintiffs have a locus standi to sue and the suit cannot be dismissed on this plea.

The next point urged is that the only remedy open to the mortgagee was to enter into possession when a default in the payment of interest was made and that that was the only way in which he was given a right to recover interest. This contention cannot be accepted. He was merely given an option to enter into possession in lieu of interest, but that was not his sole remedy. There is a clause in the deed which says that

"so long as the entire amount of mortgage money and interest is not paid the mortgagors shall not transfer the property mortgaged to any one in any way."

That obviously means that interest was to be a charge on the property and was payable as such, and was not only to be discharged out of the usufruct. Similarly, there is another clause which states that the mortgagee in case of non-payment could get the property foreclosed or sold by auction and realize the mortgage money and the amount due to him whatever it may be out of the sale proceeds. That in our opinion includes the claim to recover interest.

The next point urged is that in any case there was no liability to pay interest after the fixed period of seven years. The mortgage deed provided that interest would be paid every year during the fixed period of seven years and in case of default the mortgagee would enter into possession, and that there would be redemption after the period of seven years. No doubt it is true that there is no express covenant in the document which specifically states that interest would be recoverable even after the period of seven years has expired. On the other hand, there is no clear recital which would show that no interest after that period would be due. The learned advocate for the appellants merely relies on the circumstance that there was a specific provision to pay interest during the period of seven years. The question is purely one of the interpretation of the mortgage deed in question. The parties contemplated regular payment of interest every year and redemption after seven years, and that is why no provision was expressly made as regards their rights and liabilities after that period had expired. There is one more circumstance which suggests that interest would have been realized by the mortgagee even after the seven years had passed. In case of default of payment the mortgagee was entitled to remain in possession and appropriate the profits in lieu of interest. The mortgagors could only redeem the property if they paid the mortgage money. It follows that if they failed to redeem the property soon after the period of seven years the mortgagee would continue to appropriate the profits in lieu of his interest and in that way pay himself the interest for the subsequent years.

Had the intention been that no interest would be payable after seven years, one would have expected to find a provision that the mortgagee would be entitled to enter into possession for that period only. There is no such limitation.

The point is not wholly free from difficulty, but having regard to the observations of their Lordships of the Privy Council in the case of *Mathura Das* v. *Raja Narindra Bahadur* (1) which has been followed by a Bench of this Court in *Mahadeo Prasad* v. *Dhiraj Singh* (2) we think that in the absence of any express recital to the contrary it must be presumed from the terms of the document that subsequent interest was contemplated. The result therefore is that this appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1897] 19 All. 39=23 I. A. 139=7 Sar. 88 (P.C.).

(2) A. I. R. 1923 All. 7=77 I. C. 122=44 All. 772.

A. I. R. 1930 Allahabad 627

MUKERJI AND BENNET, JJ.

Ram Deo Ram—Plaintiff—Appellant.

v.

Mr. Frank Coombs and *others*—Defendants—Respondents.

Letters Patent Appeal No. 161 of 1929, Decided on 4th April 1930, against judgment of Ashworth, J., reported in *A. I. R.* 1929 *All.* 437.

Civil P. C., O. 21, R. 16—Sale in execution of mortgage decree by transferee of decree—Only mortgagor and not subsequent mortgagee who was party to decree served with notice—Auction sale should be held to be valid as against mortgagor only.

Where in execution of a mortgage decree by the transferee of the decree, only mortgagor-judgment-debtor and not the subsequent mortgagee who was also a judgment-debtor in the decree, is served with notice, the mere fact of omission to issue notice to the subsequent mortgagee is not sufficient for holding the auction sale invalid as against the mortgagor. The result of the omission is that the auction purchaser only acquires the rights of the mortgagor. [P 627 C 2 ; P 628 C 1]

Harnandan Prasad—for Appellant.

K. Verma—for Respondents.

Bennet, J.—This is a Letters Patent appeal by the plaintiff Ram Deo Ram against a judgment of a learned single Judge of this Court dismissing his appeal. The circumstances are that Zalim Singh obtained a final mortgage decree on 6th March 1914 and to that mortgage decree Mr. Coombs was a party as being a subsequent mortgagee. Zalim Singh then transferred his rights as decree-holder to Ram Deo Ram on a date which is not mentioned. The proper procedure for the plaintiff Ram Deo Ram under O. 21, R. 16 would have been to have a notice issued to Mr. Coombs as one of the judgment-debtors of the transfer and the rule states :

"The decree shall not be executed until the Court has heard their objection if any to the execution."

But in the present case it is admitted that the plaintiff only had notice issued to the original mortgagor and no notice was issued to Mr. Coombs, the subsequent mortgagee. In execution proceedings the property was put up to auction sale on 20th September 1923, and was purchased by the plaintiff. Mr. Coombs was in possession of two-thirds of the property as a usufructuary mortgagee, and when the plaintiff attempted to obtain possession of the property Mr. Coombs resisted his possession. The plaintiff was not satisfied with the entry made by the revenue Court, and the plaintiff came to the civil Court with a suit for possession on his auction purchase. The Court of first instance decreed possession to the plaintiff on payment of Rs. 150 to Mr. Coombs as redemption money for his usufructuary mortgage. The lower appellate Court dismissed the suit holding that the execution proceedings were altogether void owing to the failure to issue notice to the subsequent mortgagee. That decree has been upheld by the judgment of the learned single Judge of this Court.

Some rulings have been quoted by the learned single Judge, but it is admitted by the learned counsel on both sides that there is no ruling which deals with facts precisely similar to the present case. In the present case notice was issued to one judgment-debtor but not to the other. In the rulings notice was not issued to any judgment-debtor at all. The question, therefore, is whether the auction sale should be held to be valid as against the mortgagor who did receive notice or whether it should be held to be altogether invalid. We consider that the mere fact that notice was not issued to the subsequent mortgagee is not sufficient reason for holding that the auction sale was invalid as against the mortgagor. Accordingly we

consider that by that auction sale the plaintiff acquired the rights of the mortgagor. In that capacity he was allowed to redeem Mr. Coombs by the first Court. It is open to Mr Coombs, as a subsequent mortgagee, to redeem the plaintiff who is also a prior mortgagee. Three weeks are therefore given to the learned counsel for Mr. Coombs to inquire from his client and inform this Court whether his client desires to redeem the prior mortgage held by the plaintiff. In case Mr. Coombs desires to redeem, he may deposit the money in the Court of first instance, and a decree for redemption will be granted to him. In case Mr. Coombs does not desire to redeem the plaintiff as prior mortgagee, it will be then open to the plaintiff to redeem the usufructuary mortgage of Mr. Coombs on payment of the principal money of Rs. 150 by deposit in the Court of first instance in this proceeding. There is no dispute in regard to the one-third of the mortgaged property of which the plaintiff has obtained possession by virtue of the auction sale.

V.B./R.K. *Order accordingly.*

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*A. I. R. 1930 Allahabad 628

SEN AND NIAMATULLAH, JJ.

Ram Charan Sahu—Plaintiff—Appellant.

v.

Salik Ram Sahu and *others*—Defendants—Respondents.

Second Appeal No. 1284 of 1926, Decided on 16th October 1929, against decree of Dist. Judge, Azamgarh, D/- 13th April 1926.

*** (a) Civil P. C., S. 11—Doctrine does not in terms apply to orders passed in execution proceedings—Question is not barred only because it could have been raised at some stage in execution proceedings.**

The doctrine of res judicata as embodied in S. 11 does not, in terms, apply to orders passed in execution proceedings, though the principle of res judicata is applied to preclude one of the parties to the execution proceedings from raising a question which had been previously raised and decided between the parties or should be taken to have been raised and decided between the parties. But a question arising in a regular suit between the parties, otherwise maintainable, cannot be held to be barred by the rule of res judicata only because such question could have been possibly raised at some stage of the execution proceedings between the parties. [P 629 C 2 P 630 C 1]

*** (b) Civil P. C., S. 47—S. 47 does not apply where validity of decree itself as distinguished from satisfaction of decree is in question.**

Section 47 is limited to cases where the satisfaction of the decree as distinguished from the validity of the decree itself is in question. The test is whether the relief claimed aims at something which refers to discharge or satisfaction of the decree, assuming it is a good decree or whether the relief claimed is one which, if granted, will nullify the decree altogether. Where the question between the parties does not relate "to execution, discharge or satisfaction of the decree" but is one which if decided in favour of the appellant would strike at the very root of the decree which the respondent is seeking to execute, S. 47 can have no application. The fact that the suit was instituted after execution proceedings had been taken to a certain stage will not make S. 47 applicable if it was not so applicable before. [P 630 C 1]

A. P. Bagchi—for the Appellant.

P. L. Banerji—for Respondents.

Niamatullah, J.—This is a second appeal from the judgment and decree passed by the learned District Judge of Azamgarh setting aside the judgment and decree passed by the learned Subordinate Judge of that district in a suit brought by the plaintiff-appellant for a declaration that simple money decree dated 28th May 1919 passed by the District Judge of Gorakhpur in insolvency proceedings in favour of the Official Receiver and against the appellant was without jurisdiction and therefore a nullity and that the property of the plaintiff attached in execution of that decree was not liable to attachment and sale.

It appears that the plaintiff appellant obtained assignment of two decrees from Ramanand and Naurangi who were subsequently declared insolvent by the District Judge of Gorakhpur. The plaintiff-appellant gave a discharge as regards those decrees either by receiving payments or otherwise relinquishing claim in respect of the judgment-debt. It is common ground that those decrees did not subsist on the date on which the District Judge passed the decree in question before us. The learned District Judge of Gorakhpur acting as Judge of the insolvency Court held the plaintiff appellant to be liable to the estate of the insolvents Ramanand and Naurangi in respect of the amounts recoverable under the decrees assigned to the plaintiff-appellant and passed a simple money decree against him for a sum of Rs. 2,831-5-3 in favour of the receiver Raghubir Pershad, who assigned the decree to Salik

Ram Sahu, the respondent before this Court. The latter obtained a transfer of that decree to a Court in the district of Azamgarh where, the property belonging to the plaintiff appellant is situate which was subsequently attached. The plaintiff appellant thereupon instituted the suit out of which the present appeal has arisen for the declaratory reliefs already detailed. His main attack on the right of defendant 2 to execute the decree dated 28th May 1919 is that the District Judge of Gorakhpur sitting as a Judge of the insolvency Court had no jurisdiction to pass a decree of the character which he did and therefore it was a nullity and incapable of execution. The Court of first instance upheld this plea and decreed the suit. On appeal by Salik Ram Sahu, the assignee from the receiver, the lower appellate Court agreed with the Court of first instance as regards the decree passed by the insolvency Court being void having been passed by a Court having no jurisdiction to pass it, but dismissed the suit on the ground that a certain order passed in execution proceedings operated as res judicata so as to preclude the plaintiff-appellant from raising any question with regard to the validity of the decree. Accordingly, he dismissed the suit. The present second appeal has been preferred by the plaintiff-appellant impugning the correctness of the view taken by the lower appellate Court.

Little need be said on the question as to whether the insolvency Court can pass a simple money decree against a third person as the question is concluded by a recent decision of a Bench of this Court in Letters Patent Appeal No. 104 of 1927, *Salik Ram* v. *Lachmi Prasad* (1) which, it should be noted, arose out of a suit referring to the same decree as we are concerned with. In fact, the view taken by the Courts below which is supported by the ruling referred to has not been contested by the learned advocate for the respondents.

As regards the question of res judicata which the lower appellate Court has decided adversely to the plaintiff-appellant, the facts are these : When defendant 1 transferred the decree passed in his favour by the insolvency Court to the respondent Salik Ram Sahu, the latter applied for execution and a notice under O. 21, R. 16, Civil P.C., was issued to the judgment-debtor, the plaintiff appellant. He did not then contest the right of the respondent to execute the decree on the ground that it was a nullity, having been passed without jurisdiction. Relying on a judgment of this Court dated 18th February 1925 (paper No. 37-C) the lower appellate Court has held that the validity of the decree not having been questioned at the stage when notice under O. 21, R. 16 Civil P. C., was issued to the plaintiff-appellant, the decision implied in the order of the Court directing process of execution to issue, namely, that the decree was capable of execution, operates as res judicata on the same issue arising between the same parties in the regular suit. It should be pointed out that the property which was in question in execution proceedings in which notice under O. 21, R. 16, Civil P. C., was passed has not been shown to be identical with the property to which the present suit refers.

We are of opinion that the view taken by the lower appellate Court on the question of res judicata cannot be sustained. It may be, and we do not feel called upon to decide that question, that a subsequent application for execution cannot be objected to if the judgment-debtor did not take objection to a process of execution previously issued, of which notice had been given to him under O. 21, R. 16, Civil P. C. The question before us is different, namely, whether the omission on the part of the judgment-debtor to take objection on receipt of notice under O. 21, R. 16, Civil P. C., precludes him from agitating the question in a regular suit subsequently brought. The doctrine of res judicata as embodied in S. 11, Civil P. C., does not, in terms, apply to orders passed in execution proceedings, though the principle of res judicata is applied to preclude one of the parties to the execution proceedings from raising a question which had been previously raised and decided between the parties or should be taken to have been raised and decided between the parties. But a question arising in a regular suit between the parties, otherwise maintainable, cannot be held to be barred by the rule of res judicata only because such question

(1) A. I. R. 1930 All. 622.

could have been possibly raised at some stage of the execution proceedings between the parties. The question in issue in the present suit was not directly and substantially in issue in any "former suit" nor was it "heard and finally decided," as required by S. 11, Civil P. C., which must be our guide in this. Expln. 4 of that section is likewise limited to a matter which might and ought to have been made a ground of defence or attack in such "former suit." There was no former suit in which the question could have been raised. Under these circumstances the plea of res judicata must fail.

It has been argued by the learned advocate for the respondents that the suit is barred by the provisions of S. 47, Civil P. C. Indeed, in his argument bearing on the question of res judicata, S. 47, Civil P. C., has been so referred to as to indicate that he regards the two questions as inseparably connected. It is clear to us that S. 47, Civil P. C., has no application to the circumstances of the case before us. The question which arises between the parties to the suit does not relate "to the execution, discharge or satisfaction of the decree" but is one which, if decided in favour of the plaintiff-appellant, strikes at the very root of the decree which the respondent is seeking to execute. S. 47 is limited to cases where the satisfaction of the decree as distinguished from the validity of the decree itself is in question. There can be no doubt that if the suit had been instituted immediately after the decree was passed by the insolvency Court of Gorakhpur, no plea founded on S. 47, Civil P. C., could be upheld. The fact that the suit was instituted after execution proceedings had been taken to a certain stage will not make S. 47, Civil P. C., applicable, if it was not so applicable before. The test, in our opinion, is whether the relief claimed by the plaintiff-appellant aims at something which refers to discharge or satisfaction of the decree, assuming it is a good decree or whether the relief claimed is one which, if granted, will nullify the decree altogether. For these reasons we are of opinion that the ground on which the plaintiff-appellant's suit has been dismissed by the lower appellate Court cannot be upheld.

Accordingly we allow this appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance. The plaintiff-appellant will have his costs from the contesting respondent Salik Ram Sahu.

R.M./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 630

NIAMATULLAH, J.

Shakur—Defendant—Appellant.

v.

B. Sanwal Das—Plaintiff—Respondent.

Second Appeal No. 956 of 1928, Decided on 7th March 1930, against order of Second Additional Sub-Judge, Jaunpur, D/- 23rd February 1928.

(a) Agra Tenancy Act (3 of 1926), S. 264—Suit by lambardar for ejecting trespassers or squatters from common "abadi" land—Suit is for benefit of whole body of cosharers.

The interest of a lambardar in the "abadi" land belonging to the body of cosharers whom he represents is certainly of a character which entitles him to proceed against squatters and trespassers. In suits of ejectment he is not seeking to take exclusive possession of any land belonging to his cosharers, nor does his action prejudicially affect the rights of his cosharers. Prima facie his action in obtaining ejectment of trespassers is for the benefit of the whole body of co-sharers: 36 *All.* 441, *Rel. on.*: 5 *Rev. Rep.* 33, *Ref.* [P 631 C 1]

(b) Landlord and Tenant—Cosharers—Lambardar collecting rents from tenants and paying Government revenue is entitled to eject and sue for enhancement.

A lambardar collecting rents from the tenants and paying the Government revenue is entitled to eject tenants and sue for enhancement of rents in respect of land of the village included in the mahal of which he is the lambardar, and the fact that he does not own any land in the village does not detract him from his power as lambardar, which he would have possessed in any other case. [P 631 C 1, 2]

R. K. Malaviya—for Appellant.

Shiva Prasad Sinha—for Respondent.

Judgment.—For facts of the case in controversy between the parties to this appeal, see my order of remand dated 6th December 1929. The finding returned by the lower appellate Court on the issue remitted by that order is as follows:

"I hold that the plaintiff, who is 'lambardar" collects rents from the tenants, pays the Government revenue and is entitled to eject tenants and sue for enhancement of rents in respect of the land of village Kariawan included in mahal Malih Khan."

It is not disputed by the respondent that he has extended his possession to

the land adjoining the site of his house as it originally was. The plaintiff claims demolition of the defendant's house so far as it encroaches on such land. It has not been alleged by the defendant, much less proved, that he obtained the permission of any of the cosharers for building on the land which was outside the site of his house. The question, therefore, is between the "lambardar" of the "mahal" within which the land in dispute lies and a trespasser, pure and simple. If it were a case of competition between a lambardar on the one hand and some or all of the cosharers on the other, the question would be debatable. In view of the powers of a lambardar detailed in S. 264, Agra Tenancy Act (3 of 1926), which have been taken almost literally from *Gulzari Mal* v. *Jai Ram* (1), at p. 444, a trespasser, as the defendant is, cannot question the right of the lambardar to eject him from common land situate in the estate under his management. The interest of a lambardar in the "abadi" land belonging to the body of cosharers whom he represents is certainly of a character which entitles him to proceed against squatters and trespassers. In suits of this kind he is not seeking to take exclusive possession of any land belonging to his cosharers, nor does his action prejudicially affect the rights of his cosharers. Prima facie his action in obtaining ejectment of trespassers is for the benefit of the whole body of cosharers.

I have been referred to *Sheikh Abdur Raoof* v. *Bachoo* (2), in which a learned Judge of this Court held that it is within the competence of a lambardar to give permission to a tenant to erect a "kachcha" house on the land belonging to a joint "patti." If he has power to allow "abadi" land to be built on, there can be no question that he has the converse power of ejecting persons who have built on the "abadi" land without his permission or the permission of the cosharers entitled to exercise a power in that behalf.

It has been argued before me that the plaintiff, though he is a lambardar of the mahal in which village Kariawan is situated, has no interest in any land within the ambit of village Kariawan itself. This may be so, but being part of the mahal of which the plaintiff is a lambardar, it is jointly and severally responsible to the Government for the revenue of the entire mahal. The lambardar collects the rents in respect of village Kariawan. The lower appellate Court has found that he has authority to let agricultural land and to eject tenants and do all other acts incidental to the management of the village. Under these circumstances I do not think that the fact he does not own any land in village Kariawan detracts from his power as lambardar which he would have possessed in any other case.

In the view of the case that I have taken, I uphold the decree of the lower appellate Court and dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1914] 36 All. 441=24 I.C. 178=12 A.L.J. 606.
(2) 5 Rev. Rep. 33.

A. I. R. 1930 Allahabad 631

MUKERJI AND BENNET, JJ.

Dwarka Prasad and *others*—Plaintiffs—Appellants.

v.

Mahadeo Prasad and *others*—Defendants—Respondents.

First Appeal No. 549 of 1926, Decided on 7th May 1930, from a decree of Sub-Judge, Basti, D/- 11th May 1926.

Trusts Act, S. 88—Fund belonging jointly to several persons—One purchasing land with that fund—Purchase enures to benefit of all entitled to share in fund—Transfer of Property Act, S. 95.

Where there is a fund belonging jointly to several persons and one of these persons makes a purchase of land with that fund that purchase enures to the benefit of all the persons entitled to share in the fund. [P 634 C 1]

A, *B*, *C* and *D* held equal rights in respect of a simple mortgage in respect of certain property. *A* brought a suit to recover money due on the mortgage impleading *B*, *C* and *D* as pro forma defendants on the allegation that they did not join in the suit. *B*, *C* and *D* did not dispute *A's* claim to realize the money for himself and his co-mortgagees, nor did they apply to be made plaintiffs. *A* obtained a final decree, and purchased the property in the sale. *B*, *C* and *D* sued *A* claiming a portion of the property purchased by *A* on the ground that they held a share in the mortgage money.

Held: that *B*, *C* and *D* were entitled to share in the property subject to their paying *A* a proportionate share of costs incurred by him: 25 *I. C.* 735; *A. I. R.* 1915 *P. C.* 81; *A. I. R.* 1924 *All.* 813; *A. I. R.* 1924 *P. C.* 215 and *A.I.R.* 1924 *Oudh* 218, *Rel. on.*; *A. I. R.* 1925 *All.* 331 and *A. I. R.* 1929 *All.* 953, *Dist.*, 32 *I. C.* 171, *Diss. from.* [P 634 C 1]

M. A. Aziz—for Appellants.

Harnandan Prasad and *Shiv Prasad Sinha*—for Respondents.

Mukerji, J.—The facts of this case, as found by the Court below, have not been controverted before us, and therefore we take them to be correct. It appears that so far back as on 25th October 1883 the Raja of Basti made a simple mortgage of the property in suit for a sum of Rs. 1,999 in favour of four persons Binda, Bisheshar, Ram Tahal and Ganga. The pedigree given below shows how these mortgagees were related to one another.

Ram Dayal Kalwar

- Sahai
- Kuber
  - Bafati
- Prasad
  - Jagannath
- Sheo Lal
  - Ganga
- Jaggu
  - Bisheshar
  - Binda
- Pal
  - Ram Tahal
    - Mahadeo, defendant.
  - Ram Lal
    - Bhagwandas, plaintiff.
  - Jagmohan plaintiff.

In course of time several of the members of the family died out, and there was a partition, with the result that at the date of the suit, that was instituted in 1910, for recovery of the money due on the mortgage, the family was no longer joint, and the mortgagee rights were vested in equal shares in Ram Tahal, Jagmohan, Ram Lal and Mt. Maharani, wife of Binda Kalwar. Mt. Maharani is now dead. The suit just mentioned, being suit No. 585 of 1910, was instituted by Ram Tahal in the Court of the Subordinate Judge of Gorakhpur, and the co-mortgagees of Ram Tahal, namely Jagmohan, Ram Lal and Maharani were impleaded as pro forma defendants, on the allegation that they did not join in the suit : see pp. 68 and 69 of the printed record. The pro forma defendants did not dispute Ram Tahal's claim to realize the money for himself and his co-mortgagees. None of them applied to be made plaintiffs. A preliminary decree was accordingly made in favour of Ram Tahal. Ram Tahal applied for the decree being made final. Mt. Maharani made an application that she might be made a co-plaintiff. This application was dismissed by the learned Subordinate Judge on the ground that it was too late. The final decree was prepared and the property was brought to sale. Ram Tahal himself purchased the property on 21st July 1913. There ended the first stage of the history of the case. By the suit, out of which this appeal has arisen, Jagmohan Kalwar and Bhagwan Das, son of Ram Lal, claimed two-thirds of the property purchased by Ram Tahal in execution of the decree on the ground that they owned two-thirds share, because they had two-thirds share in the mortgage money. Jagmohan died pending the suit, and his legal representatives have been brought on the record.

Various defences were set up. One of these that found favour with the learned Subordinate Judge was that the plaintiffs could get only a share in the money that was decreed in favour of Ram Tahal, but that they had no right to the property. The suit was accordingly dismissed, and the plaintiffs have appealed.

The short point to be decided is whether the plaintiffs have any right to share in the property purchased by Ram Tahal. They, through their counsel, have offered to pay a fair share of the costs that Ram Tahal may have incurred in instituting the suit and executing the decree.

The learned Subordinate Judge quoted several cases that were cited before him and was of opinion that none of these cases afforded him any sure guide. He, therefore, thought that he was free to decide the case for himself. He held that as the purchase was made not only with the mortgage money but also with the costs incurred by Ram Tahal out of his own pocket, the plaintiffs had no right to share in the property. To decide this case it has to be

taken for granted that the costs of the suit and the execution were met by Ram Tahal alone. It is also a fact that the purchase was made in full satisfaction of the decree then outstanding in favour of Ram Tahal.

On behalf of the appellants the learned counsel has cited many cases; in our opinion they all go to support his contention. We need not notice all the cases, but shall notice only some of them. We shall take the cases in order of their dates of decision.

The first case is *Ramji Das* v. *Mohan Lal* (1). In this case, which was decided by Sundar Lal, J., there were three joint mortgagees, and one of these purchased the equity of redemption. Out of the remaining two only one of them brought a suit for recovery of the two-thirds share of the mortgage money. The entire mortgage money was not claimed on the ground that the mortgagee owning a one-third share had become the mortgagor by purchasing the latter's rights. The plaintiff (one of the co-mortgagees) got a decree and having put the decree into execution purchased the property himself. Thereupon the remaining co-mortgagees brought a suit to recover a half share in the property so purchased by the decree-holder. The learned Judge affirmed the decree by which the suit had been decreed and observed as follows :

"The property in suit was purchased for the mortgage-money in which both had equal title and share and were entitled to equal share in the property so purchased."

In coming to this conclusion the learned Judge professed to apply a Full Bench case of this Court, namely *Kesri* v. *Ganga Sahai* (2).

The Full Bench case of *Kesri* v. *Ganga Sahai* (2) was a case in which a joint decree had been obtained by several decree-holders and only one of them took out execution of the decree. He alone purchased the property, and when the co-decree-holders sought to recover their proportionate share in the property, it was held that they could. It will be noticed that the case before Sundar Lal, J., was not a case of co-decree-holders but was a case very similar to the case before us. In that case also, as in the present case, one of several co-mortgagees brought the suit.

(1) [1914] 25 I. C. 735.
(2) [1911] 33 All. 563=11 I. C. 517.

The Full Bench case of *Kesri* v. *Ganga Sahai* (2) was carried in appeal before their Lordships of the Privy Council and the decision was affirmed : see *Ganga Sahai* v. *Kesri* (3).

In *Khub Chand* v. *Todarmal* (4) Sulaiman, J., held that where one of several decree-holders had taken out execution and had purchased a property in execution, he held it for the benefit of all the decree-holders. This was in accordance with the Privy Council decision in *Ganga Sahai* v. *Kesri* (3). Later on, the same learned Judge sitting with Ryves, J., in *Makhan Lal* v. *Sohan Lal* (5) decided in the peculiar circumstances of the case, that in that particular case the plaintiff Makhan Lal was not entitled to share in the property purchased. That was, however, a special case. Makhan Lal, from the very beginning, was opposing the defendant's suit and was putting obstacles to its success. It was held that in the circumstances it could not be said that the purchase had been made for the benefit of Makhan Lal as well. The facts of the case being entirely peculiar, that case can have no bearing on the one before us.

In the case of *Bandhu Ram* v. *Chinta Man Singh* (6) the question arose whether a certain property had been purchased by the defendant out of a joint fund, and whether, therefore, it was liable to be shared by the plaintiffs. Their Lordships of the Privy Council did not discuss the question but remarked that the title to the property depends on the title to the bond. Their Lordships said :

"It is sufficient to say that the title to the land in dispute must in their Lordships' opinion, depend on the title to the bond given by Pyare Mander to Rajdhari on 17th August 1891. If that bond was the separate property of Rajdhari, then the land which he purchased in the suit brought by him to enforce the bond was also his separate property . . . . But if he held the bond on behalf of himself and his two brothers . . . then he could in the circumstances of the case have no better title to the land and respondent 1 is entitled to retain the decree granted by the High Court."

There is one more case, namely *Jai Inder Bahadur Singh* v. *Sheo Inder*

(3) A. I. R. 1915 P. C. 81=30 I. C. 265=42 I. A. 177=37 All. 545 (P.C.).
(4) A. I. R. 1924 All. 813=78 I. C. 814.
(5) A. I. R. 1925 All. 331=87 I. C. 665.
(6) A. I. R. 1922 P. C. 215=66 I. C. 402.

Bahadur Singh (7). In this case it was held that where properties had been purchased with bonds belonging to a certain estate the persons who are entitled to share in the estate were also entitled to share in the property purchased in execution of the decrees obtained on the bonds.

These cases all tend to establish that where there is a fund belonging jointly to several persons and one of these persons makes a purchase of land with that fund, that purchase inures to the benefit of all the persons entitled to share in the fund. This is really the principle laid down in S. 88, Trusts Act, 1882. It runs as follows :

"Where a trustee . . . or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage . . . . he must hold for the benefit of such other person the advantage so gained."

Illustration (d) to this section is as follows :

"*A*, a partner, buys land in his own name with funds belonging to the partnership. *A* holds such land for the benefit of the partnership."

In this state of the law, the only possible answer to the question before us can be that the plaintiffs are entitled to share in the property subject, no doubt, to their paying to Ram Tahal's successor a proportionate share of the costs incurred by him.

On behalf of the respondents the learned counsel has drawn our attention to the cases, namely *Ganeshi Lal* v. *Jagannath* (8) and *Makhan Lal* v. *Sohan Lal* (5), already discussed. The case in *Ganeshi Lal* v. *Jagannath* (8) no doubt supports the respondents' case fully. But it does not appear that the attention of their Lordships was directed towards the Privy Council case decided a few months earlier, namely *Ganga Sahai* v. *Kesri* (3). Without referring to any authority and without considering S. 88, Trusts Act, two learned Judges of this Court came to the conclusion that in the circumstances similar to the present ones, the plaintiff was entitled only to a share in the money and could have no right to share in the property which had been acquired with the money. In view of the numerous rulings in which the contrary view has been entertained we do not think that this case lays down the correct view of the law.

The learned counsel for the respondents also referred us to the case of *Anrup Misr* v. *Ram Harakh* (9). That case is obviously distinguishable and does not call for any remark.

The result is that this appeal must succeed, and the plaintiffs' right to share in the property must be affirmed subject no doubt to their contributing towards the costs incurred by Ram Tahal. Several other points were raised in the case and all these points have not been decided by the lower Court. These points will now have to be decided. We accordingly allow the appeal, set aside the decree of the Court below and remand the suit under O. 41, R. 23, Civil P. C., and direct the Court below to re-enter the suit on its original number in the register and proceed to decide it in accordance with law. Costs here and hithertofore will abide the result.

R.M./R.K. *Appeal allowed.*

(7) A. I. R. 1924 Oudh 218=78 I. C. 333.
(8) [1916] 32 I. C. 171.
(9) A. I. R. 1929 All. 953=51 All. 998.

A. I. R. 1930 Allahabad 634

MUKERJI AND BENNET, JJ.

(Babu) Upendra Nath Basu—Appellant.

v.

Kali Charan Mitra and *others*—Respondents.

First Appeal No. 435 of 1926, Decided on 15th April 1930, against decree of Sub-Judge, Benares, D/- 12th July 1926.

(a) Transfer of Property Act, S. 81—No preferential right can exist between two auction purchasers from mortgagor.

There cannot be any preferential right to reserve mortgaged property from sale between two persons who are both auction purchasers of the mortgagors' rights in different portions of the mortgaged property : *A.I.R.* 1921 *All.* 323, *Ref.*; 7 *All.* 711, *Dist.* [P 635, C 2, P 636 C 1]

(b) Civil P. C., O. 34, R. 5—Decree in suit for sale, specifying that so much money should be paid to plaintiff co-mortgagee and so much to other co-mortgagee joined as defendant, is not objectionable in form.

Where a co-mortgagee sues for sale making the other co-mortgagee party-defendant, and the decree passed specifies that so much money should be paid to the plaintiff and so much to the defendant-mortgagee, there cannot be said to be two separate decrees in one suit and so in form the decree is not objectionable. [P 636 C 1]

(c) Mortgagor and mortgagee—Payments made to one of two mortgagees into his pri-

vate account do not reduce mortgage debt due to the other mortgagee.

Payments to one of two mortgagees into his private account cannot be considered as payments which would reduce the mortgage debt due to the other mortgagee and more so where there is a definite separation between the two mortgagees. [P 636 C 2]

B. Mallik—for Appellant.

U. S. Bajpai, K. C. Mittal, A. P. Pandey and *Gadadhar Prasad*—for Respondents.

Bennet, J.—This is a first appeal by defendant 1, Upendranath Basu, against a decree for sale on a simple mortgage passed by the learned Subordinate Judge of Benares. The original mortgage deed was a simple mortgage for Rs. 19,000 dated 17th January 1905 executed by two persons, Sarat Chander Bhattacharya, defendant 5 and Bishnu Shankar, the father of defendants 6 to 9, in favour of the plaintiff Kalicharan Mitra and his brother Kali Das Mitra whose estate is now represented by his widow, defendant 12, Srimati Bidut Kiran Dasi. The suit was brought by Kalicharan Mitra alone making defendant 12, his brother's widow, a party, and a decree has been passed in favour of the plaintiff to the extent of Rs. 7,421-10-6 and in favour of defendant 12 to the extent of Rs. 2,475-14-10. We may say at once that it would have been a better procedure if the learned Subordinate Judge had acceded to the prayer in the written statement of defendant 12 and joined her as a plaintiff instead of keeping her as a defendant. The result has been that certain evidence elicited by her counsel in cross-examination has not been subjected to cross-examination by the contesting defendants including the appellant. There are three points taken for the appellant in first appeal: firstly that the decree of the learned Subordinate Judge is wrong in directing the marshalling of assets in favour of defendant 11; secondly that the nature of the decree is wrong; and thirdly that certain payments have been made on behalf of defendant 1 and his transferees to defendant 12 by which the entire mortgage debt due to her has been paid off.

We begin with the question of the marshalling of assets. The decree directs as follows:

"The mortgaged house (which has been purchased by defendant 11) shall not be sold by auction as long as the whole of the remaining property mortgaged be not sold and the decree money realized."

It is argued that the learned Subordinate Judge was wrong in giving the direction that the house at Benares purchased by defendant 11 Sheo Narain Gwala should not be sold at auction as long as the whole of the remaining property mortgaged be not sold. The remaining property consists of zamindari property in Patna District. None of the mortgaged property is now held by the mortgagors. The zamindari property was sold by auction-sale at which the mortgage was notified and defendant 1, the appellant, was purchaser on 23rd March 1908. On 2nd December 1914 defendant 1 made a deed of gift of part of this property to the father of defendants 2, 3 and 4 and to the father of defendants 6 to 9 and to defendant 5 and to defendant 10. In the mortgage deed 6-annas 8-gandas share of house No. 19/21 in Benares city was mortgaged, and the written statement of defendant 11 states that this share was sold at an auction-sale at some period not specified, but prior to 1908, as in a partition suit of 1908 the auction-purchaser, predecessor-in-title of defendant 11, got his share separated, and defendant 11 is now in possession of this separated portion. Defendant 11 alleges that at the sale of the share of the house by auction the mortgage of 1905 was not notified. He produced a witness Gokul Prasad to state that an inspection of the registers in the registration office did not show the mortgage. It is not clear why this was so, as the auction-sale must have been before 1908 and, therefore, the period of 12 years usually examined would show the mortgage. The simple mortgage of 1905 was in substitution of a simple mortgage of 21st June 1899, also on the share in the house and between the same parties, and both deeds were registered at Benares. The question, therefore, is whether there should be any preferential right to reserve mortgaged property from sale between two persons who are both purchasers of the mortgagors' rights in different portions of the mortgaged property. S. 56, T. P. Act, directs:

"If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is in the absence of a contract to the

contrary, entitled to have the mortgage debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties."

But this section does not apply to a purchaser by auction-sale as has been held in *Rama Shankar Prasad* v. *Ghulam Husain* (1) and the language of the section has been altered to make this clear. The learned Subordinate Judge relied on the ruling reported in *Rodhmal* v. *Ram Harakh* (2) in which it was held that the equities which apply to a puisne incumbrancer in the marshalling of securities under S. 81, T. P. Act, were equally applicable to a bona fide purchaser for value, without notice, of a portion of the property the whole of which was subject to a prior incumbrance. But the contest here is between two auction-purchasers, and there can be no such equity between them and no marshalling of assets. Accordingly we allow the appeal on this point and direct that the words which have been quoted above should be expunged from the decree.

The second point taken by the learned counsel for the appellant was that two separate decrees had been passed one in favour of the plaintiff and one in favour of defendant 12, and that it was contrary to law to have two separate decrees in one suit. We find, however, on examination of the decree that this is not correct. The decree specifies that so much money should be paid to the plaintiff and so much money should be paid to defendant 12, and if the total of these two amounts is not paid, then the properties should be sold. In form, therefore, there is nothing objectionable in this decree.

The third point deals with certain payments alleged to have been made by defendant 1 to defendant 12. (Here the judgment discussed evidence and then proceeded). We have, therefore, a considerable body of evidence to prove that these payments were made, and we have the application in guardianship showing that the payments were due from the estate of the deceased Kali Das and we have the letter of defendant 12 herself admitting that these payments were made and should be deducted from the amounts due to her. Taken together these payments exceed largely the amount decreed by the learned Subordinate Judge as due to defendant 12. Accordingly we consider that the contention of the appellant is well founded that no balance of the mortgage money is due to defendant 12. We, therefore, allow the appeal on this point also. A point was also argued by the learned counsel for the appellant in the beginning of his address that a set off should be allowed against the plaintiff for part of these amounts which had been paid to defendant 12. But later on in his argument he admitted that authority was against him on this point. We consider that payments of this nature to one of two mortgagees into her private account cannot be considered as payments which would reduce the mortgage debt due to the other mortgagee and more so as in the present case where there was a definite separation between the two mortgagees.

Accordingly we allow the appeal to the extent indicated above with proportionate costs in both Courts. The decree, therefore, in favour of the plaintiff will stand in regard to the amount decreed with the exception that there will be no marshalling of assets. The decree in favour of defendant 12 is set aside. A fresh decree under O. 34, R. 4, Civil P. C., will be prepared. Six months to pay.

S.N./R.K. *Decree modified.*

(1) A. I. R. 1921 All. 323=63 I. C. 209=43 All. 589.

(2) [1885] 7 All. 711=(1885) A.W.N. 198.

A. I. R. 1930 Allahabad 636

SULAIMAN AND NIAMATULLAH, JJ.

Jadu Nandan Ram—Judgment-debtor—Applicant.

v.

Parsotam Ginning Co. Ltd.—Decree-holder—Opposite Party.

Execution First Appeal No. 216 of 1929, Decided on 25th April 1930, against decree of Addl. Sub-Judge, Etawah, D./16th February 1928.

(a) Limitation Act, Art. 182 — Appeal against other defendants in which decree against some defendants not challenged and has become final — Time begins to run from date of decree and not from date of decree in appeal.

The expression 'final decree' clearly implies that the appeal should be from the decree which is sought to be executed; or at any rate, in the appeal that decree should be

impugned, so that the order passed by the appellate Court should finally incorporate the decree of the first Court. In cases where the first Court's decree becomes merged in the appellate Court's decree, time, of course, begins to run from the date of the appellate Court's decree. Art. 182 does not mean that, even if an appeal has been preferred against other defendants in which the decree against some defendants who are not parties to the appeal is not challenged in any way and has, in fact, become final the time can still be enlarged by reason of the appeal: 13 *All.* 1 (*F. B.*) and *A. I. R.* 1921 *All.* 56, *Rel. on*; 26 *Mad.* 91 (*F. B.*) and 47 *Cal.* 813, *not Foll.* [P 637 C 2]

(b) Decree — Validity — Decree against dead person is nullity.

Decree against a person who is actually dead on the date when the decree was passed is a nullity and void: 13 *All.* 53 (*P.C.*) and 40 *All.* 423, *Foll.* [P 637 C 2]

Damodar Das—for Appellant.

Baleshwari Prasad — for Opposite Party.

Sulaiman, J.—A suit for recovery of money was instituted against five defendants. The first Court decreed the claim against defendants 3, 4 and 5 but dismissed it as against defendants 1 and 2. The decree of the first Court was passed on 12th May 1923. An appeal was preferred by the plaintiff from that portion of the decree which dismissed his claim against defendants 1 and 2. He impleaded defendants 1 and 2 only in the appeal and did not implead the remaining defendant Defendant 5, namely Mohan, died on 28th July 1926. On 28th October 1926, the appeal was allowed by the High Court. In the course of the judgment it was pointed out that defendants 1 and 2 were also liable. The form in which the decree was prepared was to the effect that the plaintiff's suit was decreed against all the defendants.

An application for execution of the decree against the heirs of defendant 5 was filed on 18th September 1928, in which it was recited that there had been two previous applications for execution on 17th January 1924 and 2nd August 1927. The judgment-debtor, among other pleas, took the objection that the application was time barred, because time began to run from the first Court's decree dated 12th May 1923. The execution Court has overruled this objection, holding that time began to run from the date of the appellate Court's decree, viz., 27th October 1926.

Under Art. 182 time in the case of an application for execution begins to run from the date of the decrees or, where there has been an appeal, the date of the final decree or order of the appellate Court or the withdrawal of the appeal. The expression 'final decree' clearly implies that the appeal should be from the decree which is sought to be executed; or, at any rate in the appeal that decree should be impugned, so that the order passed by the appellate Court should finally incorporate the decree of the first Court. In cases where the first Court's decree becomes merged in the appellate Court's decree, time, of course, begins to run from the date of the appellate Court's decree. That article, in our opinion does not mean that, even if an appeal has been preferred against other defendants in which the decree against some defendants who are not parties to the appeal is not challenged in any way and has, in fact, become final, the time can still be enlarged by reason of the appeal. The final decree of the appellate Court must be such a decree as amounts to a formal expression of an adjudication conclusively determining the rights of the parties with regard to the matter in controversy as laid down in S. 2.

In the present case what the appellate Court obviously intended was that in addition to the decree which had been passed by the first Court in favour of the plaintiff, it gave an additional decree against defendants 1 and 2 also, As defendants 3 to 5 had not been impleaded in the appeal and were not respondents before it, the appellate Court could not pass a fresh decree against these persons who were not parties.

The position of Mohan is stronger still, because he was actually dead on the date when the appellate Court's decree was passed. Even if the appellate Court had intended to pass a decree against him, that decree would be a nullity and void. see *Radh Prasad Singh* v. *Lal Sahib Rai* (1), and *Sripat Narain Rai* v. *Tirbeni Misra* (2). It, therefore, seems to us that the time began to run from the date of the first Court's decree so far as defendants 3 to 5 were con-

(1) [1891] 13 All. 53=17 I. A. 130=5 Sar. 600 (P. C.).
(2) [1918] 40 All 423=45 I. C. 21.

cerned, because as against them the final decree was only that of the first Court. There is plenty of authority of this Court in support of this view, e. g., *Mashiatunnissa* v. *Rani* (3), and *Gyan Singh* v. *Ata Husain* (4). It appears that in some other High Courts a different view has, in some cases, been taken: vide *Kristnama Chariar* v. *Mangammal* (5), and *Satish Chandra Chaudhuri* v. *Girish Chandra Chakravarty* (6). There are, however, other cases of these very Courts laying down the contrary view. We prefer to adhere to the view which has prevailed in this Court and with which we are in full agreement.

The Court below has not gone into the question whether the decree-holder has been applying for execution or taking other steps in execution so as to keep alive his decree ; and we do not propose to go into this question at this stage. We accordingly allow this appeal and setting aside the decree of the Court below send the case back to that Court for disposal according to law. The costs of this appeal shall abide the result, and shall be calculated on the higher scale.

P.N./R.K. *Case remanded.*

(3) [1891] 13 All. 1=(1890) A. W. N. 207 (F.B.).
(4) A. I. R. 1921 All. 56=60 I. C. 817=43 All. 320.
(5) [1903] 26 Mad. 91 (F.B.).
(6) [1920] 47 Cal. 813=60 I. C. 915.

A. I. R. 1930 Allahabad 638

SULAIMAN AND KING, JJ.

Moti Chand and *others*—Appellants.

v.

Mahabir Prasad—Opposite Party.

Execution First Appeal No. 179 of 1929, Decided on 17th March 1930, from decree of Addl. Sub-Judge, Allahabad, D/- 18th March 1929.

(a) Civil P.C., S. 47—Decision under S. 47 to amount to decree must satisfy requirements of decree as defined in S. 2—In execution proceedings of mortgage decree, Court, on objection being raised, ordering that mortgage decree was split up and there should be rateable reduction in decretal amount—Order of Court was of interlocutory nature not amounting to decree.

Every order passed by execution Court in the course of proceedings under S. 47 does not necessarily amount to a decree so as to be appealable. S. 47 must be read with the definition of "decree" in S. 2. The mere determination of a question would not be sufficient but that determination must amount to the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to the matters in controversy. [P 639 C 2]

In the execution proceedings of a mortgage decree for sale, the Court, on an objection being raised, passed an order stating that the mortgage debt had been split up and there ought to be rateable reduction in the decretal amount.

Held: that as the objection was not disposed of conclusively and the Court had still to determine the market value of the different portions of the property and the rateable liability of each item, its order was in the nature of an interlocutory order and so did not amount to a decree: *A. I. R.* 1924 *All.* 808 and *A. I. R.* 1926 *All.* 401, *Rel. on.* [P 639 C 2]

(b) Mortgagor and Mortgagee—Neither judgment debtor nor his transferee pendente lite is entitled to have decretal amount split up and liability apportioned, once mortgage decree is passed.

Once a joint mortgage decree is passed against several items of property the mortgagee decree-holder is entitled to realise the entire amount from any part of these properties and he can also sell them in any order that he wishes to choose. Neither the judgment-debtor nor any transferee pendente lite from him is entitled to have the decretal amount split up and the liability apportioned. [P 640 C 1]

P. L. Banerji and *Govind Das*—for Appellants.

K. Verma—for Respondent.

Sulaiman, J.—This is a decree-holders' appeal arising out of certain execution proceedings. A preliminary objection is taken to the hearing of this appeal. It will be convenient to give the facts of this case before disposing of this objection. In 1913 a mortgage-deed was executed in favour of Raja Moti Chand by Dr. Bageshwari Narain and others for a large sum of money hypothecating several properties including a house described as house No. 40 in Chowk Allahabad. Three-fourths share in this house was subsequently purchased by Lala Madho Prasad. A suit was instituted on 17th August 1920 on the basis of this mortgage deed and was decreed in part by the first Court. Both parties appealed to the High Court where there was a compromise decree on 12th March 1926. Under this compromise it was agreed among other things that Mahabir Prasad would pay Rs. 13,500 to the plaintiffs and the plaintiffs would exempt the three-fourths share in this house which had been purchased by him. A decree was passed on the basis of this compromise for a consolidated amount of over Rs. 2,00,000

which was to be realised by sale of all the properties with the exception of the three-fourth share in this house. The preliminary decree was followed by a final decree which was prepared on 26th March 1927.

Another creditor of the mortgagors obtained a simple money decree in 1914 and in execution of that decree attached the one-fourth share in this house on 16th March 1925, while the appeal was still pending in the High Court. The attaching creditor was, however, not a party to that appeal. After the compromise decree he filed an objection in the execution Court to the effect that the mortgagee had released a part of the mortgage property and there ought to be a proportionate reduction in the amount of the mortgage money. This objection was filed on 15th September 1927 and the prayer was in the following words:

"One-fourth share of house No. 40 aforesaid purchased by the objector petitioner may not be sold and Rs. 100 or any other proportionate mortgage money may be ordered to be paid to the decree-holder."

After hearing the parties the Court first passed an order on 9th June 1928 stating that the mortgagee having released three-fourths of the share and also another property had split up the mortgage and therefore the objector was entitled to get the mortgage debt apportioned; it ordered:

"The parties should give the market value of the different portions of the mortgaged property in different hands within 15 days."

On 5th January 1929, the decree-holder applied stating that the order of 9th June 1928 was an interlocutory order deciding a principle against him from which he could not appeal and requested the Court to pass a final order. The Court, therefore, passed an order on 18th March 1929, which is the subject matter of an appeal. Under this order it fixed the amount which the decree-holder was entitled to recover and ordered that on payment of that amount within one month by Mahabir Prasad his one-fourth share should be released from sale, but in case of default of payment that portion also will be sold. The costs were to be borne by both the parties.

On behalf of the respondent the first objection is that the decree-holder ought to have appealed from the order of 9th June 1928, and having allowed it to become final the decision that the mortgage debt has been split up was final between the parties and could not be re-opened. The argument is that the decision of that question of principle was a determination of a question within S. 47, Civil P. C., and therefore by virtue of the provisions in S. 2, Civil P. C., it amounted to a decree and ought to have been appealed from.

It seems to us that every order passed by an execution Court in the course of proceedings under S. 47 does not necessarily amount to a decree so as to be appealable. S. 47 must be read with the definition of "decree" in S. 2. The mere determination of a question would not be sufficient but that determination must amount to the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to the matters in controversy. Unless an interpretation is put on the definition of "decree" in S. 2, every conceivable order in the Execution Department would become automatically appealable. There are several cases of this Court which have accepted this principle. We may for instance refer to the case of *Husain Bhai* v. *Beltie Shah Gilani* (1) and *Hira Lal* v. *Tikam Singh* (2) (*A. I. R.* 1926 *All.* 401).

The order of 9th June 1928 was in our opinion in the nature of an interlocutory order expressing the opinion of the Court that the mortgage debt had been split up and there ought to be a rateable reduction in the decretal amount. The objection of the judgment-debtor was not disposed of by the Court conclusively as it had still to determine the market value of the different portions of property and to fix the rateable liability of the one-fourth share of Mahabir Prasad. As to the objections filed by Mahabir Prasad the Court had expressed no complete opinion on the point involved and it did not finally dispose of his objection. There was therefore no conclusive determination of the matter in controversy and the Court in our opinion was still seised of the case. No appeal therefore lay from that interlocutory order and the preliminary objection has no force.

(1) A. I. R. 1924 All. 808=83 I. C. 1035=46 All. 733.

On the merits it seems to us that the order of the Court below cannot be supported. The respondent is a purchaser at an auction held in execution of a simple money decree under which a part of the mortgage property had been attached during the pendency of the mortgage suit. It is quite clear that he cannot acquire any paramount right against the mortgagee decree-holder and is bound by the compromise decree which was ultimately passed in this suit and under that decree there was a joint liability for the payment of the entire decretal amount against the entire mortgaged property excluding the three-fourths share in the house. It is therefore not open to him to go behind that decree and urge in the Execution Department that the amount should be split up. The execution Court ought not to be allowed to go behind the decree to allow the decree-holder to realize the whole amount by sale of the property entered in the decree. Once a joint mortgage decree is passed against several items of property the mortgagee decree-holder is entitled to realize the entire amount from any part of those properties and he can also sell them in any order that he wishes to choose. Neither the judgment-debtor nor any transferee pendente lite from him is entitled to have the decretal amount split up and the liability apportioned. We accordingly allow this appeal and setting aside the decree of the Court below dismiss the objections of the judgment-debtor with costs in both Courts including in this Court-fees on the higher scale.

S.N./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 640

BENNET, J.

Nilkanth—Defendant—Appellant.

v.

Rup Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1667 of 1928, Decided on 20th March 1930, against decree of Addl. Dist. Judge, Cawnpore, D/- 28th August 1928.

(a) Agra Tenancy Act (3 of 1926), S. 227—Suit against cosharer—Decree cannot be passed for gross rental for negligence in collection.

In a suit brought under S. 227 against a cosharer a decree cannot be passed on gross rental against a cosharer for negligence of that cosharer in making collections.

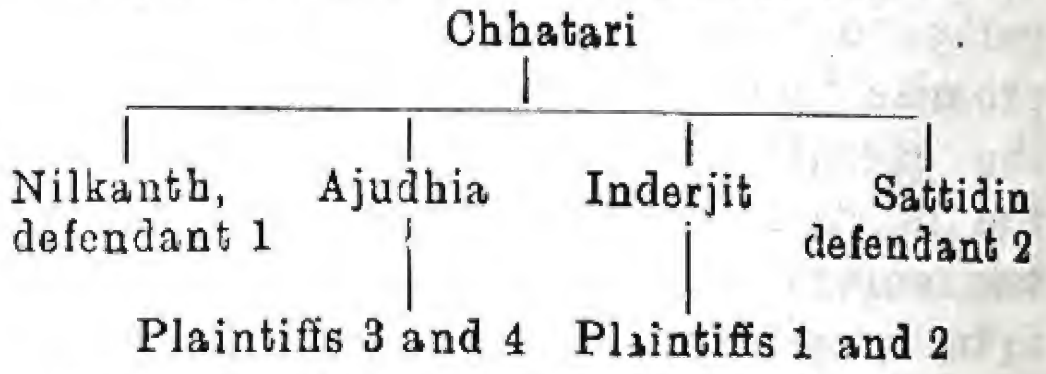
[P 641 C 1]

(b) Agra Tenancy Act (3 of 1926), S. 227 (2)—Production of siyaha is not sufficient.

Production of the siyaha is not sufficient compliance with S. 227 (2). [P 641 C 1]

K. N. Laghate—for Appellant.

Judgment.—This is a second appeal by Nilkanth, defendant, against concurring decrees of the two lower Courts holding him liable to the plaintiffs for profits for the years Fs. 1331 to 1333. The parties are related as follows:



It is admitted that the plaintiffs and defendants, their uncles, are cosharers in a patti No. 1, rental Rs. 205-12-0, and that Chhatari was the original owner of the land in question. After his death his widow was entered, and on her death in F. 1331 the names of the parties were entered. Para. 2 of the plaint alleges that the defendants make collections in respect of the said patti No. 1 and pay the Government revenue and cesses, and that the profits are then to be divided between the parties in proportion to the half share which each party owns. This arrangement is admitted in para. 2 of the written statement of the appellant. The written statement set up a plea that profits were satisfied by the grant to the plaintiffs of land in other mahals, but the lower Courts have found this plea to be unproved. The situation therefore is that the defendants alone collected the rent in this patti and have not paid any profits to the plaintiffs who are due a half share of the rent. There is apparently no area of sir and khudkasht in this patti. There is a lambardar Ramnarain, but he does not make any collections in patti No. 1.

The chief ground of appeal is that the lower Courts have granted a decree for profits to the plaintiffs on gross rental. The suit was brought under S. 227 Act 3 of 1926, and it is contended that a decree can only be passed against cosharers on collections and not on gross rental. Both the lower Courts have laid stress on the fact that the defendant was negligent in collections and

did not sue any tenants for arrears of rent or eject any tenants and allowed the arrears to accumulate from practically nothing to the sum of Rs. 153-9-5 during the three years in question. I consider that this contention for the appellant is well founded, and that a decree cannot be passed on gross rental against a cosharer for negligence of that cosharer in making collections. It is true that in the present case the defendants undertook what are practically the duties of lambardars, but in default of the definite appointment of the defendants as lambardars the liability of a lambardar under S. 226, Act 3 of 1926, cannot attach to the defendants. The remedy is for the plaintiffs to take part in making collections themselves and the plaintiffs should not leave that work entirely to the defendants.

There was another ground under which the lower appellate Court and the Court of first instance had justified the decree on gross rental and that was that the defendants did not produce any accounts. For the appellant-defendant it was contended that sufficient compliance was made with S. 227 (2), Act 3 of 1926 by the production of the siyaha. I do not consider that the production of the siyaha is sufficient compliance with that section. It might well be that the complaint against a cosharer was that although he made collections he did not write up the siyaha by dictation to the patwari. In that case what he would be required to produce under S. 227 (2) would be the account books in which he actually entered his collections. It is obvious that a person making collections must keep some such account, otherwise he would not know how much he had collected from each tenant. The subsequent duty cast upon a cosharer making collections of dictating those collections to the patwari is not sufficient compliance with the obligation to keep accounts under S. 227 (2). But the lower appellate Court has not found that the account in the siyaha is not a true account. The finding of that Court appears to be that the difference between the amount of collections recorded and the amount of gross rental is due not to the neglect to enter collections in the siyaha but to neglect of the defendant to make the collections. Under those circumstances a decree on gross rental cannot be passed against the defendant under S. 227 (2). Accordingly I allow the appeal on this point. In place of the decree of the Court of first instance on gross rental I allow a decree on collections which, as found by the Court of first instance, amounts to Rs. 197-3-0 due to the plaintiff. Interest will be allowed as decreed by the lower Courts.

A further point was urged in ground 3 of appeal that rents not verified but written as zaid could not be realized lawfully and must be deducted from the gross rental. This ground is not contained in the grounds of appeal to the lower appellate Court and therefore the point cannot be taken in second appeal. In any case the decree is now on collections. Accordingly I allow the appeal with costs to the extent indicated.

V.B./R.K. *Appeal allowed in part.*

A. I. R. 1930 Allahabad 641

SULAIMAN AND NIAMATULLAH, JJ.

Kapoor Chand Jain—Applicant.

v.

Emperor—Opposite Party.

Civil Revn. No. 37 of 1929, Decided on 25th April 1930, against order of Collector, Agra, D/- 15th October 1928.

(a) High Courts Act, S. 15—Revision lies from order including person in list of touts—Legal Practitioners Act, S. 36.

High Court can entertain in exercise of general powers of superintendence an application in revision from an order of District Magistrate including the name of a person in a list of touts under S. 36, Legal Practitioners Act: 21 *All.* 181 and *A. I. R.* 1928 *All.* 334, *Rel. on.* [P 642 C 1]

(b) Legal Practitioners Amended Act (15 of 1926) S. 2 (A)—Enquiry entrusted to Subordinate Court—Superior Court cannot include name of person in list of touts contrary to recommendation.

If the enquiry is entrusted to a subordinate Court it is the subordinate Court which must be satisfied that the person is proved to be a tout. If that authority is not satisfied and does not send up his name, the superior authority which itself made no enquiries cannot include the name of a person who has not been so recommended. [P 642 C 2]

Baleshari Prasad—for Applicant.

U. S. Bajpai—for the Crown.

Sulaiman, J.—This is an applic in revision from an order of the D Magistrate and Collector of Agra

ing the name of Kapoor Chand in a list of touts under S. 36, Legal Practitioners Act, framed and published by him. A preliminary objection is taken that no revision lies. We think that this question is now concluded by the opinion expressed in *Kashi Nath* v. *Emperor* (1), where following an earlier case in the matter of the petition of *Madho Ram* (2), it was remarked that this Court could interfere in the exercise of the general powers of superintendence conferred upon it by S. 15, High Courts Act, 1871 and S. 107, Government of India Act. We may point out that although this objection was not raised, another Bench also did entertain the application in *Ghafoor Khan* v. *Emperor* (3).

On the merits we find that the order of the District Magistrate and Collector cannot be supported. Instead of making an enquiry into the complaint himself he thought it fit to entrust the enquiry to the Joint Magistrate under him. The Joint Magistrate took evidence and drew a report in which, so far as Kapoor Chand was concerned, his opinion was that there was a possibility that this man's name had been included in the list on account of party intrigues against him owing to his association with the police. The Joint Magistrate noted that a pleader supported another witness who said that Kapoor Chand was a man of respectable status. The actual recommendation was in the following words:

"At any rate the case against this man is doubtful, of which he should be given the benefit."

This report bears the date 12th October 1928. On 15th October the District Magistrate and Collector passed the order which is the subject of revision. He started by saying: "I accept the report" and then went on to declare that all the persons including Kapoor Chand were declared touts and remarked:

"All these persons were given an opportunity to explain their activities in and about Court and all failed."

Although the report of the Joint Magistrate was in favour of Kapoor Chand, the District Magistrate did not give him any opportunity to appear and to be allowed to be heard. It is not correct to say that he had failed to explain his activities because the Joint Magistrate who enquired into his case did not feel satisfied that the case had been made out against him without any reasonable doubt. It is also extraordinary that although the learned District Magistrate and Collector said that he accepted the report he actually differed from the recommendation of the Joint Magistrate so far as Kapoor Chand was concerned. Apart from these irregularities we think that the District Magistrate has acted illegally in declaring Kapoor Chand a tout.

Under S. 2 (A), Legal Practitioners Amended Act (Act 15 of 1926), if the District Magistrate sends the names of persons suspected to be touts to a Subordinate Court and that Court holds an enquiry and reports to the authority which has ordered the enquiry the name of such person who has been "proved to the satisfaction of the Subordinate Court to be a tout" that authority may include the name of such person in the list of touts. It is therefore quite clear that if the enquiry is entrusted to a subordinate Court it is the subordinate Court which must be satisfied that the person is proved to be a tout. If that authority is not satisfied and does not send up his name, the superior authority which itself made no enquiries cannot include the name of a person who has not been so recommended. The District Magistrate did not make any additional enquiry himself, but merely acted on the report submitted to him. We think that he acted illegally in going contrary to the report.

We have already pointed out that no opportunity was given by the District Magistrate and Collector to Kapoor Chand to appear and show cause, particularly when the report of the Joint Magistrate was in his favour. This was in contravention of the proviso to that section. We accordingly allow this revision and set aside the order of the District Magistrate and Collector dated 15th October 1928 so far as it concerns Kapoor Chand and direct that his name be not included in the list of touts. We direct that the parties should bear their own costs of this revision.

P.N./R.K. *Revision allowed.*

(1) A. I. R. 1924 All. 69=79 I. C. 693=45 All. 676.
(2) [1899] 21 All. 181=(1899) A.W.N. 15.
(3) A.I.R. 1928 All. 334.

A. I. R. 1930 Allahabad 643

SULAIMAN AND KENDALL, JJ.

Baldeo Prasad—Plaintiff—Appellant.

v.

Arya Priti Nidhi Sabha and *others*—Defendants—Respondents.

First Appeal No. 536 of 1926, Decided on 6th March 1930, against decree of Sub-Judge, Muzaffarnagar, D/- 28th May 1926.

(a) Hindu Law—Ascetic Arya Samajist—Performance of Prajapathiyesthi homam is essential to become Sanyasi.

The performance of the Prajapathiyesthi homam is essential and is the final ceremony to be performed even by the Arya Samajist who becomes a Sanyasi : 33 *M. L. J.* 63 and 14 *C. W. N.* 191, *Ref.* [P 644 C 1]

(b) Hindu Law — Ascetic — Renunciation will not be complete merely by declaring himself Sanyasi — Necessary ceremonies must be gone through.

The mere fact that a person declares that he has become a Sanyasi or that he is described as such or wears clothes ordinarily worn by the Sanyasis would not be sufficient to make him a perfect Sanyasi. It is essential that he must enter into the fourth stage of his life in accordance with the necessary requirements. He must not only retire from all worldly interests and become dead to the world, but to attain this he must perform the necessary ceremonies without which the renunciation will not be complete. [P 644 C 1]

G. Agarwala—for Appellant.

R. K. Malaviya and *K. C. Mital*—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for recovery of possession of immovable property by setting aside a deed of trust executed by Amar Singh, the nephew of the plaintiff Baldeo Prasad. According to the plaint Amar Singh gave up the world in December 1920, and adopted faqiri sanyas in January 1921, and was named Sanyasi Amirtanand ; that in consequence all his rights in his property became extinct and the same reverted to his relations. But admittedly on 24th January 1921 he executed the deed of trust in favour of the respondent Sabha, which is an Arya Samaj institution. According to the plaintiff the deed of trust was null and void inasmuch as on the date of its execution Amar Singh had no longer any right or interest left in him. The defendants contested the suit by denying that Amar Singh had ever renounced the world and given up his rights in the property or that he had completely become a Sanyasi. It was further pleaded that he was a Vaish by caste and could not have become a Sanyasi.

The learned Judge has found that the evidence to prove that Amar Singh had become a complete Sanyasi before 1921 was not satisfactory, and he has further held that the facts established by that evidence were insufficient to make out the case of complete abandonment of all worldly concern.

The plaintiff has appealed and challenges those findings.

So far as the Sanyasis belonging to the Sanatan Dharma religion are concerned, the procedure to be followed before a person becomes a complete Sanyasi has been laid down in great detail by Srinivasa Aiyangar, J. in *Kondol Row* v. *Swamulavaru* (1). Speaking of Sanyasam in general, he has pointed out that the postulant has to perform his death ceremony (though this is not considered essential by some) and the eight sradhas the last of which is his own sradh, he must then distribute his wealth among his sons and Brahmins reserving enough for the homam (sacrifice in the fire) to be subsequently performed :

"Then he has to perform Prajapathiyesthi and finally Viraja homam. These are sacrifices in fire and are a purificatory ceremony. At the end of the ceremonies the postulant has no property at all, for even the sacrificial vessels if they are of wood must be burnt in the fire and if they are of metal must be given to the priest."

He then takes leave of his sons and standing in water utters a mantra three times to the effect that he has given up his desire for sons, wealth, world and everything. He does not become a Sanyasi till the mantra is pronounced. This procedure is stated to be common to all Sanyasis. A somewhat similar practice was established in the case of *Ramdhan Puri* v. *Dalmer Puri* (2) where too the performance of the Viraja homam ceremony was considered necessary for the attainment of the status of a perfect and complete Sanyasi chela.

The learned advocate for the appellant, however, contends that these ceremonies are only essential for those who belong to the Sanatan Dharma and are not applicable to an Arya Samajist. Admittedly Amar Singh was an Arya

(1) [1917] 33 M. L. J. 63=40 I. C. 535.
(2) [1910] 14 C. W. N. 191=2 I. C. 385.

Samajist and has previously dedicated some property in favour of an Arya Samaj institution in 1917. No authority has been cited in support of the proposition that in the case of an Arya Samajist the complete renunciation of the world can be effected by a mere expression of an intention or by merely calling oneself a Sanyasi. On the other hand, the learned advocate for the respondent has drawn our attention to a passage in Satyarth Prakash (1964 Sambat edition) Chap. 5, p. 131, which is the sacred book of the Arya Samaj. The passage when freely translated reads as follows :

"After having performed the Prajapathiyesthi yagna (or homam), thrown the sacred thread in it (the fire) the tuft of hair growing on the head and such other symbols et cetera leaves the house and becomes a Sanyasi."

This book therefore itself shows that the performance of the Prajapathiyesthi homam is essential and is the final ceremony to be performed even by the Arya Samajist who becomes a Sanyasi.

In the present case apart from the fact that there are oral statements to the effect that Amar Singh had become a Sanyasi, that he was calling himself a Sanyasi and that he was wearing yellow clothes, there is no evidence whatsoever on the record to prove the performance of any of the ceremonies. It cannot be doubted that the mere fact that a person declares that he has become a Sanyasi or that he is described as such or wears clothes ordinarily worn by the Sanyasis would not be sufficient to make him a perfect Sanyasi. It is essential that he must enter into the fourth stage of his life in accordance with the necessary requirements. He must not only retire from all worldly interests and become dead to the world, but to attain this he must perform the necessary ceremonies without which the renunciation will not be complete : Mayne's Hindu law, Edn. 9, page 867.

We also accept the finding of the Court below that the evidence adduced by the plaintiff to show that he had become a complete Sanyasi in December 1920, is not trustworthy. In the first place this seems contrary to the allegation in para. 2 of the plaint, where it was stated that he adopted Faqiri Sanyas in January 1921. In the second place, there is no direct evidence to show what actually happened in December 1921, except that he attended the anniversary of Gurukul at Bindraban. No one who was present on this occasion has been produced by the plaintiff. On the other hand the defendants have produced Arjun Singh and Kashi Ram who say that they were present at Bindraban on this occasion and that Amar Singh had not become a Sanyasi at that time. A report of the proceedings of that anniversary has also been produced, which does not contain any reference to Amar Singh becoming a Sanyasi. The evidence therefore does not prove the plaintiff's case.

The result therefore is that this appeal must be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 644

SULAIMAN AND KING, JJ.

Talib Ali Shah—Defendant — Appellant.

v.

Piarey Lal and *another*—Plaintiffs—Respondents.

First Appeal No. 500 of 1926, Decided on 16th April 1930, against decree of Sub-Judge, Bulandshahr, D/- 7th July 1926.

Civil P. C., S. 151 and O. 32, Rr. 4 and 5 —Subsequent to discovery that minor was not properly represented by duly appointed guardian, Court should restore case to file and proceed with it after appointing guardian—Such restoration and appointment is not addition of new party— Limitation Act, S. 22.

Subsequent to the discovery that the minor has not been properly represented by a duly appointed guardian it is open to the Court in the exercise of its inherent power under S. 151 to restore the case to its original number on the file and proceed with it after duly appointing a guardian. The restoration of the case and the appointment of a new guardian cannot be held to be tantamount to the addition of a new party to the suit. The appointment of a guardian ad litem must always be some time after the institution of the suit and the suit must be deemed to have been instituted against the minor on the date when it was filed, even though on that date the guardian ad litem was not or could not have been appointed : 39 *All.* 8 and *A. I. R.* 1924 *All.* 225, *Rel. on.*; 53 *I. C.* 184 and *A. I. R.* 1924 *Mad.* 489, *not Appr.*

[P 645 C 2 ; P 646 C 1]

Mushtaq Ahmad—for Appellant.

Panna Lal and *Hari Pal Varshni*—for Respondents.

Sulaiman, J.—This is an appeal by Talib Ali Shah defendant 20, arising out of a suit on the basis of a mortgage deed dated 12th May 1904, executed by the

original owner of this property, Mahbub Ali Shah, in favour of the plaintiff Piarey Lal and his co-mortgagee Nanak Chand whose rights he has since acquired under a subsequent purchase. When the suit was originally instituted Talib Ali Shah was described as a major and an ex parte decree was obtained against him and the other defendants. When however the decree was put in execution he objected that he had all along been a minor and had not been properly represented. The execution Court acceded to this contention and allowed the objection. The plaintiff Piarey Lal then applied to the original Court under S. 151, Civil P. C., claiming that the suit should be restored and proceeded with after the appointment of a guardian ad litem of Talib Ali Shah. The Court acceded to this request and the suit was tried on the merits and has been decreed. Talib Ali Shah now appeals.

In order to understand the pleas raised in defence it is necessary to briefly state the previous history of this property. Prior to the mortgage in question there was a mortgage deed executed by Mahbub Ali on 6th February 1904, in favour of his wife Begam Sultan in part satisfaction of her dower debt. Mahbub Ali was also indebted to a creditor Lala Gopal Rai who obtained a simple money decree against him in execution of which he put up Barwana Mahmudpur for sale which was purchased at auction by Begam Sultan for Rs. 575. Subsequently Begam Sultan executed a sale deed dated 19th December 1906, of this property along with 5 biswas of mahal Sardarnagar which she had purchased at another auction in favour of Talib Ali Shah.

The defence of Talib Ali Shah is twofold. In the first place he asserted that under the purchase from Begam Sultan he had acquired her prior mortgagee rights and that therefore the sale should be subject to such rights. In the second place he pleaded that inasmuch as no guardian ad litem had been appointed for him the suit could not be deemed to have been instituted on the date when he was impleaded as a major.

The first question depends purely on the interpretation of the sale deed of Begam Sultan. This is printed at p. 54. She purported to sell one-third of 19 sihams out of 140 sihams of the entire 20 biswas of Barwarna Mahmudpur which she had purchased at auction in execution of Lal Gopal Rai's decree along with 5 biswas of mahal Sardarnagar. She described herself as the full proprietor of these properties and transferred the absolute interest to the vendee putting him in proprietary possession and making him the absolute owner thereof. There was a further stipulation that there were no encumbrances on these properties and that if any hypothecation lien chargeable on the properties sold was discovered she would indemnify the purchaser. Reading the deed as a whole there is no doubt that she purported to transfer the property which she purchased at auction free from all encumbrances, that is to say, she transferred her absolute proprietary interest in the same. But by no stretch of the language the deed can be interpreted to mean that she also transferred the right to recover her mortgage money. As a matter of fact the previous deed is not at all mentioned in the document and there is no clause which could convey to Talib Ali Shah her rights as a mortgagee. Really she sold these lands free from her mortgage. Talib Ali Shah therefore can claim this property to be exempt from the liability to discharge Begam Sultan's mortgage but cannot claim to have himself acquired the mortgagee rights. The plea therefore has no force.

The second plea is equally groundless. When the suit was instituted Talib Ali Shah was duly made a defendant although he was wrongly described as a major. He ought to have been described as a minor and after the institution of the suit an application should have been made to the Court under O. 32, R. 3 for the appointment of a guardian ad litem of the minor. The omission to follow the necessary procedure amounted to a material irregularity which made the decree totally ineffective and invalid as against the minor. But we cannot treat the suit as having been either dismissed or decreed effectively against Talib Ali Shah. The view which has prevailed in this High Court is that subsequent to the discovery that the minor has not been properly represented by a duly appointed guardian, it is open to the Court in the exercise of its in-

herent power under S. 151, Civil P. C., to restore the case to its original number on the file and proceed with it after duly appointing a guardian. We may refer to the case of *Bhagwan Dayal* v. *Param Sukh Das* (1) which was again followed in *Kirpa Kishan Kishori* v. *Babu Lal* (2). These cases appear to have been dissented from by the Madras High Court on two grounds. First that O. 9, R. 13 cannot apply as the minor was really no party to the decree, and secondly that the restoration of the case and the appointment of a new guardian is tantamount to the addition of a new party to the suit. It is unnecessary for us to consider whether O. 9, R. 13 would be applicable to such a case, for in the present case the inherent jurisdiction under S. 151 has been exercised. We are unable to accept the view that the restoration of the case and the appointment of a guardian ad litem in any way amounts to the addition of a new party. Talib Ali Shah has been a defendant to the suit from the very beginning, the only defect being that no proper guardian was appointed for him. The appointment of a guardian ad litem must always be some time after the institution of the suit and the suit must be deemed to have been instituted against the minor on the date when it was filed, even though on that date the guardian ad litem was not or could not have been appointed. We are unable to accept the view of the Madras High Court expressed in *Eda Punnayya* v. *Jangalu Kama Kotayya* (3) and followed in *Armuga Goundan* v. *Periavanjiappa Goundan* (4). We prefer the view which has so far prevailed in this High Court and dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

(1) [1917] 39 All. 8=36 I. C. 366.
(2) A. I. R. 1924 All. 225=76 I. C. 765=45 All. 606.
(3) [1919] 53 I. C. 184.
(4) A. I. R. 1924 Mad. 489=78 I.C. 76.

A. I. R. 1930 Allahabad 646

SULAIMAN AND NIAMATULLAH, JJ.

Hanuman Singh—Applicant.

v.

Ram Lakhan and *others* — Opposite Parties.

Civil Revn. No. 55 of 1929, Decided on 24th April 1930, against order of Addl. Sub-Judge, Mirzapur, D/- 13th August 1928.

Civil P. C., Sch. 2, Para. 1—Reference to arbitration by parties without any reference to guardian ad litem of minor—Award is not binding on minor.

When a guardian ad litem has been appointed for the minor, it is that guardian alone who can represent the minor in all proceedings in that suit. If without any reference to the guardian ad litem of the minor the other parties to the suit refer their disputes to arbitration the minor's uncle professing to act as the guardian, the award cannot bind the minor. [P 646 C 2]

K. N. Katju and *Abdul Hasan Jafary* —for Applicant.

Iqbal Ahmad and *Anugrah Narain Singh*—for Opposite Parties.

Sulaiman, J. — This is an application in revision from an order filing the award and framing the decree in terms of it. This was a partition suit in which there were a number of defendants, including defendant 7, who was a minor. His father was dead, and his mother was appointed as guardian ad litem for the suit. It appears that his grandfather is also alive and is a party to the suit. Without any reference to the guardian ad litem of the minor the other parties referred their disputes to arbitration, and the minor's uncle professed to act as the guardian of the minor. On the reference having been made an award was delivered which has been accepted by the Court on the ground that, although there is nothing to show that the minor's guardian ad litem had agreed to this reference, the award appears to be not prejudicial to the minor.

It seems to us that the Court below has taken an erroneous view of the situation. Under R. 1, Sch. 2, it was incumbent on the Court to see that all persons interested in the suit had agreed to refer the matter to arbitration. When a guardian ad litem had been appointed for the minor, it was that guardian alone who could represent the minor in all proceedings in that suit and nobody else could represent him (O. 32, R. 5). The learned Subordinate Judge is, therefore, quite wrong in thinking that the award would bind the minor, although his guardian ad litem had not been consulted.

It is, therefore, quite clear that the award, as one having been delivered against the minor, cannot bind him. We do not consider it necessary to decide at this stage whether the result of this

would be that the whole of the award would fail as against all the parties to the suit or whether it would only be ineffective as against the minor. Nor do we consider it necessary to decide at this stage whether the minor would not otherwise be bound, for instance, if it were held that he was duly represented by the managing member of his family. We accordingly allow this revision, set aside the order of the Court below and send the case back to the Court below for disposal according to law. The applicant shall have the costs of this revision from the plaintiffs-respondents.

P.N./R.K. *Revision allowed.*

A. I. R. 1930 Allahabad 647

BOYS, J.

Mohammad Sadiq — Defendant—Appellant.

v.

Altaf Husain and *others*—Plaintiffs—Respondents.

Second Appeal No. 1168 of 1928, Decided on 7th May 1930, against decree of Dist. Judge, Budaun, D/- 20th March 1928.

(a) Pleadings—Mere abuse should not find place in pleadings.

Mere abuse describing a party as very "cunning and litigious" should not be allowed to find a place in any pleadings. [P 647 C 2]

(b) Agra Tenancy Act (3 of 1926), S. 271, Expl. 1 — Plea of proprietary right solely untenable and inended solely to oust jurisdiction of revenue Court— Trial Court need not act under first part of S. 271.

The trial Court is not obliged to act under the first part of S. 271, if it is of opinion that the plea of proprietary right is solely untenable and intended solely to oust the jurisdiction of the revenue Courts. Where the defendant does not ask the issue about proprietary title to be framed, the trial Court is fully justified in believing that the issue could not and would not be pressed, or in other words that it was untenable. It cannot be subsequently said that mere raising of proprietary title made it incumbent on the trial Court to frame such issue. [P 647 C 2; P 648 C 1]

Akhtar Husain Khan—for Appellant.

P. L. Banerji and *H. P. Sen*—for Respondents.

Judgment.—The plaintiffs sued the defendant for profits in the revenue Court under S. 227, Act 3 of 1926, the suit being against a cosharer and in respect of the years 1331, 1332 and 1333. The defendant denied the plaintiffs' proprietary title and set up a title in himself by adverse possession. I may incidentally note that para. 3 of the written statement describes the plaintiffs as "very cunning and litigious". Mere abuse of this description should not be allowed to find a place in any pleadings. The Assistant Collector framed two issues "What profits are due to the plaintiffs?", and after hearing the case gave the plaintiffs a decree. The defendant appealed to the lower appellate Court and in ground 1 of his appeal said:

"The plaintiffs-respondents are not the owners of that property for the profit of which the suit had been filed. The lower Court has erred in not framing an issue in respect of ownership in spite of the objections taken by the appellant."

Even here the appellant did not specifically claim that such an issue should have been sent for trial to a civil Court. Taking the judgment of the lower appellate Court at the value given to it by counsel for the appellant here, the point was argued before the lower appellate Court and the defendant-appellant's objection was rejected because there was no substance in his plea.

In second appeal here I am asked to hold that it was the imperative duty of the trial Court, immediately the question of proprietary title appeared to be raised, to frame an issue itself and immediately to send that issue for decision by a civil Court. This argument denies all force to Expl. 1, S. 271 and if it was to be accepted, a pen might as well be drawn through that explanation. The trial Court is not obliged to act under the first part of S. 271, if it is of opinion that the plea of proprietary right is clearly untenable and intended solely to oust the jurisdiction of the revenue Courts. The trial Court was clearly not bound to send this case to the civil Court under any cricumstances whatever until it had framed an issue. It must, therefore, first arrive at the stage of framing issues. Those are framed invariably with the assistance of the counsel on either side. When the Assistant Collector proceeded to frame issues he was not invited by counsel on either side so far as the record shows and so far as the counsel for the appellant is able to suggest, to frame an issue on this point. If the very party who now says that this issue ought to have been framed, did not ask for the issue to be framed, the trial Court

would be fully justified in believing that that issue could not and would not be pressed, or in other words, that it was untenable. At a later stage of the case, when it had been pressed in the lower appellate Court, it has been found in fact to be untenable, but that of course will not throw any light on the course the Assistant Collector ought to have pursued. In my view, if the defendant did not choose at the time issues were framed to ask for an issue on this point, he has only himself to blame if the Assistant Collector regarded it as an issue that did not seriously arise.

Counsel for the appellant suggests that the defendant may have deliberately kept this point in reserve in order to raise it in the appellate Court. If he did so, his blood must rightly be on his own head. It is expressly to stop manoeuvres of that sort that this Court is becoming more and more strict in refusing to allow points to be taken in an appellate Court which have not been taken in the lower Courts. However, for the reasons given, I am of opinion that to accept the appellant's argument would be to delete Expl. 1 to S. 271 from the Act. I dismiss the appeal with costs.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Allahabad 648

MUKERJI AND BENNET, JJ.

Benares Bank Limited — Plaintiff — Appellant.

v.

Hormusji Pestonji and *others*—Defendants—Respondents.

First Appeal No. 501 of 1926, Decided on 28th January 1930, against decree of Sub-Judge, Agra, D/- 30th June 1926.

*** Negotiable Instruments Act, S. 64 — Acceptor of hundi remains liable under it although it was not presented for payment.**

Where consequences are provided for as following from the non-presentment, it is not open to the Court to hold that besides the consequences provided for by the law, other consequences, not mentioned by the law, are also to follow. [P 649 C 1]

Under S. 64 the result of non-presentment of hundis for payment is not exemption of the acceptor from liability but the exemption of other parties to the hundis only. The word "other" has been used to show that there is a difference between S. 64 and Ss. 61 and 62 where the words used are "no party." The section therefore means that the parties who are mentioned in the section may be liable but other parties to the documents are not to be liable. The exception to S. 64 cannot be read as controlling the plain language of the main section, but must be read as more or less an independent rule of law. The acceptor of a hundi therefore remains liable under it in spite of the fact that it was not presented for payment : (1896) *A. W. N.* 201 ; 13 *Mad.* 172 ; 32 *Bom.* 247 ; *A. I. R.* 1929 *Lah.* 240 and 21 *All.* 450, *Rel. on.* ; 39 *All.* 364, *Disc.* and *Dist.* ; *A. I. R.* 1922 *All.* 279 and *A. I. R.* 1925 *All.* 442, *Disc.* ; 23 *O. C.* 364, *not Appr.*

[P 649 C 2 ; P 651 C 2]

S. K. Dar and *Govind Das* — for Appellant.

N. P. Asthana, *K. Verma* and *Hanuman Prasad*—for Respondents.

Mukerji, J.—The appeal is by the plaintiffs, who claimed to recover two sums of money on two hundis, dated respectively 3rd January 1925 and 2nd February 1925 for the sums of Rs. 5,000 and Rs. 3,000 respectively. The drawers of the hundis are defendants 1 and 2 (respondents 1 and 2 here) and the drawee was defendant 3 (respondent 3, Ramji Das, before us). Ramji Das accepted the two hundis. The plaintiff bank alleged that they presented the hundis for payment on due dates, but this allegation of theirs has been negatived by the Court below. Then it was argued before the Court below that under S. 64, Negotiable Instruments Act, the acceptor was liable even if there was no presentment for payment. The Court below did not accept this view of the law, and holding that the drawers and the acceptor were exempted from payment owing to want of presentment, it dismissed the suit as against defendants 2 and 3. Defendant 1 confessed judgment, and accordingly a decree was passed against him.

In this Court only one point has been urged, and it is this. Under S. 64, Negotiable Instruments Act, the result of non-presentment of the hundis for payment was not the exemption of the acceptor from liability, but the exemption of other parties to the hundis. We have to see how far this contention is correct.

A large number of cases have been cited before us, but before I proceed to examine the cases it will be useful to examine the provision of the law itself.

Chapter 5, Negotiable Instruments Act, deals with presentment. This chapter consists of 17 sections Ss. 61 to 77. Out of these sections there are some which lay down that the instruments

should be presented for certain purposes and also lay down the consequences of the failure to make the presentment. In the scheme of the Indian Act, an attempt has been made to bring together the law on promissory notes, bills of exchange and cheques. This has caused a certain amount of confusion. Ss. 62, 64, 67, 68 and 69 deal with promissory notes. Ss. 61, 64, 68 and 69 deal with bills of exchange. Ss. 64, 68, 72 and 73 deal with cheques. It will be noticed that the sections mentioned above provide certain consequences for non-compliance with the rule as to presentment. The other sections simply lay down how a presentment is to be made, and where it has to be made and where it need not be made at all. As a general principle it must be accepted that where 'consequences are provided for as flowing from non-presentment, it is not open to the Courts to hold that besides the consequences provided for, by the law, other consequences, not mentioned by the law, are also to flow.

With this general proposition in view let us proceed to examine the several sections of Chap. 5. S. 61 deals with bills of exchange payable after sight. It provides that where, in the case of a bill of exchange of this nature, no time or place is specified for presentment, it must be presented to the drawee for acceptance. Then it provides that in case of default of such presentment, no party thereto shall be liable on it, to the person making such default. It will be noticed that this section provides for presentment in certain cases, and it also provides for the consequence. The consequence is put down in very wide terms, namely no party, whoever he may be, to the bill of exchange is to be liable to the person making the default. S. 62 deals with a promissory note payable at a certain period after sight. It again provides for presentment and further provides that in default of such presentment no party thereto will be liable to the person making the default. The words "no party" are of very wide significance.

We can leave aside S. 63 which only provides for grant of time for deliberation. Coming to S. 64 we find that it provides that promissory notes, bills of exchange and cheques must be presented for payment. It provides that a promissory note must be presented for payment to the maker, bills of exchange must be presented for payment to the acceptor and cheques must be presented for payment to the drawee. Then S. 64, in keeping with Ss. 61 and 62 and some other sections in Chap. 5 provides for the penalty for non-compliance with the rule of presentment. The penalty is provided in the following language, viz.,

> "in default of such presentment, the other parties thereto are not liable thereon to such holder."

The word "other" has been used to show that there is a difference between S. 64 and Ss. 61 and 62, where the words used are "no party." It cannot be said that the word "other" has been used by mistake or oversight. The word has been there since 1881, and it has never occurred to the legislature that it was redundant and should not have found place in the section. The use of the expression "other parties" gives a clear and intelligible meaning to the section. This would mean that the parties who are mentioned in the section may be liable, but other parties to the several documents are not to be liable. For the present we shall leave out of consideration the exception to S. 64. In my opinion it is slightly out of place, and this is the reason why it has caused some trouble in the interpretation of the main S. 64.

Sections 65 and 66 describe, the former the hours of presentment, and the latter the date of presentment. As they do not provide for any broad rule of presentment and the consequences of default, we need not consider them. S. 67 again provides for presentment and records the effect of non-presentment. It deals with a promissory note alone but a promissory note which is payable by instalments.

Section 68 deals with all kinds of instruments, namely a promissory note, a bill of exchange and a cheque. It provides that where these are drawn or accepted payable at a specified place and not elsewhere, they must, in order to charge any party thereto, be presented for payment at that place. It provides, therefore, for presentment in a particular manner and also provides for the consequence of non-presentment in that manner.

Section 69 deals with a promissory note and a bill of exchange of a certain kind, namely payable at a specified place and lays down that if the rule is not complied with, the maker or the drawer, as the case may be, will be discharged. Ss. 70 and 71 go together. S. 70 lays down where the presentment is to be made, and S. 71 lays down what is to be done where the rule in S. 70 cannot be complied with.

Section 72 deals with a cheque. It lays down that a cheque must be presented at the bank upon which it is drawn within a certain time and provides that the consequence of non-presentment would be to discharge the drawer. S. 73 deals with a cheque and defines the time of presentment, and provides for the consequence, namely discharge of all the parties thereto except the drawer. S. 74 deals with 'presentment of negotiable instruments generally and does not provide for a penalty. S. 76 goes with S. 74 and need not be discussed. S. 75-A deals with delay. S. 76 defines where non-presentment is not necessary. S. 77 deals with liability of a banker.

It will be noticed, therefore, that some of the provisions of Chap. 5 lay down presentment as necessary and the manner of presentment, and the others provide for the penalty or the consequence of non-presentment. We have, therefore, to see whether there is any provision which lays down that the consequence of non-presentment for payment of a bill of exchange of the kind before us, is the discharge of the acceptor. No such rule can be found within the four corners of Chap. 5. S. 64 is the only section which has been relied upon, and I have shown that it does not say that the circumstance, namely non-presentment of a bill of exchange for payment, gives a discharge from liability to the acceptor.

Let us now consider the exception to S. 64. It is not the case that in the case of all promissory notes no presentment is necessary. Ss. 62, 64, 67, 68 and 69 deal with promissory notes and provide for presentment and record the consequence of non-presentment. The exception to S. 64 deals with a promissory note payable on demand, and the proper place of the exception would have been below S. 74, which deals with negotiable instruments payable on demand. The exception to S. 64 deals with a promissory note alone and says that where it is payable on demand but is not made payable at a specified place, no presentment is necessary. The fact, therefore, that that exception to S. 64 deals with the consequence of non-presentment cannot be taken as enlarging the natural meaning of S. 64. The true method of providing an exception is to take a case which but for the exception would fall within the general rule, but it is impossible to do this in this particular case. If S. 64 stands as it does the exception must be taken as going to contradict it. What are then we to do? We cannot read the exception as controlling the plain language of S. 64. S. 64, therefore, in my opinion, should be given its plain meaning and the exception to it must be read as more or leas an independent rule of law.

Now I would consider a few cases decided by the High Courts. In this Court the earliest case that has been cited before us is *Farzand* v. *The Agra Savings Bank* (1). This was a case on a bill of exchange, and there was no presentment. It was held, in view of the provisions of S. 64, that the acceptor who is the principal debtor in the case of a bill of exchange (see S. 37, Negotiable Instruments Act) was not exempted. This ruling and a case decided in the Madras High Court, *Ramakistnayya* v. *Kassim* (2), were followed by this very Court in *Phulchand* v. *Ganga Ghulam* (3). In the case of *Gaya Din* v. *Sri Ram* (4) some doubt was thrown on the correctness of the ruling in *Phulchand's* case. That was a case in which the holder of a hundi sought to make the drawer liable. The Court of first instance dismissed the suit against all the parties except the drawer, but the lower appellate Court dismissed the suit altogether on the ground that the note had not been presented. This decision was upheld by the High Court, the appeal being dismissed. The consequence of non-presentment, as described in S. 64, would be that the drawer would be exempted

(1) [1896] A. W. N. 201.
(2) [1890] 13 Mad. 172.
(3) [1899] 21 All. 450=(1899) A. W. N. 157.
(4) [1917] 39 All. 364=39 I. C. 649.

from liability. The same result was arrived at by the High Court in this case but on somewhat different grounds. S. 64 was quoted and the case in *Phulchand* v. *Ganga Ghulam* (3) was cited. There is no discussion of S. 64 although it might appear that the case in *Phulchand* v. *Ganga Ghulam* (3) was doubted. We cannot treat the case of *Gayadin* v. *Sri Ram* (4) as any authority for the proper reading of S. 64, Negotiable Instruments Act. As I have pointed out, the result would have been the same if S. 64 had been applied to the same case. In the two other cases that were cited before us as coming from this High Court, namely *Pachkauri Lal* v. *Mulchand* (5) and *Jhandu Lal Mithu Lal* v. *Wilayti Begam* (6), there is not much which can be relied upon by the appellant. In *Pachkauri* v. *Mulchand* (5) the drawer and the drawee of the hundi were one and the same person, and it was held that no presentation on due date was necessary in that case. There is no discussion of S. 64, and all that does appear is a mention of the section. In the case in *Jhandu Lal* v. *Wilayti Begam* (6) it was held that where the drawer and acceptor of a hundi are one and the same person, it is open to the holder to treat the document as a promissory-note. The case was decided mainly on the basis of S. 76, Negotiable Instruments Act. Coming to cases decided in other Courts we have got, besides the case in *Ramakistnayya* v. *Kassim* (2) already referred to, the case of *Ardeshir Sorabsha Moos* v. *Khushaldas Gokul Das* (7) the relevant remarks appearing at p. 253.

In the Lahore High Court there is a very recent case *Ghaniya Lal* v. *Karim Chand* (8). In this case a Division Bench of the High Court has accepted entirely the view which was taken by this Court in *Phulchand* v. *Ganga Ghulam* (3).

The only case in which a clearly different view appears to have been taken is the case of *Oudh Commercial Bank* v. *Gurdin* (9). In this case the learned Judicial Commissioner sitting singly held that in view of the exception to S. 64 the meaning of that section was that every party to the instrument was discharged except the holder himself. This reading of S. 64 reduces it to an absurdity. I fail to see how a holder can be liable to himself. The holder cannot sue himself for the amount of the negotiable instrument. For this reason and for the reasons given above, I find myself in entire disagreement with this case.

The result is that my reading of S. 64 and the preponderance of judicial authority is in favour of the appellants' contention. In the result, I would dismiss the appeal against respondent 2, who is one of the drawers of the bills of exchange and would allow the appeal and give a decree with costs in both the Courts against respondent 3, who is the acceptor of the hundis.

Bennet, J.—I agree with the judgment of my learned brother. I desire to mention an additional reason, which seems to me of some weight, in arriving at the interpretation of S. 64, Negotiable Instruments Act, at which he has arrived, that is that under that section in default of presentment for payment, the maker of a promissory-note, the acceptor of a bill of exchange and the drawee of a cheque are liable to a holder, but other parties are not liable. The question in issue is whether the words "the other parties thereto" refer to parties other than the maker of a promissory-note, the acceptor of a bill of exchange and the drawee of a cheque or whether the words refer to parties other than the holder.

The Court of first instance followed *Oudh Commercial Bank* v. *Gurdin* (9) where the latter interpretation has been laid down chiefly based on the argument that S. 64 must be interpreted in the light of the exception to that section. That exception states :

> "Where a promissory-note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof."

If this is an exception to the rule embodied in S. 64, then S. 64, should provide that in general the maker of a

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(5) A. I. R. 1922 All. 279=66 I. C. 503=44 All. 554.
(6) A. I. R. 1925 All. 442=87 I. C. 488=47 All. 572.
(7) [1908] 32 Bom. 247=10 Bom. L. R. 268.
(8) A. I. R. 1929 Lah. 240=115 I. C. 860=10 Lah. 755.
(9) [1920] 23 O. C. 364=59 I. C. 604.

promissory-note is not liable if there is no presentment for payment. Therefore, it is argued as regards a promissory-note the words "the other parties" in S. 64 must include the maker and not mean parties other than the maker. By analogy in the case of bills of exchange and cheques, the words "the other parties" would include acceptors and drawees.

Now on this interpretation in the case of a cheque, the drawee would not be liable in default of "presentment as hereinafter provided." But under S. 84 (3), illustration (a), a bank on which a cheque is drawn retains a liability on a cheque not presented within a reasonable time of its issue. Accordingly this method of interpretation breaks down in the case of a cheque. By analogy, therefore, this interpretation cannot apply in the case of promissory-notes and bills of exchange, and I consider the interpretation which has been placed on S. 64 by my learned brother is the correct interpretation.

S.N./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 652

KING AND NIAMATULLAH, JJ.

Natwar—Plaintiff—Appellant.

v.

Mt. Loi and *others* — Defendants—Respondents.

Second Appeal No. 1618 of 1927, Decided on 10th April 1930 from decree of District Judge, Agra, D/- 19th July 1927.

(a) Will—Construction—Effect should be given to testator's intention disclosed by unambiguous language occurring in will.

In construing a will primarily effect should be given to the testator's intention disclosed by the unambiguous language occurring in the will. The plain and the natural meaning of such language should not be departed from to give effect to a supposed intention of the testator on the assumption that he used it in a particular sense and not in a sense consonant with the personal law : *A. I. R.* 1917 *P. C.* 23, *Rel. on.* [P 655 C 1]

(b) Words — Construction — Malik ordinarily imports full ownership and may in particular setting denote life-estate—Will—Construction.

Ordinarily the word "malik" imports full ownership ; but having regard to the context and the setting in which that word occurs it may denote a life estate. Where, however, the will expressly states that the interest given to the "malik" is descendible on his or her heirs, no question of life estate can arise : 14 *Cal*, 296, *Ref.* [P 654 C 1]

(c) Will—Construction.

One *D* a Hindu who had no male issue bequeathed his entire property to *K*, widow of his predeceased son for life with remainder to his three daughters, *L.* 1, *L.* 2 and *L.* 3. The will also provided that in case on death of *K* any of his daughters be found to have predeceased leaving a son, such son would take the share of his mother; otherwise her share would devolve on her surviving sisters. Subsequent to this will there was a partition between *D* and the members of his family by which certain properties were assigned to *D* who added a testamentary clause to the deed in respect of what he received under the deed of partition. Under this *K* was given half of *D's* property, the other half being devised to three daughters who were also declared entitled to succeed to *K's* half on her death. The clause in the deed was to the following effect : "My three daughters shall be the owners malik of my immovable property situate in Muttra after death of *K*. As regards my birt jajmani and the property appertaining thereto, my daughters shall be owners malik of half and the remaining half would be taken by second party. This refers to members of *D's* family other than his daughters or *K* and after the death of any of my daughters the legal heirs (warasa-i-quanuni) shall be the owners malik, but in respect of my immovable property situate in Muttra, birt jajmani rights and the property appertaining thereto which I may leave, no one will have the power to make a transfer of any kind."

Held : (1) that the devise contained in the deed of partition superseded the will ;

(2) that the three sisters took as tenants in common each having a heritable estate descendible on their heirs according to the Hindu law : 14 *Cal.* 296, *Ref.* [P 655 C 1]

N. P. Asthana—for Appellant.

U. S. Bajpai—for Respondents.

Niamatullah, J.— The property in suit except hundis for Rs. 3,600 as to which there is dispute, admittedly belonged to one Dangal who had no male issue. He had, however, three daughters one of whom, Mt. Laltia, was married to the plaintiff-appellant. All the three daughters survived Dangal.

On 19th March 1903 Dangal executed a will bequeathing his entire property to Mt. Kalawati, the widow of his predeceased son, for life, with remainder to his three daughters, Mt. Loi, defendant 1, Mt. Lukyan, defendant 2, and Mt. Laltia, the plaintiff's wife, since deceased, in equal shares. The will also provides that in case on the death of Mt. Kalawati, any of his daughters be found to have predeceased leaving a son, such son would take the share of his mother; otherwise her share would devolve on her surviving sisters.

Subsequently on 30th April 1906 there was a partition between Dangal and some members of his family by which certain properties were assigned to Dangal, who added a testamentary clause to the deed in respect of what he received under the deed of partition. The devise contained in the deed of partition admittedly supersedes the will, dated 19th March 1903. Mt. Kalawati (the widow of the predeceased son) is given half of Dangal's property, the other half being devised to his three daughters, who are also declared entitled to succeed to Mt. Kalawati's half on her death. The parties are at variance as regards the interpretation to be placed upon the aforesaid clause, which is the main question calling for a decision in this appeal.

Dangal died some time after the deed of partition already referred to. It does not appear whether Mt. Kalawati survived Dangal. Whether she did or not there is no dispute that all the three daughters of Dangal survived her, so as to entitle them to the entire estate obtained by Dangal under the deed of partition. Mt. Laltia died afterwards (the exact date of her death does not appear and is not material) leaving no issue. Plaintiff Natwar is her husband and claims to be her heir in respect of the property, which she got under the testamentary clause in the deed of partition. The plaintiff's case is that the interest acquired by his deceased wife under her father's devise was a heritable estate and that he is entitled to succeed to it in preference to her surviving sisters. The contesting defendants are Mt. Loi and Mt. Lukyan, the two surviving daughters of Dangal. They deny the plaintiff's right to succeed to the interest of his deceased wife, on the allegation that, in accordance with the proper interpretation to be placed upon the testamentary clause occurring in the deed of partition, Mt. Laltia's interest would devolve upon them by survivorship.

One of the properties in dispute is a hundi for Rs. 3,600 as to which the dispute was whether it formed part of Dangal's estate. Both the lower Courts have found that it did not. The decision of that question of fact turned on evidence which satisfied the Courts below that the hundi in question, which is ex facie in favour of Girraj, did not form part of the estate of Dangal. The finding being one of fact cannot be reopened on second appeal. Under these circumstances we need not further advert to this part of the case.

As regards the rest of the property in dispute consisting of two houses and a shop in Muttra, both the lower Courts have held that the plaintiff is not entitled to succeed to the interest of his deceased wife having regard to the intention of the testator as disclosed by the terms of the devise contained in the deed of partition. Accordingly they dismissed the plaintiff's suit.

It has been contended in second appeal before us that the Courts below have misinterpreted the clause on which the right decision of the case depends. We have already indicated generally the purport of the clause under which the parties claim a right to the property in dispute. It is, however, necessary to state precisely the words in which the devise is couched before we proceed to interpret it and deal with the contentions put forward on behalf of the parties before us. The relevant part of the clause in question is as follows:

"My three daughters shall be the owners (malik) of my immovable property situate in Muttra after the death of Mt. Kalawati. As regards my birt jajmani and the property appertaining thereto, my daughters shall be the owners (malik) of half and the remaining half would be taken by the second party to this document this refers to members of his family other than his daughters or Mt. Kalawati) . . . . . .and after the death of any of my daughters the legal heirs (wurasa-i-qanuni) shall be the owners (malik), but in respect of my immovable property situate in Muttra, birt jajmani rights and the property appertaining thereto, which I may leave, no one will have the power to make a transfer of any kind."

It is contended on behalf of the defendants that the above clause should be construed with due regard to the notions of a Hindu, as Dangal was, and that he would naturally wish his daughters to take such estate in the property bequeathed by him as they would have taken under the ordinary Hindu law, which makes the interest of one of the daughters descendible on the survivors to the exclusion of her personal heirs. In other words it is argued that the three daughters took no more than a joint estate in the property bequeathed to them, so that on the death of any one of them her interest would survive to

the remaining daughters. This interpretation militates against the clear provision that in case of the death of any one of the daughters the heirs of the deceased will succeed to her interest. It could not have been the intention of the testator, having regard to the words used by him, that sisters should be her heirs.

It is suggested that the daughters were not given an absolute interest by the devise contained in the deed of partition, the word "malik" being controlled by the limitation as regards power of transfer to be found at the end of the clause. It should, however, be noticed that the restraint on alienation has reference not only to the daughters but to all succeeding heirs, and includes the case of male holders after the death of all the daughters. That each daughter takes a heritable estate is made clear in a preceding part of the clause. In substance it provides that each of the testator's daughters should take a heritable estate but none of them or their heirs shall have power to transfer. Ordinarily, the word "malik" imports full ownership; but having regard to the context and the setting in which that word occurs, it may denote a life-estate. Where, however, the will expressly states that the interest given to the "malik" is descendible on his or her heirs, no question of life-estate can arise. In *Thakur Harihar Baksh* v. *Thakur Uman Parshad* (1) at p. 307 their Lordships of the Privy Council expressed the opinion that the use of the words "naslan bad naslan" in a document conclusively indicates that an absolute interest was conferred. In the document which their Lordships had to construe, power of transfer had not been expressly given and the contention was that the estate conferred by it was not an absolute one. Their Lordships seem to be of opinion that where an estate of inheritance is conferred by a deed, it must be taken to be full ownership. In that view the restraint on alienation can only be regarded as repugnant to the absolute estate previously given by the use of the word "malik" and by declaring it to be heritable, being imposed not only on the immediate legatees but also on their heirs including the ultimate male holder, who ex hypothesi is to take an absolute estate.

The learned District Judge has adopted a somewhat different line of reasoning than that of the learned advocate for the appellant. He observes :

"In Hindu law as regards property which has been given by a father to a daughter the sister is not a legal heir but after the father and mother and other heirs are exhausted, the husband is a legal heir. Therefore, strictly accordingly to Hindu law, if there was no provision the plaintiff would be heir to the share of Mt. Lalta; but the question is: Did Dangal intend by the words "legal heir" that the plaintiff should inherit or that his remaining daughters should inherit ? It does not appear to me at all probable that Dangal was an expert on Hindu law. In his view and in the ordinary view a sister would be more correctly described as a legal heir of a deceased sister rather than the husband. This construction is supported by the fact that in an earlier document, a will dated 19th March 1903, Dangal made special provision that on the death of any daughter her son would take the share and if she died without issue (la wald), the other daughters would take her share. It does not seem to me at all probable that Dangal intended to make any change in the method of disposal between 1903 and 1906. . . . . I consider, therefore, ... that the daughters should take jointly and not as tenants-in-common."

According to the testator's intention as expressed by the will of 19th March 1903, on the death of any daughter the surviving daughters would not necessarily succeed to her interest on the supposition that they were joint tenants and not tenants in common because if any of them leaves a son he is to take his mother's interest as her heir. If, therefore, the will of 19th March 1903 be taken as indicative of the testator's intention at the time he executed the deed of partition, the expression "legal heirs" would include one class of heirs, viz., her male issues. There is no reason why the word which is of sufficient amplitude to include all heirs should be confined to sons only. The learned District Judge has inferred the intention of the testator not from the words used in the clause in question, but from the terms of the earlier will of 1903, the probable extent of his knowledge of Hindu law, and the supposed popular notion that a sister is an heir to the exclusion of the husband. We think that the plain meaning of the words used in the will cannot be controlled by inference to be drawn from extrinsic circumstances. As was pointed out by

(1) [1887] 14 Cal. 296=14 I. A. 7=4 Sar. 766 (P.C.).

their Lordships in *Manindra Chandra Nandi* v. *Durga Prasad Singh* (2) :

"In construing the terms of a deed the evidence of the intention of the parties thereto is inadmissible; the question is not what the parties may have intended, but what is the meaning of the words which they used."

Primarily, therefore, effect should be given to the testator's intention disclosed by the unambiguous language occurring in the will. The plain and natural meaning of such language should not to be departed from to give effect to a supposed intention of the testator on the assumption that he used it in a a peculiar sense, and not in a sense consonant with the personal law.

Having considered the language employed in the testamentary clause in question, the contentions of the parties and the view of the lower appellate Court, we are clearly of opinion that the three daughters of Dangal took as tenants in common, each having a heritable estate descendible on her heirs according to Hindu law. It is not disputed that a sister is not an heir according to that law in preference to the husband of the deceased. This being so the plaintiff's claim should be decreed in respect of the shop and the two houses detailed at foot of the plaint.

In the result we allow this appeal and decree the plaintiff's suit as regards the immovable property aforesaid. As both the parties have partially succeeded, we direct the parties to pay their own costs throughout.

V.B./R.K. *Appeal allowed.*

(2) A. I. R. 1917 P. C. 23.

A. I. R. 1930 Allahabad 655

MUKERJI AND BENNET, JJ.

Har Saran Das—Plaintiff—Appellant.

v.

Harbans Singh and *others*—Defendants—Respondents.

Letters Patent Appeal No. 69 of 1929, Decided on 28th March 1930, against judgment of Dalal, J., reported in *A.I.R.* 1929 *All.* 335.

Agra Tenancy Act (3 of 1926), Ss. 4 and 7—Planting of grove on sir land—Sir character is not lost.

The planting of a grove on a sir land does not result in the sir land losing its character of sir: 42 *All.* 483 and *A. I. R.* 1924 *P. C.* 247, *Dist.*; *A.I.R.* 1929 *All.* 335 *Affirmed*. [P 655 C 2]

M. L. Agarwala—for Appellant.

Harbans Sahai—for Respondents.

Bennet, J.—This is a Letters Patent appeal by the plaintiff zamindar against a judgment of a learned single Judge of of this Court upholding the dismissal by the lower appellate Court of the suit of the plaintiff. The plaintiff sued for damages for cutting certain trees on plot 249/1 which is within the zamindari of the plaintiff. The transactions in regard to this number are as follows: In the settlement of F.1275 (1871 A.D) the No. 249 was recorded as a sir of Bahadur Singh, a cosharer, .and it is not argued that entry was incorrect. There was no entry that the land at that time was grove. The land has still been recorded as sir and comes within the definition of sir in S. 4.(12) (a), Act 3 of 1901 (U. P. Land Revenue Act), which is

"land recorded as sir in the last Record-of-Rights framed before the commencement of this Act and continuously so recorded since, or which but for error or omission would have been so continuously recorded."

The next transaction in regard to this land is an auction sale on 20th January 1921, on a decree passed against Bahadur Singh proprietor. On this decree the entire zamindari share of Bahadur Singh was sold, and it was purchased by one Ajudhia, who subsequently sold it to the plaintiff. Subsequent to that sale on 1st July 1925, Bahadur Singh sold his exproprietary tenancy in this grove to the defendants 1 and 2. The question is whether defendants 1 and 2 by this purchase from Bahadur Singh acquired the right to cut the trees in this grove.

The only argument which has been addressed to us on Letters Patent appeal is ground 1 in the memorandum of appeal,

"because the character of the land ceased on its conversion into a grove, and Bahadur Singh did not become an exproprietary tenant."

It is argued on behalf of the appellant that with the planting of a grove the land lost its character of sir. This argument is founded upon the fact that in Act 2 of 1901 "land" is defined as land let or held for agricultural purposes. But this definition of land is not found in Act 3 of 1901 in which occurs the definition of sir. No authority has been shown to us for the proposition that the planting of a grove on a sir land results in the sir land losing. its character of sir. Reference was made

to *Bhagwan Din* v. *Piari Lal* (1), but in that ruling it was held that the land in question though entered as a sir in the F. 1305 settlement was wrongly entered as the persons then holding the land were not proprietors. Accordingly that ruling is no authority whatever for the proposition in question. Reference is also made to a ruling of their Lordships of the Privy Council reported in *Kesho Prasad* v. *Sheo Pargash Ojah* (2). In this it was held that a grove is not land held for agricultural purposes within the meaning of the Agra Tenancy Act. It has no bearing on the question before us.

We consider that the decree of the lower appellate Court was correct, and accordingly we dismiss the Letters Patent appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1920] 42 All. 483=58 I.C. 620=18 A.L.J. 570.

(2) A. I. R. 1924 P. C. 247=46 All. 831=51 I. A. 381 (P.C.).

A. I. R. 1930 Allahabad 656

DALAL, J.

Bachu Lal and *others*—Applicants.

v.

L. Dharam Deo Lal and *others*—Opposite Parties.

Civil Revn. No. 367 of 1929, Decided on 12th March 1930, against order of Dist. Judge, Ghazipur, D/- 5th September 1929.

Agra Tenancy Act (3 of 1926), S. 253—Scope.

The power of revision is given with respect to the decision of such subordinate revenue Court in which an appeal lies to the District Judge, and not with respect to the decision of the District Judge on appeal from the decision of any subordinate revenue Court: *A.I.R.* 1929 *All.* 560, *Ref.* [P 656 C 2]

Jwala Prasad Bhargava—for Applicants.

K. Verma—for Opposite Parties.

Judgment.—In my opinion no revision lies. The only power of revision given to the High Court is by S. 253, Agra Tenancy Act.

"The High Court may call for the record of any suit or application which has been decided by any subordinate revenue Court and in which an appeal lies to the District Judge and in which no appeal lies to the High Court and if such subordinate revenue Court appears:

(a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may pass such order in the case as it thinks fit."

In the present case the District Judge has made a remand under O. 41, R. 23 to the Assistant Collector and this order in remand is sought to be revised by this Court. Previously it appears that counsel made an attempt to lodge an appeal from such an order just as on the civil side an appeal from such an order is permitted under the Civil Procedure Code. It was pointed out by a Bench of this Court in *Dwarka Prasad* v. *Ojah Dariao Singh* (1) that no such appeal lay. When it has been held that an appeal did not lie, an application in revision is being attempted. The provisions of S. 253 do not cover an order in remand passed by a District Judge. The Court of District Judge is not a revenue Court as will appear from the description of grades of Court given in the Act from S. 234 to S. 239. The Court of Assistant Collectors and Collectors are those understood by the term "subordinate revenue Court" in S. 253. A commentary was shown to me in which the commentator was of opinion that an order in remand by a District Judge would be open to revision by the High Court. The commentator appears to me to have been misled by the identity of grounds as to rsvision in S. 253 with the grounds of revision in S. 115, Civil P. C. I do not think however that the provisions of S. 253 are identical with those of S. 115, Civil P. C. There can be no doubt as to the language of the section. First of all reference is made to a decision by a subordinate revenue Court in which an appeal lies to the District Judge. The power of revision is given with respect to the decision of such subordinate revenue Court, and not with respect to the decision of the District Jndge on appeal from the decision of any subordinate revenue Court. It appears that the legislature contemplated that the matter should wait until there was a final decision. There is permitted an appeal from an appellate decree of a District Judge under S. 246 of the Act. This application is dismissed with costs.

V.B./R.K. *Application dismissed.*

(1) A. I. R. 1929 All. 560.

A. I. R. 1930 Allahabad 657

MUKERJI AND BENNET, JJ.

Abu Jafar—Plaintiff—Appellant.

v.

Syed Mohammad Kazim—Defendant—Respondent.

Letters Patent Appeal No. 169 of 1929, Decided on 22nd April 1930, from judgment of Dalal, J., D/- 30th April 1929.

(a) Cosharer— Sir land — Incidents and rights of cosharers stated.

Sir lands are held by proprietors and not by tenants. The particular privileges under which a particular proprietor is allowed to hold certain portions of the land in the khewat are summed up in the phrase "*sir* land." When the proprietor loses the right of a proprietor, he acquires the right to hold the lands on certain easy terms. This privilege he may give up. When he does so, the whole body of cosharers become entitled to hold the land. But none of the proprietors can hold the land as their *sir*. [P 657 C 2]

(b) Agra Tenancy Act (3 of 1926), S. 27— Question of title.

When a question arises between two cosharers as to how much is one cosharer's *sir*, the question is one of title and not of any tenancy. [P 658 C 1]

A. M. Khwaja—for Appellant.

Panna Lal—for Respondent.

Mukerji, J.—The facts of the case are given in the judgment of the learned single Judge of this Court against whose judgment this appeal is.

It appears that there was once a single proprietor Mohammad Husain of khewat No. 29 which consisted of an area of 14 bighas and 10 biswas. Mohammad Husain held 12 bighas and 1 biswa, as his *sir* land. In course of time Mohammad Husain's property devolved on his heirs and some of the heirs transferred their shares. The appellant before us, Syed Abu Jafar, is one of the heirs of Mohammad Husain while the respondent Syed Mohammad Kazim is the purchaser of the shares of the remaining cosharers. Some time ago there were three coowners in khewat No. 29, viz. Abu Jafar, owning 2/16th, Mt. Muti Fatma owning 1/16th and Mohammad Kazim owning 13/16th share of the khewat.

When Mohammad Kazim purchased the shares of the cosharers owning 13/16th share, the vendors relinquished their right as exproprietary tenants in favour of Mohammad Kazim. Mohammad Kazim went before the revenue Court and asked that his name should be recorded in respect of 13/16th share of the *sir* lands. As already stated the major portion of the area of the khewat consisted of *sir* lands. To the misfortune of Mohammad Kazim, the highest revenue Court took the view that as the vendors of Mohammad Kazim had relinquished their exproprietary rights in the *sir* lands, Abu Jafar became the *sir*-holder of the entire area. This view was undoubtedly wrong and is wrong for the following reasons.

To start with, according to the definition of *sir* lands as given in S. 4 of the N. W. P. and Oudh Land Revenue Act, 1901, *sir* land as described in Cls. (a), (b) and (c), sub-Cl. (12) ceases to be *sir* land when it becomes the subject of an exproprietary tenancy. When the vendors of Mohammad Kazim relinquished their exproprietary tenancy, the portion of the area which they held as *sir* land ceased to be *sir* land and Abu Jafar could not be the *sir*-holder of the entire area, for the simple reason that the 13/16 of the area ceased to be *sir* land. The second reason against this view would be that the *sir*-holders were not tenants, so that it might be said that when some of the tenants died, the surviving tenants became the tenants of the entire holding. *Sir* lands are held by proprietors and not by tenants. The particular privileges under which a particular proprietor is allowed to hold certain portions of the land in the khewat are summed up in the phrase "*sir* land." When the proprietor loses the right of a proprietor, he acquires the right to hold the lands on certain easy terms. This privilege he may give up. When he does so, the whole body of cosharers become entitled to hold the land. But none of the proprietors can hold the land as their *sir*.

To continue the history of this litigation, Mohammad Kazim being unsuccessful in the highest revenue Court, instituted a suit in the civil Court to obtain a declaration that Abu Jafar was not holding the entire area as *sir*-holder. The civil Courts, up to this Court, on appeal, gave him a decree to that effect. The result was that Abu Jafar was held to have got *sir* rights only over 2/16th share of the entire land viz. 12 bighas 1 biswa. Mohammad Kazim purchased the 1/16th share of Moti Fatma. Thus he has been entitled to 14/16th share out of the entire khata. Mohammad

Kazim again went to the revenue Court to have the khatauni corrected, in accordance with the judgment of the civil Court. The revenue Court again refused to accede to his request.

There the matter stood, when Abu Jafar made an application to the revenue Court for an imperfect partition of the khewat. His object clearly was that he should be recorded as *sir*-holder of 2/16th of the area and as an exproprietary tenant of the remaining portion of 12 bighas and 1 biswa. Mohammad Kazim objected to this application and the question arose whether Abu Jafar was the *sir*-holder of the 12 bighas and 1 biswa, so that the provisions of S. 126 of the Land Revenue Act might be attracted in his favour. The revenue Court decided that it was a matter involving no proprietary title and could be decided later on. Mohammad Kazim appealed to the District Judge. The learned District Judge held that it was a question of proprietary title and held in favour of Mohammad Kazim. He decided that the judgment of the civil Court was operative not as res judicata but also was a correct judgment in the circumstances of the case.

A second appeal was filed in this Court and it was dismissed. It is against this judgment that the present appeal is.

In giving out the history of the litigation, we have practically expressed our views. There can be no doubt that when a question arises between two cosharers as to how much is one cosharer's *sir*, the question is one of title and not of any tenancy. Question of title can be litigated finally in the civil Court and civil Court alone. We hold therefore that the lower appellate Court, namely the District Judge, was competent to hear the appeal and Abu Jafar has no merits in this litigation.

In the result this appeal fails and it is hereby dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 658

DALAL, J.

Rozan and *others* — Accused—Applicants.

v.

Emperor —Opposite Party.

Criminal Reference No. 794 of 1929, Decided on 16th January 1930, made by Addl. Sess. Judge, Basti, on 11th November 1929.

Criminal P. C., Ss. 139 (2) and 140 (1)—Magistrate cannot compel a party to go to civil Court and specially party in whose favour he is inclined.

The provisions of S. 140 (1) do not apply to a stay under S. 139 (2) and the Magistrate cannot compel either party to go to the civil Court. If the defendant denies the claim and the denial is proved, the criminal Court holds its hand and it will be the business of the plaintiff to bring a civil suit if he likes. If he does not, the denial is maintained. If he does bring a suit and succeeds, the Magistrate may proceed to pass an order absolute under S. 140 (1). Under no circumstances when the opinion of the Magistrate is in favour of one party can he direct that party to go to the civil Court. [P 658 C 2]

S. Mohammad Amin—for Applicants.

M. Waliullah and *L. M. Roy*—for the Crown.

Judgment.—I am not surprised at the Magistrate being confused by the inartistic provisions of Ch. 10, Criminal P. C. What is meant by the provisions of S. 139 (2) is that when a Magistrate finds that there is reliable evidence in support of the denial by the defendant of the plaintiff's claim of public right, all he has to do is merely to stay the proceedings until the matter of the existence of such right has been decided by a competent civil Court. The provisions of S. 140 (1) do not apply to such stay and the Magistrate cannot compel either party to go to the civil Court. The purpose of this new section introduced in 1923 is clear. The plaintiff in the criminal Court makes a claim and a defendant denies it. If the denial is proved the criminal Court holds its hand and it will be the business of the plaintiff to bring a civil suit if he likes. If he does not, the denial is maintained. If he does bring a suit and succeeds the Magistrate may proceed to pass an order absolute under S. 140 (1). When the opinion of the Magistrate was in favour of the applicants, Rozan and others, the Magistrate had no jurisdiction to direct Rozan and others to go to

the civil Court. The Magistrate's order of 20th July 1929, subsequent to the sentence:

"I stay the proceedings till the matter of the existence of such right has been decided by a competent civil Court"

is cancelled.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 659

SULAIMAN AND KING, JJ.

Unao Commercial Bank Ltd., Unao—Decree-holder—Applicant.

v.

Mohar Gobind Rai and *another*—Judgment-debtors—Opposite Parties.

Execution First Appeal No. 42 of 1929, Decided on 9th April 1930, against decree of Sub-Judge, Gorakhpur, D/- 17th September 1928.

(a) Civil P. C., O. 21, R. 1—Person attaching decree is entitled to take money out of Court and to certify payment—Civil P. C., O. 21, R. 53 (3).

Once a decree has been attached by another decree-holder, the latter becomes a representative of the holder of the attached decree and is entitled to take out execution in the same way as the orginal holder thereof. He is entitled therefore to take the money out of Court and to certify payments : *A. I. R.* 1925 *All.* 123, *Expl.* and *Dist.* [P 661 C 1]

(b) Principal and Agent—Pleader receiving money under decree on behalf of client bank and certifying payment—Bank cannot go back upon his action asserting that money was not paid to bank by him.

Where a pleader of a bank certifies payment under a decree on behalf of the bank, he does so as an authorized agent of the bank; and the bank cannot go back upon his action on the assertion that the amount has been withheld by pleader and not paid to the bank. [P 661 C 2]

P. L. Banerji and *S. N. Sethi*—for Applicant.

Shiva Prasad Sinha — for Opposite Parties.

Sulaiman, J.—This is an appeal by the Unao Commercial Bank Limited arising out of certain execution proceedings under the following circumstances : Mohar Gobind Rai and Inderjit Gobind Rai were indebted to one Sheo Nandan Prasad who held a decree against them. The Unao Commercial Bank as well as the Punjab National Bank held money decrees against Sheo Nandan Prasad. The Unao Commercial Bank in execution of its own decree attached Sheo Nandan's decree against the original judgment-debtors Mohar Gobind Rai and Inderjit Gobind Rai. The Punjab National Bank also applied for execution and attached the same decree which was in execution at that time in Cawnpore. Later on the Unao Commercial Bank applied to the Cawnpore Court for the transfer of the execution to Gorakhpur where properties belonging to the original judgment-debtors were situated. The Punjab National Bank did not make any separate application but the Court, in its certificate of transfer, noted that the said decree of Sheo Narain had been attached in execution of the Punjab National Bank also and that whatever money is realized by means of execution should not be paid to the attaching creditor, the Unao Commercial Bank Limited, but should be forwarded to Cawnpore for rateable distribution.

At Gorakhpur the Unao Commercial Bank applied, on 11th January 1928, for execution of the decree without any reference to this note in the certificate of transfer. On 8th February 1928, Babu Raghunath Prasad, the pleader for the decree-holder, the Unao Commercial Bank Limited, certified the payment of Rs. 1,000 by the judgment-debtors to the said bank and filed a receipt for the same. The Court accepted this verification on his statement and the payment was certified. On that date the Court's attention was not drawn to the fact that there was a note in the certificate of transfer under which the payment should not have been received by that bank alone. Later on, when the office brought this circumstance to the notice of the Court the pleader was called upon to deposit the amount in Court. Various adjournments were allowed and the Court appears to have been unnecessarily lenient to him in giving time to deposit the amount. His excuse was that he had put it in a fixed deposit in some bank, but in spite of successive orders of the Court he was unable either to produce the fixed deposit receipt or pay the amount in Court. It is noteworthy that on 20th August 1928 an application was presented by the Unao Commercial Bank itself through their authorized agent Rambali praying that three weeks' time be allowed to B. Raghunath Prasad, its pleader, and admitting that he had received the

whole amount and would make the deposit. There was a further prayer that execution should proceed with regard to the rest. When so much delay had occurred the Court finally ordered that unless the amount was deposited forthwith he would report the conduct of the pleader to the District Judge. Soon after this the pleader concerned died but the certificate of payment remained on the record as it had stood before. The Court finally ordered that the decree was paid up and the Cawnpore Court should be informed of it and also of the fact that Rs. 1,000 had been paid to the decree-holders' pleader and the amount should be credited in the decree-holders' account. The Court further expressed the opinion that if the bank had suffered any loss it could recover the amount from the heirs of the pleader.

The Unao Commercial Bank has preferred this appeal to which the Punjab National Bank is not a party. On their behalf it is urged that the payment made to the pleader was illegal and wholly unauthorized and the certificate was not valid and operative and that therefore the bank is entitled to further execute the decree and realize the amount from the judgment-debtor. Reliance is placed on the definition of the word "decree-holder" in S. 2 (3) which says that it means any person in whose favour a decree has been passed or an order capable of execution has been made. The argument is that this definition cannot apply to an attaching creditor and that therefore an attaching creditor is not contemplated in O. 21, R. 1, as the person to whom payment can be made out of Court. As authority for this proposition the learned advocate for the appellant relies on the case of *Rambadan Singh* v. *Ram Pargash Singh A. I. R.* 1925 *All.* 123. The judgment in that case showed that the attachment of the decree had automatically come to an end as a result of their application having been struck off for default of prosecution on 23rd December 1922. It was alleged that Rambadan, the judgment-debtor, had made payment of the amount to these attaching creditors. The learned Judge held that the payment was not a valid payment under O. 21, R. 1 (b). He further held that their decree having been passed as early as 1907, their application of 1922 was barred by the twelve years' rule of limitation. The learned advocate for the appellant relies on the observations of the learned Judge in the judgment which, according to him, imply that no payment within the meaning of that rule can ever be made to an attaching creditor of the decree-holder, and that a debtor liable under a decree which has been attached cannot be allowed to make payment to the person who has attached the decree against him. The respondent was not represented by any counsel, and the learned Judge has not discussed the provisions of O. 21, R. 53. After our judgment had been delivered we sent for the record of that case and discovered that the payment had been alleged to have been made on 2nd December 1922, while the attachment was still subsisting, and also that the case was considered by a Letters Patent Bench in appeal. The Letters Patent Bench pointed out that the attention of the learned Judge was not drawn to sub-R. (3), O. 21, R. 53, but did not consider it necessary to go into the question because in their opinion the appeal failed on the ground that the decree of the attaching creditors had become barred by lapse of time and was incapable of execution after 12 years.

No doubt a decree-holder is defined as a person in whose favour a decree has been passed or an order capable of execution has been made, but under S. 146, Civil P. C., where any proceeding may be taken or application made by or against any person then the proceeding may be taken or the application may be made by or against any person claiming under him. It, therefore, follows that the representative of a decree-holder is entitled to take the same proceeding as the original decree-holder in whose favour the decree was passed.

No doubt O. 21, R. 1, under which payment can be made to the decree-holder out of Court, speaks of the decree-holder, but there can be no reason to suppose that it would not include his representative who is entitled to act in his place. The representative of the decree-holder for the time being would undoubtedly be entitled to receive payment in the same way as his predecessor in whose favour

the decree was passed. O. 21, R. 53 (3) which deals with the attachment of decrees provides that the holder of a decree said to be executed by the attachment of another decree for payment of money shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof. This provision makes it quite clear that once a decree has been attached by another decree-holder, the latter becomes a representative of the holder of the attached decree and is entitled to take out execution in the same way as the original holder thereof. If the decree-holder could himself, before attachment, take the money out of Court and certify payment, his representative would be entitled to do the same. It is possible that in actual practice this would leave a door open for fraud, but that circumstance cannot be taken into account when we are considering the effect of the provisions of O. 21 as they stand. Under R. 1 of that order a judgment-debtor can make payment to the decree-holder out of Court, and there is nothing in that order which prevents him from doing so when the execution proceedings are being carried on by another creditor who has stepped into the shoes of his original decree-holder. Of course, in such cases the Court would obviously require the attaching creditor to deposit in Court the surplus of the amount realized in case there be any, i. e., the amount in excess of his own decree.

In the particular case before us there were two attaching creditors, of which fact the judgment-debtors must have had notice. We, therefore, do not wish to decide the question whether if the Punjab National Bank had been trying to execute the decree and claiming that the certificate of payment given by only one of the decree-holders was insufficient and did not amount to a valid discharge, the position would not have been different. It is possible to hold that the decree-holder mentioned in O. 21, R. 2 must mean all the decree-holders jointly interested for the purposes of the certificate. We, however, leave this point open.

We think that in the present case it is not open to the Unao Commercial Bank to proceed with further execution of the decree and try to recover the amount over again from the judgment-debtors. The position, in our opinion, is the same as if payment had been made by the judgment-debtors directly to the bank, and the bank, in spite of receipt of the amount, was trying to execute the decree afresh. In such an event the Bank would obviously have been estopped by its own conduct.

In the present case the amount was paid by the judgment-debtors not to B. Raghunath Prasad in his personal capacity but as the authorized vakil of the bank, and the certificate of payment was given by B. Raghunath Prasad on behalf of the bank as its authorized pleader. The admission contained in the application of the 20th August 1928, made by the bank through its authorized agent Ram bali, was also an admission made by a party to the proceeding. The bank, therefore, is bound by the action taken by its own authorized agent in the course of the execution proceedings, and it cannot be allowed to go back upon that action on an assertion that the amount has actually been withheld by its agent and not paid to the bank. If it has suffered in any manner its remedy is against the heirs of its own agent or against any other agent who might have been in collusion with him. We, therefore, think that it is sufficient to dismiss the appeal on the ground of estoppel. The appeal is accordingly dismissed with costs including in this Court fees on the higher scale.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Allahabad 661

SEN AND NIAMATULLAH, JJ.

Peare Lal-Kishan Prasad—Plaintiff—Appellant.

v.

Diwan Singh-Ganeshi Lal — Defendant—Respondent.

Second Appeal No. 1493 of 1926, Decided on 13th January 1930, against decision of Dist. Judge, Meerut, D/- 15th September 1926.

(a) Company—Amendment of Articles of Association.

The moving or passing of a recolution regulating the business of the members upon the happening of a sudden and unexpected emergency due to unusual rainfall does not

amount to an amendment of the Article of Association. [P 666 C 2, P 667 C 1]

(b) **Company—Body of tradesmen cannot nullify or amend contract between individual members.**

In the absence of a usage of trade, it is not open to any body of tradesmen, whether incorporated or not, to amend or nullify a contract entered into between its individual members or to substitute a new contract for the old one. [P 667 C 1]

* **(c) Contract Act, S. 78—In absence of intention to the contrary property in ascertained goods passes to purchaser immediately upon entering into contract—It would not cease to pass merely by postponement of payment of purchase-money and of taking delivery.**

Where a contract for sale is entered into the test as to whether the property in the ascertained goods passed to the purchaser from the date of the contract or not is the intention of the contracting parties. And in the absence of a contract to the contrary, as the presumed intention of the parties and as a matter of law, the property in the ascertained goods passes to the purchaser on the date of the contract. The property in the goods does not cease to pass simply by reason of his not having found convenient to take delivery earlier by payment of the purchase-money : *Seeth* v. *Moore*, (1886) 11 *A. C.* 350; *Turley* v. *Bates*, 2 *H. & C.* 200 and *Martineau* v. *Kitching*, (1872) 7 *Q. B.*. 436, *Rel. on.*

[P P 668 C 2, P 669 C 1]

(d) **Contract Act, S. 78—Whether goods are "ascertained" or not depends upon evidence—Fact that purchaser has to do something to goods, namely weighing them for his own satisfaction would not prevent completion of contract.**

Whether the goods are ascertained or not is a question of evidence and is to be determined with reference to the facts of each case. There is a distinction between a case where something remains to be done by the vendor for the purpose of putting them into a state in which the vendee is to take them, and a case where the vendee for his own satisfaction, wants to get the goods weighed for the purpose of ascertaining the amount of the price. In the latter case, the completion of the contract does not stop till the vendee has weighed the goods : 4 *Cal.* 801; 44 *Cal.* 98 and *A. I. R.* 1923 *Oudh* 15, *Rel. on.*

[P 667 C 2, P 668 C 2]

(e) **Contract Act, S. 78—Term in contract that no delivery shall take place till payment of purchase money does not per se postpone purchaser's title.**

The seller may insist upon a term in the contract that no delivery shall take place till the payment of the entire purchase money but the incorporation of this term does not per se postpone the title of the purchaser.

[P 669 C 2]

(f) **Contract Act, S. 78—"Ascertained" means agreed by parties to be appropriated.**

The word "ascertained" means goods which the parties have agreed upon as the goods to be appropriated to the contract. [P 668 C 2]

(g) **Vendor and Purchaser—To prove that buyer was ready to carry out part of contract, it is not essential to show that he actually made tender of price.**

In order to prove that the buyer was ready to carry out his part of the agreement it is not essential for him to show that he actually made a tender of the price. The buyer should have been ready and willing to carry out the bargain on his part in order to insist upon delivery : 30 *Cal.* 865 (*P. C.*), *Foll.* [P 669 C 1]

K. N. Katju, *S. K. Dar* and *K. C. S. Bhatia*—for Appellant,

P. L. Banerji—for Respondent.

Judgment.—Parties to this action are dealers in grain in Mandavi Faizaganj in the city of Meerut. On Jeth Badi 12, Sambat 1982 corresponding to 19th May 1925, the plaintiff-appellant purchased from the defendant-respondent a khatti or grain pit situate in Ahata Sri Ram. The bargain was struck about the purchase of 504 maunds of wheat at the rate of Rs. 5-9-3 per maund. A quarter of the purchase money, Rs. 748-9-6, was paid by way of earnest money. It was a term of the contract that the balance of the purchase money, namely Rs. 2,100, was to be paid by the plaintiff to the defendant later upto Phagun Sudi 5, 17th February 1926 in accordance with the custom of the trade which prevailed in the Faizganj market.

The terms of the contract were reduced to writing and were embodied in two separate documents in printed forms exchanged between the parties. These documents have the curious name of langot. The etymology of the word is not known, but the langot appears to possess the incidents of bought and sold notes. Curiously enough these documents were not produced in the Courts below either by the plaintiff or the defendant ; and it was not till a later stage of the progress of arguments in this Court that the "langot" executed by the plaintiff in favour of the defendant was produced in this Court. The parties admitted its genuineness and it was received in evidence.

The document is headed with the words "The Meerut Veopar Chamber" and contains the following entries :

Number of grain pit	... 8
Bank number if the bank's money is invested	... 145
Name of the bank	... Allahabad Bank
Name of the person who fills the grain pit	... Diwan Singh Ganeshi Lal
Name of the broker	... Mangda

Name of commodity	... Wheat
Weight	... 504 maunds
New or old goods	... New
Full description of the locality where the pit is situate	... Ahata Sri Ram Sarak Bhagpat
How much money remains due on account of the grain pit	... Rs. 2,100
Date from which interest at 15 annas per cent per month will be charged	... Jeth Badi 12th Sambat 1982
Rent of the grain pit for the next year according to the current year	Rs. 35
Signature of the person who fills the grain pit	Diwan Singh Ganeshi Lal
Date	Jeth Badi 12th, 1982, 17th May 1925

The document is signed by the Secretary of the Meerut Veopar Chamber. There is a note appended to this document:

"The grain pits have been purchased and sold in accordance with the rules of the "Meerut Veopar Chamber." Then follows a tabular form in which the following entries have been recorded:

Date on which grain pit is sold . . . . .Jeth Badi 12th, 1982.

Name of seller. . . . . Diwan-Singh-Ganeshi Lal.

Name of purchaser, ... Pearey Lal-Kishen Prasad.

Rate . . . . . Rs. 5-9-3.

The Meerut Veoparak Sabha appears to have commenced its work some time in February 1925. The defendant applied for membership of the Sabha on 21st March 1925. The purchase and sale of the khatti was registered in the books of the Sabha on deposit of one rupee as fee on 16th May 1925. The 'langot' embodying the contract was in a printed form prescribed by the Sabha.

The Veoparak Sabha was registered under S. 26, Companies Act (Act 6 of 1913) on 16th June 1925. Certain rules regulating the business of the company were framed; but these rules contain a note that

"nothing in these rules will apply to transactions prior to the registration of the company."

Ex hypothesi, the contract between the parties was made on 19th May 1925, but the company was not registered till 16th June 1925. Some of the rules of this company are material for the purpose of this appeal and may be reproduced.

Rule 2: Before selling the khatti in the market the person who has filled it will get it registered in the chamber, giving a full description thereof regarding locality, weight, serial number of his account book and name of the Bank advancing money on its security with its serial number. When the secretary or the assistant secretary of the chamber has satisfied himself, either personally or otherwise, as to the actual existence of the khatti on the spot, he shall affix the seal of the chamber to the langot agreement of sale, and sign it, whereafter the filler of the khatti will be at liberty to sell the same in the market. He shall pay Re 1. as registration fee for each khatti to the chamber."

Rule 6: In case of transactions of grain pits the seller will charge weighment dues at the rate of Re. 1-9-0 per cent, and will allow grain 1½ chatak per maund which will be estimated on the actual weight of grain, i. e., grain without dust etc. Purchaser will be responsible for (aal pal) damage, and the filler of the grain pit, for (talron musla) i. e., dampness or rain water."

Rule 9: The following will be the conditions for delivery and quality of goods in respect of different kinds of khattis.

(a) Wheat pits: Every maund containing 30 p. c. of red wheat, 63 p. c. of white wheat, 2 p. c. of dust, 5 p. c. barley, etc.

In case there be more than 5 p.c. of barley etc. then half of it will be considered as dust, and half as wheat. A pit containing up to 12 p. c. of other kind of grain, i. e., up to 5 p. c. of barley and 2 p.c. of dust,5 p.c. of other material will also have to be accepted, but discount at the above rates will be allowed. If the purchaser, on weighing 200 maunds of the goods, finds that the adulteration is in excess of 12 p.c. he may refuse to take delivery of the khatti and accept in lieu thereof, some other pit or may have the same pit weighed by mutual agreement as to discount, etc., with the seller. But once he has exercised his option of accepting the pit, he cannot refuse to take delivery thereof, but he will be entitled to the discount at the above rates. If red wheat is more than 30 p. c. then the purchaser will get ½ a pie for each extra percentage of it for every maund, but the whole of the red wheat will not be taken as a khatti of white wheat. A khatti containing 90 per cent ofred wheat and 10 per cent of white wheat will be considered as a pit of red wheat. For lesser percentage than 90 per cent discount at rates specified will be charged."

Rule 11: If adulteration is less than what is allowed under the above rules in any pit, then the seller will be entitled to a refund (batta) at the same rate.

Rule 14: The seller will also enter in the langot parcha the condition that if the purchaser, on examining the goods at the time of delivery,refuses to accept the same at the above discount rates, then the seller will deliver to him an equal quantity of new goods. The seller will also enter on the parcha the word "purana mal," i. e., old goods. At the time of the agreement, the earnest money paid to the seller will be paid after deducting the amount due on account of discount and if at the time of delivery these goods are not accepted, and now ones are delivered, then the said amount

will be paid to the seller without any interest being charged.

Rule 17: The filler of the pit will be responsible for the damaged goods (talron musla) up to Phagun Sudi 5 of the year in which it is filled up.

Rule 16: The last due date for khatti is Phagun Sudi 5. The purchaser can have his goods weighed whenever he likes till that date. If the buyer does not get them weighed by the last date and does not make the payment on that date, the seller will be entitled to the pit and recover his losses from his contracting party.

One of the questions which has to be dealt with in this appeal is whether the rules set out above should be treated as an integral part of the contract between the parties. The Court of first instance answered the question in the affirmative. The lower appellate Court answered it in the negative.

In the Memorandum of the Articles of Association, there is a provision that the articles cannot be amended or added to

"except after notice of the intention to propose such alteration at some specified general meeting shall have been given at least five days before the date of such meeting."

It is also necessary that the alteration shall have been agreed to by a majority of 3/4ths of the members present and voting at the said general meeting. It concludes with the words:

"The said modification or addition has to be confirmed at a subsequent general meeting and when this has been confirmed, these articles will be subject to the provision of the Indian Companies Act and will have the same force and effect and be as binding on all members if they had formed part of the original Articles."

After the date of the contract between the parties there was an unusually heavy rainfall in the Meerut District which flooded the area where the grain pit was situate. The Meerut Veoparak Sabha, in order to meet this situation, passed a resolution on 8th August 1925 calling on all those persons whose pits were menaced by the effect of the flood to get from the seller some other khatti in substitution or to pay off the price to the purchaser at the chamber's rate of the day. The defendant did not avail of the resolution. One of the questions in the case is as to whether the resolution passed by the Meerut Veoparak Sabha was ultra vires or was binding upon the parties.

The custom of trade regulating the purchase and sale of khatti is stated by the plaintiff in the following terms:

"In Mandavi Faizganj of city Meerut, the practice regarding the sale of ready khatti is that earnest money, which is about 1/4th of the price, is paid at the time of purchase and the remaining amount is left in deposit with the purchaser and is paid to the original filler at the time of opening the khatti and if the khatti is not opened till Phagun Sudi 5 next the said amount is paid (to the original filler) with interest at the rate of 15 annas per cent per mensem up to the time of opening the khatti i. e., up to Phagun Sudi 5 next, the filler remains liable for tala (i. e., when water comes from beneath) and musla (i. e., when water comes from above) and the person who fills the khatti remains in possession thereof, in lieu of the remaining amount aforesaid."

On the date of the contract, the grain pit in dispute was held in mortgage by the Allahabad Bank. There is a recital in the judgment of the trial Court which has not been disputed either in the grounds of appeal of the lower appellate Court or that of this Court that the bank was in possession as mortgagee.

The suit which has given rise to the present appeal was instituted on 13th January 1926. The plaint is obscure and not very artistically drawn up. Indeed, it is difficult to understand the nature of the action. It is certain it is not an action for detinue. It is suggestive of a claim for damages for non-delivery of goods to which a complete title had vested in the plaintiff but as a matter of fact, the case has been fought out upon the ground that the title to the property had not passed at the date of the contract. It is not explained upon what basis the plaintiff claims to recover damages. The plaintiff claims from the defendant the difference between Rs. 6 per maund and the rate at which the grain was purchased. Why the plaintiff claims at the rate of Rs. 6 per maund is unexplained. It was essentially a case in which the trial Court ought to have pressed the plaintiff to state his case with a view to clear up the pleadings. Had this been done, much of the obscurity would have disappeared from the case and the issues would have been confined to a very limited area.

The plaintiff claimed to recover Rs. 836-3-0 as damages from the defendant on account of the latter's failure to deliver the grain contracted for of a particular kind, quality or description as given in R. 9 of the rules framed by the Veoparak Sabha. He contended

that these rules formed an integral part of the contract, that the defendant had no right to refuse delivery till the balance of the purchase money was paid, that the property in the goods did not pass to the plaintiff at the time of the contract, that the defendant was under a legal obligation to open the grain pit, to weigh the grain and to deliver grain of a marketable quality to the plaintiff, that the plaintiff was not liable for any damage to the goods from the effects of the flood, that the plaintiff was not bound to pay the purchase money to the Allahabad Bank and that the defendant's refusal to deliver the goods to the plaintiff amounted to a breach of contract on his part.

The defendant contested the claim on the ground that under the terms of the contract, the property in the goods had passed to the plaintiff, on the date when the contract was concluded, that the plaintiff was liable for the loss or damage to the goods from the action of flood, that the payment of the balance of the purchase money was a condition precedent to delivery, that the plaintiff had refused to pay the balance before delivery could take place, that the defendant was entitled to refuse delivery under the circumstances, and that the breach having been committed by the plaintiff, the claim for damages was not maintainable.

The trial Court held that the rules framed by the Veoparak Sabha were terms of the contract, that there being no privity between the plaintiff and the Allahabad Bank, the defendant could not insist upon the plaintiff paying the balance of the purchase money to the bank, that the defendant was bound to deliver the goods to the plaintiff as the latter was ready and willing to pay the purchase money at the time of delivery, that the breach was committed by the defendant and that the plaintiff's claim was well founded. It gave the plaintiff a decree for Rs. 710.3.0.

Certain facts were found by the trial Court which are in the teeth of the pleadings; and the criticism of the lower appellate Court was justified that the trial Court either misread the evidence or did not appreciate it. The result was that certain errors crept into the judgment which could and ought to have been avoided. The trial Court ought to have known that the pit was opened during the trial of the suit long after the due date, that the defendant did not open the pit before the commencement of the action and that it was the case of neither party that the terms of the original contract in the langot had been departed from.

The controversy raged over the terms of the contract. Both the Courts below were faced with the difficulty that the original langots which were the most vital of all documents were not before them. There was the further trouble that if the case of the plaintiff was to be accepted, the terms of the contract were to be found not in one self-contained document but had to be gathered from more than one document. Fortunately, however, the documents which had to be looked into for this purpose are instruments prepared by businessmen. These instruments although not drawn up or expressed with scientific precision are clear and unambiguous in which the terms have been set out in elaborate detail and in due order of consecution. There can, therefore, be no difficulty in finding out the real contract between the parties. The rules of the Veoparak Sabha are clear and the terms of the langot are equally clear. No complication arises as to their construction if they are viewed apart or if they are pieced together. We have, therefore, placed the "rules" immediately after the terms of the langot in the earlier part of our judgment, for facility of reference. The examination of the pit disclosed that the weight of the grain contained in it was 515 maunds, out of which 125 maunds were damaged.

The lower appellate Court reversed the decision of the first Court and dismissed the suit upon the following findings;

(1) The property in the goods passed to the purchaser from the date of the contract.

(2) The purchaser was liable for all loss or damage to the goods from the result of the flood.

(3) The purchaser was entitled to certain allowances or rebates on the occurrence of certain contingencies as provided for in the rules.

(4) The contract between the parties were in terms of a langot Ex. B. This was a self-contained contract and was not to be supplemented or controlled by the rules of Veoparak Sabha (Meerut Chamber of Commerce).

(5) The resolution of the said Sabha, dated 2nd May 1925, was ultra vires.

(6) The plaintiff was bound to pay the balance of the price before he could insist upon delivery. Actual money should have been tendered. Plaintiff refused to pay before delivery. The plaintiff and not the defendant was guilty of breach of contract.

We are not in agreement with all the findings of the learned District Judge, although we are prepared to uphold the decree passed by him. The lower appellate Court had no justification in treating the terms of Ex. B, as the contract between the parties. The finding on this point proceeds upon an alleged "admission":

> "it is, however, admitted that the terms are the same as in a blank form which is marked Ex. B in this case."

It is not stated whose admission it is and whether the said admission is verbal or written. Likewise, it has not been stated whether the said admission is part of the pleadings in the case. If the lower appellate Court had taken the trouble to compare the entries contained in Ex. B with para. 11 of the written statement it would have been manifest at once to the Court that the terms of Ex. B could not have been the terms of the original contract. In Ex. B the stipulated rate of interest was 14 per cent per mensem. The parties, however, were agreed that in the original contract the rate of interest was 15 annas per cent per mensem which was payable by the plaintiff to the defendant under certain circumstances. The terms of Ex. B also differ in the material particulars from the terms incorporated in the receipt for the earnest money, granted by the defendant to the plaintiff (Ex. 1). The Court below ought not to have assumed that the rules (7 in number) on the back of Ex. B were part of the contract in dispute. There was no allegation and no proof that these rules were part of the contract. We are clearly of opinion that the lower appellate Court was in error in treating the terms of Ex. B, as the contract between the parties.

We have already noticed that the Veoparak Sabha was not registered under the Indian Companies Act till 16th June 1925. Certain rules, however, had been framed by the Sabha in anticipation of the Sabha being ultimately registered. We have set out some of these ruies. The defendant contends that these rules formed the basis of the contract between the parties and must be treated as terms of the contract as agreed upon. The Court of first instance gave effect to this plea. The lower appellate Court took the contrary view. The finding of the lower appellate Court rests upon the fact that the rules were headed with a note that they were not applicable to transactions prior to the registration of the company. It is argued that the contract in controversy was admittedly made before the registration of the Sabha and that therefore, the rules could not be woven into the contract. There was, however, nothing to prevent the parties from adopting these rules as terms of their contract. This the parties clearly appear to have done. The lower appellate Court was therefore not right in holding that these rules were outside the contract.

We have already noticed that the Meerut Veoparak Sabha had passed a resolution on 8th August 1925 calling on persons, whose grain pits were exposed to the risk of damage from the effect of the unusual rainfall which had taken place about this time, either to give the purchaser some other khatti or grain pit by way of substitution or to exercise an option to purchase the grain pit at a certain price. The judgment of the trial Court was considerably influenced by this resolution, it being of the opinion that the resolution was known to the defendant, that he was bound by it and that he must bear the consequence of not availing himself of the option given. The lower appellate Court came to the conclusion, that the resolution in question was ultra vires and as such was not binding upon the defendant. Under Art. 51, Articles of Association no article of association could be ruled out or amended except at a general meeting of the Sabha. The moving or passing of a resolution regulating the business of the members upon

the happening of a sudden and unexpected emergency due to unusual rainfall did not amount to an amendment of the Articles of Association. At the outside it was an amendment of the original rules which had been framed for regulating the business of the association, and defining the date upon which the rights and liabilities of the purchasers and sellers of grain pits were to be governed. Art. 51 did not apply to the resolution in question and the Court below has evidently erred in holding that the resolution was ultra vires.

It does not follow from this that the Court of first instance was right in considering that the resolution was binding upon the parties. The original contract dated 19th May 1925 could not be modified by a subsequent resolution moved by the Veoparak Sabha on 8th August 1925. It was not pleaded in the case that the parties by mutual consent agreed to adopt this resolution as part of their contract. No evidence was adduced to prove that the parties intended to adopt it or that they, as a matter of fact, adopted it. The trial Court therefore was not justified in treating this resolution as a term of the contract and in holding that the defendant was bound by it.

In the absence of a usage of trade, it is not open to any body of tradesmen, whether incorporated or not, to amend or nullify a contract entered between its individual members or to substitute a new contract for the old one. No usage of trade has been pleaded or proved. There are no materials before this Court for testing the competency or powers of the Meerut Veoparak Sabha from this standpoint. Indeed, it is not necessary to do so for the purpose of this case. It is manifest to us that the resolution in question whether ultra vires or otherwise, had never been adopted by the parties as part of their contract. We are agreed that the rules of the Veoparak Sabha which we have set out in the earlier part of our judgment must be considered to be part of the contract. The plaintiff has strongly relied upon Rr. 9, 11, 17 and 18. Shortly put his contention is that the goods had not been "ascertained" on the date of the contract. It is argued that the goods could not be ascertained so long as the grain pit had not been opened, the goods inspected and weighed and goods answering a particular description apportioned to the plaintiff out of the bulk contained in the pit, and that the seller had to weigh the goods before the price could be determined. On these facts, it is contended that the property in the goods had not passed to the plaintiff and that the latter was not liable to accept the damaged grain which was sought to be forced upon him.

The contention of the plaintiff is not sound either in view of the terms of the contract or the law regulating the vesting of ownership. Up till a certain date, the seller was liable for damage arising from tala and musla, i.e., loss arising from sub-soil dampness or from rain-water filtering down into the khatti from the surface of the grain pit. The purchaser was liable to take the grain if damaged by other causes (aal pal). The parties had expected such contingencies and had provided for them in the contract. They had also provided for remedies open to the purchaser. Upon an examination of all the terms of the contract, it is quite plain that the property in the goods was intended to be passed to the purchaser from the date of the contract.

Under S. 78, Contract Act,

"sale is effected by offer and acceptance of ascertained goods for a price or of a price for ascertained goods together with payment of the price or delivery of the goods."

In *Seath* v. *Moore* (1), at p. 370, it has been held that it is a question of the construction of the contract in each case at what stage the property shall pass and it is a question of fact in each case whether that stage has been reached. It was held in *Shoshi Mohan Pal* v. *Nobo Kristo Poddar* (2), at p. 805, that where in a contract for sale of rice so far as vendors were concerned, nothing remained to be done on their part to the rice sold "for the purpose of ascertaining the amount of the price," and the fact that the purchaser has to do something to the goods for his own satisfaction, namely weighing the rice does not prevent the completion of the sale. There is a distinction between a case where something remains to be done by the vendor to the goods for the purpose of

(1) [1886] 11 A.C. 350=55 L.J.P.C. 54=5 Asp.M.C. 586=54 L.T. 690.
(2) [1879] 4 Cal. 801.

putting them into a state in which the vendee is to take them and a case where the vendee for his own satisfaction wants to get the goods weighed for the purpose of ascertaining the amount of the price. This distinction has been recognized in a number of cases and appears to be well founded: *Annan* v. *Dubar Sheikh* (3) (at p. 41 *of* 26 *O. C.*) and *Abdul Aziz* v. *Jogendra Krishna Roy* (4) (at p. 115). Two rules of civil law appear to have been incorporated both in the Sale of Goods Act and in the Indian Statute with which we are concerned. Those rules have been stated by Blackburn, J, to be as follows (Contract of Sale, third edition, 1910, p. 184):

"They are two fold: the first is that where, by the agreement, the seller is to do anything to the goods for the purpose of putting them into that state in which the buyer is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property.

The second is, that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods where the price is to depend on the quantity or quality of the goods; the performance of these things, also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted."

In *Simmons* v. *Swift* (5) (at p. 862) the rule has been enunciated as follows:

"Generally speaking, where a bargain is made for the purchase of goods and nothing is said about payment or delivery, the property passes immediately so as to cast upon the purchaser all future risks, if nothing further remains to be done to the goods: although he cannot take them away without paying the price. If anything remains to be done on the part of the seller, until that is done the property is not changed."

The real question in all such cases is whether the parties did intend that property should pass: *Turley* v. *Bates* (6) (at p. 203) and *Martineau* v. *Kitching* (7).

The true test therefore is what was the intention of the parties. Admittedly the whole of the purchase money had not been paid by the plaintiff to the defendant. It is equally clear that the grain pit was on the date of the contract in the possession of the Allahabad Bank as the pawnee or mortgagee thereof, and it may be presumed that the defendant was not in a position to deliver the goods so long as the mortgage had not been redeemed. This fact was known to the parties and is indeed clearly set out in the langot which contains the contract. Could it have been the intention of the parties that property in the goods was not to pass to the purchaser so long as the balance of the purchase money had not been paid by him, or delivery received by him? If there was a sale of ascertained goods, in the absence of a contract to the contrary, the property in the goods passed at once to the purchaser who must bear all risks and damage to the goods notwithstanding the fact that the entire price had not been paid or delivery taken. The word "ascertained" has not been defined or explained in the Indian Contract Act. According to Chitty (Law of Contracts, 17th edn. 1921, p. 462) the expression means "goods which the parties have agreed upon as the goods to be appropriated to the contract." There is no uncertainty in the present case as to the quantity of the goods sold. The plaintiff under the terms of his contract unconditionally agreed to purchase 504 maunds of wheat. There is no doubt as to the price of the commodity. It was settled at the rate of Rs. 5-9-3 per maund. Nothing remains to be done by the seller for ascertaining the amount of the price. Indeed, the purchaser has paid Rs. 748-9-6 by way of earnest money and has agreed to pay the balance which is also definitely known to be Rs. 2,100. The purchaser is entitled to claim delivery at any time up to Phagun Sudi 5th corresponding to 17th February 1926.

We are clearly of opinion that the goods purchased were "ascertained goods" within the meaning of S. 78, Contract Act. The property in the goods did not cease to pass to the purchaser simply by reason of the latter not having found it convenient to take delivery earlier by payment of the balance of the purchase money. In similar cases in which the parties had

(3) A. I. R. 1923 Oudh 15=68 I. C. 969=26 O. C. 39.
(4) [1917] 44 Cal. 98=36 I. C. 149.
(5) 5 B. & C. 857=5 L. J. (O. S.) K. B. 10=8 D. L. R. 693.
(6) 2 H. & C. 200.
(7) [1872] 7 Q. B. 436=41 L. J. Q. B. 227=20 W. R. 769=26 L. T. 836.

agreed that the delivery should be postponed, the Courts have held that the provisions of S. 78, Contract Act, came into operation and the property in the the goods passed to the purchaser as soon as the proposal for sale was accepted.

The terms of the contract are definite that no delivery was to be made till the balance of the purchase money was paid by the plaintiff to the defendant. It made no difference that the goods were in the possession of the Allahabad Bank as mortgagee. The defendant was entitled to ask the plaintiff to pay the price to the Allahabad Bank and take delivery of the grain. The defendant according to the finding of the Court below, which we must accept, was ever ready to perform his part of the contract. No authority is needed for the proposition that in order to prove that the buyer was ready to carry out his part of the agreement it was not essential for him to show that he actually made a tender of the price. We have not before us a case of reciprocal promises or simultaneous agreements to pay the price and take delivery. Upon a true construction of the contract, the buyer should have been ready and willing to carry out the bargain on his part in order to insist upon delivery. In *Shriram Rup Ram* v. *Madan Gopal* (8) their Lordships of the Judicial Committee have made the following observation :

"It is true that no tender was actually made, but the respondents, naturally enough in view of a rising market were ready and willing to carry out the bargain on their part, and it is proved that they made preparations with the object of having the money ready in hand. More than this they were not required to do by the Contract Act which provides by S. 51 that when a contract consists of reciprocal promises to be simultaneously performed no promiser need perform his promise unless the promisee is ready and willing to perform his reciprocal promise."

The provision of S. 51, Contract Act, is not applicable to the terms of the contract in hand. We have no doubt as to the principles applicable to the transaction between the parties. (1) In the absence of a contract to the contrary, as the presumed intention of the parties and as a matter of law, the property in the ascertained goods passes to the purchaser on the date of the contract. (2) Whether the goods are ascertained or not is a question of evidence and is to be determined with reference to the facts of each case. (3) In the absence of a contract to the contrary, the title to the goods does not cease to vest in the purchaser from the mere fact of postponement of payment of the purchase money or of the delivery of the goods. (4) The seller may insist upon a term in the contract that no delivery shall take place till the payment of the entire purchase money but the incorporation of this term does not per se postpone the title of the purchaser.

There was a clear failure of the plaintiff in carrying out his part of the contract. He was not ready with his money. He was not anxious to take delivery of the goods for he apprehended that the goods had been seriously damaged by the flood and were not marketable. But he was not justified in repudiating his ownership. He had his remedies against the seller which had been definitely and distinctly provided for in the Contract Act. The plaintiff appears to have consciously ignored the terms of the contract and had the cool effrontery to bring a suit for damages against the unoffending defendant where the breach had been committed by himself and not by the defendant. We are of opinion that his suit was rightly dismissed by the lower appellate Court. We dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

(8) [1903] 30 Cal. 865=8 C. W.N. 25.

A. I. R. 1930 Allahabad 669

SEN AND NIAMATULLAH, JJ.

Balbhadar Singh—Plaintiff — Appellant.

v.

Lakshmi Bai—Defendant — Respondent.

Second Appeal No. 926 of 1927, Decided on 10th February 1930, from decree of Dist. Judge, Agra, D/- 14th March 1927.

(a) Transfer of Property Act, (as amended by 27 of 1926), S. 123—Section does not operate retrospectively.

The amending Act 27 of 1926 cannot operate retrospectively on a deed of gift executed before 16th September 1926. [P 672 C 2]

(b) Interpretation of Statutes — Similar words in two sections of same Act — Presumption.

Where similar words have been used in two different sections of the same Act, the legis-

lature must be presumed to have used the words in the two sections in the same sense unless there be something in the context to indicate the contrary. [P 673 C 1]

(c) **Transfer of Property Act, S. 123 — Attestation before passing of amending Act must be by two witnesses at least who should have signed it on actually seeing the executant sign it.**

Where a deed of gift has been executed before the passing of Act 27 of 1926, but the executant is proved to have signed the document in the presence of only one of the marginal witnesses, there is no attestation of the document in fulfilment of the provision of S. 123 which insists upon a minimum of two attesting witnesses who should have actually seen the executant sign the document : 35 *Mad.* 607 (*P. C.*) ; 31 *Mad.* 215 ; 35 *I. C.* 192 and 11 *A. L. J.* 757, *Foll.* [P 673 C 2]

(d) **Evidence Act, S. 68 — S. 68 has nothing to do as regards validity or legality if there is no proper attestation.**

Section 68 has nothing to do with the question about the legality or validity of the instrument itself as an effective document of title if there has bsen no proper attestation as required by law. [P 673 C 2]

(e) **Hindu Law—Gift—Conditional gift—Gift can be revoked if condition not justified.**

Under Hindu law, if a person makes a gift to another in expectation that the donee will do more work in consideration of the gift, it follows that if the donee failed to do that which it has conditioned he should do, gift is revocable : 5 *N. W. P. H. C. R.* 5, *Rel. on.* [P 673 C 2]

(f) **Transfer of Property Act, S. 123 — S. 123 is mandatory and Court can apply section when it goes to the root of controversy even if plea is not taken.**

Section 123 is mandatory and the requirements provided therein must be strictly fulfilled, although a plea may not be definitely taken under S. 123. Where such plea cuts at the very root of the matter in controversy, the Court is entitled to take cognizance of the question. [P 674 C 2]

N. P. Asthana—for Appellant.

B. Malik—for Respondent.

Sen, J.—Baboo, son of Sukhdeo Das, was a resident of Agra and owned three pucca built houses in mohalla Chipitola. On 12th February 1916 he executed a deed of gift of these houses in favour of his nephew Balbhadra who is the plaintiff in this action. This deed of gift was duly registered. On the date of the execution of the deed of gift Baboo owed about Rs. 400 to Bansidhar, Gulab Singh, Ram Gopal and Balmukund. The deed of gift purports to have been attested by three witnesses, viz., Durga Prasad, Brijbasi Lal and Bansidhar. The document provided that the debt due from the donor was to be paid by Balbhadra the donee. It is not disputed that Balbhadra did not pay this debt. It further appears that there was no transmutation of possession. Balbhadra lived at Benares. Baboo lived at Agra. Baboo continued in possession of the houses notwithstanding the execution of the deed of gift. On 17th September 1917, Baboo revoked the deed of gift in favour of Balbhadra by means of a duly registered instrument. On 15th March 1918, he sold one of the donated houses to a third party with whom we are not concerned in this appeal. On 19th December 1922, he sold the other two houses to his own sister Mt. Lakshmi Bai. Baboo died towards the close of the year 1924. The present action was commenced by Balbhadra donee against Mt. Lakshmi Bai for possession of two houses which were sold to her on 19th December 1922. He also claimed mesne profits at the rate of Rs. 20 a month.

The plaintiff alleges that he had acquired an indefeasible right in the houses in dispute under the deed of gift dated 12th February 1916. The plaint has been inartistically drawn up, but this is not the only criticism that it is exposed to. It has been stated in the plaint that the cause of action for the suit accrued on 23rd March 1926. It is not explained and it is impossible to ascertain how or why the cause of action occurred on that date. The plaint does not state that Baboo in his lifetime had revoked the deed of gift on 17th September 1917, or that he had sold one of the houses to one person and the other two houses to the defendant. These omissions raise considerable doubt about the honesty of the plaintiff's claim. The defendant did not admit para. 1 of the plaint in which it had been stated that Baboo had gifted the houses in dispute to the plaintiff and made him absolute owner with possession and occupation of the same. By this the defendant may have intended to challenge not only authenticity of the deed of gift but its validity under the law. The plaintiff, was in any case, put to a strict proof of its execution and he had to further prove that a valid gift had been made in his favour by fulfilment of the essential conditions for the creation and completion of the gift in controversy. If the plaint was clumsy, the written statement was not a shade

better than the plaint. It was stated that Baboo deceased did not execute any deed of gift of his own accord. It is not clear whether by this statement the defendant intended to admit the execution of the deed of gift in plaintiff's favour. The position is by no means rendered clearer by the alternative plea urged by the defendant that the deed of gift became null and void on 17th September 1917 (when the deed of revocation was executed by Baboo). In this state of the pleadings it is very difficult to ascertain the exact points of disagreement between the parties. It is to be regretted that Mr. Y. S. Gahlaut allowed the pleadings to stand as they are without any attempt to elucidate facts and particulars material to the case. Indeed the matter went to trial without any attempt to tie down the parties to a clear articulation of the facts which were really in issue between the parties. Laxity of pleadings inevitably leads to confusion of the trial, and confusion has happened in this case, which has warped the decision of the trial Court and has hampered that of the Court of appeal.

It is not clear whether the defendant intended to admit the execution of the deed of gift in plaintiff's favour. Was it the case of the defendant that Baboo executed the instrument by undue pressure and was therefore not a voluntary agent? The written statement states that Baboo did not execute the instrument of his own accord. No distinct issue on this point appears to have been pressed for. The only issue framed by the Munsif was :

"Did Baboo execute any deed of gift in favour of the plaintiff, if so, is he entitled to sue?"

The execution of the gift is not the same thing as the validity of the gift with due fulfilment of all legal essentials. Again, the proof of the deed of gift under the provisions of the Evidence Act is a very different matter. This distinction has not been appreciated by the learned Munsif. The distinction was apparently present in the mind of the learned District Judge in one portion, but does not appear to have been maintained in the concluding portion of the judgment, for in the latter portion the legal consequences flowing from absence of attestation appear to have been mixed up with the finding relating to execution.

The Court of first instance held that the deed of gift was proved by the statement of Durga Prasad, one of the attesting witnesses. The learned Munsif does not set out the material portions of the statement of Durga Prasad nor discuss his statement. The Munsif held that the donee had acquired an indefeasible right to the property and that therefore the donor was not competent to revoke the gift. The judgment does not deal with the question as to whether the gift was revocable by reason of the donee not paying the debts of the donor or whether the gift was absolute or conditional. This was an important question which ought not to have been passed over in complete silence. In juxtaposition with his omission may be noticed a gratuitous finding of the Munsif that Mt. Lakshmi Bai was not a bona fide purchaser for value without notice of the plaintiff's claim. This point did not arise from the pleadings.

The learned Munsif decreed the plaintiff's suit for possession and for mesne profits at the rate of Rs. 2-4-0 per month.

The learned District Judge has reversed the decision and dismissed the suit.

The learned District Judge observes :

"The first question taken up in appeal is whether the deed of gift has been proved to kave been executed according to law. Under S. 123, T. P. Act, a deed of gift of immovable property must be by registered instrument signed by the person who executed it and attested by at least two witnesses. The deed in question purports to be attested by three witnesses of whom only one Durga Das, has been produced. Durga Das states Baboo put his thumb impression in my presence. He recognized his attestation on the deed dated 12th February 1916, and none other witness was present then. Of the two other witnesses on the deed Brijbasi Lal is admitted to be dead and Bansidhar is stated by the vakil of the plaintiff-respondent to be related to the appellant and to be hostile. It is, therefore, impossible for the plaintiff to prove that Durga Das is incorrect when he states that there was no other witness except himself present at the execution of the deed of gift. It has been laid down in 10 *A. L. J.* p. 159, that a mortgage deed is not valid when the witnesses to the deed were not present at its execution but put their names on the document on the acknowledg-

ment of the executant. In *Sahedher Koiri* v. *Raja Ram* (1) it was held that the deed of gift like mortgage is not duly attested unless witnesses signed the deed after seeing its actual execution, a mere acknowledgement of his signature by the donor not being sufficient. It appears clear from these rulings that the deed of gift is not proved to have been duly executed in accordance with the provision of S. 123, T. P. Act, and accordingly the case for the plaintiff must fail on this ground alone."

The learned Judge further found that the deed of gift contained reciprocal promises on the part of the contracting parties inasmuch that it contained a condition that the donee was to pay the debts of the donor, that the donee had failed to carry out the condition and that the donor was therefore competent to revoke the gift. S. 51, Contract Act, has been relied upon. The judgment concludes with the observation :

"On these two grounds the want of proof of valid execution of the deed of gift, and of the non-fulfilment of the condition by the donee, I consider that the plaintiff's case must fail."

Plaintiff has appealed to this Court and the points raised are :

(1) Whether the deed of gift was duly proved ?

(2) Whether the gift was conditional and Baboo was competent to revoke the gift for non-fulfilment of the condition ?

The question has not been raised in the memorandum of appeal as to whether a valid gift was created by Baboo after due fulfilment of the requirements of the law. There can be no doubt that this point was distinctly present to the mind of the learned District Judge and he intended to answer and did as a matter of fact answer the question in the negative. There is reason to think that where he uses the word "execute," he does not do this in a technical sense. Although the plea was not definitely taken that there was no gift as it had not been effected in accordance with S. 123, T. P. Act, the learned District Judge was entitled under the circumstances of the case to take cognizance of the question which cut at the root of the subject-matter of controversy between the parties. The provision of S. 123, T. P. Act, is mandatory and the requirements provided therein must be strictly fulfilled. The provision as to attestation was considered by their Lordships of the Judicial Committee to be of the nature of a barrier against perjury and fraud and the barrier should not be removed.

(1) [1913] 11 A. L. J. 757=21 I. C. 83.

Section 123, T. P. Act, provides that :

"for the purpose of making a gift of the immovable property, the transfer must be effected by a registered instrument signed by or on behalf of donor, and attested by at least two witnesses."

A similar provision finds its place in S. 59, T. P. Act, which provides for the mode in which mortgages must be effected. The word "attested" was not defined in the Act. It was defined for the first time in Act 27 of 1926 which received the assent of the Governor-General in Council on 3rd September 1926. The present suit was instituted on 30th March 1926. But it should be borne in mind that the amending Act 27 of 1926 could not operate retrospectively on a deed of gift executed on 12th February 1916, by force of Act 10 of 1927.

As has been noticed already, the deed of gift bears the signature of three attesting witnesses, Durga Das, Brijbasi Lal and Bansidhar. Durga Das, who alone was examined, deposed that Baboo put his thumb impression in his presence and that the other two witnesses were not then present. Brijbasi is dead. Bansidhar was not examined as he was related to Lakshmi Bai and was said to be hostile to the plaintiff. In *Shamu-Pattar* v. *Abdul Kadir Raouthan* (2) it was held that the attestation of a mortgage deed within the meaning of S. 59, T. P. Act, must be made by the witnesses signing their names after seeing the actual execution of the deed. The mortgage in this case was made by an instrument dated 30th May 1899. The persons, whose names appeared in the deed as witnesses, affixed their signatures just before the deed was presented for registration, and the executants had not actually signed in the presence of those witnesses. The Subordinate Judge held that the deed had not been properly attested and was therefore void. This view was affirmed by Wallis and Sankaran Nair, JJ: *Shama Patter* v. *Abdul Kader* (3). The Lordships of the Privy Council held that the word "attested" in the section meant the witnessing of the actual execution of the document by the person purporting to execute it. It necessarily followed that the document had not been attested as required by

(2) [1912] 35 Mad. 607=16 I. C. 250=39 I. A. 218 (P.C.).

(3) [1908] 31 Mad. 215=18 M. L. J. 219.

law, that therefore no valid mortgage was created under S. 59, T. P. Act, and that the document could not be sued on as a mortgage deed. In *Radha Shiam* v. *Chunni* (4), the mortgage sought to be enforced was said to have been executed on 9th August 1905. The mortgagor in his written statement admitted the execution of the mortgage but contended that as the deed had not been properly attested as required by S. 59, T. P. Act, no mortgage decree could be passed in plaintiff's favour. The attesting witnesses were examined, but they deposed that they had not seen the actual execution. It was held that

"the document not having been executed in the manner prescribed by S. 59, T. P. Act, did not operate as a mortgage."

The rule, which applies with reference to mortgages, is equally applicable to gifts. The phraseology of Ss. 59 and 123 is almost identical. Where similar words have been used in two different sections of the same Act, the legislature must be presumed to have used the words in the two sections in the same sense unless there be something in the context to indicate the contrary. The aforesaid rulings therefore are helpful in determining the question as regards the validity of the gift now in controversy; and in view of those cases, no gift was validly created because of the defect in the attestation. In *Sdhedhar Koiri* v. *Raja Ram* (1) the plaintiff based his claim on an alleged deed of gift, dated 19th March 1907. The lower Courts had decreed the suit on the ground that the deed was duly proved. The point raised before Lyle, J., was that the deed of gift was invalid in law, as it was not duly attested. It was found as a fact that the so-called attesting witnesses did not see the donor actually executing the document but merely heard her acknowledge that she had executed it. Following the Privy Council decision in Shamu Pattar's case it was held that no valid gift was effected inasmuch as the deed of gift had not been "attested" in accordance with law. Where a deed of gift therefore has been executed before the passing of Act 27 of 1926, but the executant is proved to have signed the document in the presence of only one of the marginal witnesses, there is no attestation of the document in fulfilment of the provision of S. 123, T. P. Act, which insists upon a minimum of two attesting witnesses (who should have actually seen the executant sign the document). The above view appears to have been taken by the other Indian Courts in *Rai Ganga Pershad Singh* v. *Ishri Pershad Singh* (5), *Baijnath Singh* v. *Mt. Biraj Koer* (6), and *Shib Chandra Singha* v. *Gour Chandra Pal* (7).

The question as to the mode in which a mortgage or a gift can be legally effected ought not to be confounded with the question as to how the mortgage-deed or the deed of gift should be legally proved. The absence of proper attestation invalidates the transaction either as gift or mortgage. Where the executant of the document does not admit its execution, the document has to be proved in accordance with the provisions of S. 68 or 69, Evidence Act, which relates to the mode of proof. S. 68 provides that where a document is required by law to be attested it shall not be used as evidence until one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive. This section has nothing to do with the question about the legality or validity of the instrument itself as an effective document of title if there has been no proper attestation as required by law. S. 69 lays down the rule as to how a document must be proved where no attesting witness can be found. S. 70 obviates the necessity of a formal proof of execution against the executant where the latter admits its execution. It is clear therefore that these sections relate to the mode of proof. In *Shib Dayal* v. *Sheo Gulam* (8) the mortgage bond in suit purported to have been attested by a large number of witnesses. Only one attesting witness was called, who proved that he saw the mortgagor sign the mortgage and that he affixed his signature as an attesting witness. This witness did not state that any other attesting witness was present on the occasion. It was held by this Court that in the absence of any rebutting

(4) [1916] 35 I. C. 192.

(5) A. I. R. 1918 P. C. 3=45 I. C. 1=45 Cal. 748=45 I. A. 94 (P.C.).

(6) A. I. R. 1922 Pat. 514=68 I. C. 383=2 Pat. 52.

(7) A. I. R. 1922 Cal. 160=68 I. C. 86.

(8) [1917] 39 All. 241=38 I. C. 694.

evidence the mortgage in suit was sufficiently proved. The question as to whether the mortgage was duly and validly effected was raised in the case, but was not dealt with in the judgment. This decision cannot therefore be treated as an authority for the proposition that where a mortgage bond has been formally proved it is to be presumed that the mortgage had been duly effected in accordance with law. This case moreover is different from the facts of the present case in which it has been found that when Baboo signed the deed of gift the two other marginal witnesses were not present. In *Ram Dei* v. *Munna Lal* (9) one of the attesting witnesses to the mortgage deed was dead. The other attesting witness was called. He proved that the executant signed the mortgage bond in his presence and that he then attested it. It was not expressly proved that the other attesting witness was not present at the time when the document was signed by the mortgagor. The decision of the case clearly indicates that the learned Judges were considering the question whether the document had been duly proved. They referred in terms to Ss. 68 and 69, Evidence Act. It was contended before them that the burden lay upon the mortgagee to prove that the mortgage deed was properly attested and *Abdul Karim* v. *Salimun* (10) was relied on. They distinguished that case on the ground that the question there was whether a document, which had not been signed in the presence of the witnesses, could operate as a mortgage or could be regarded as having been "attested" within the meaning of S. 59, T. P. Act. The only point was that the mortgage was sufficiently proved according to the requirements of Ss. 68 and 69, Evidence Act. The appellant therefore finds no real support for his contention from this judgment.

It is clear that the learned District Judge was right in holding that the deed of gift in suit was not "attested" in fulfilment of the provision of S. 123, T. P. Act, and therefore no valid title passed to the plaintiff.

The learned Judge, however, was not right in holding that the execution of the document by Baboo was not proved if by "execution" he meant the formal execution of the document. The evidence of Durga Das is conclusive on the point and it must be held that the document was formally proved.

If the deed in controversy conferred no title upon Balbhadra, it is unnecessary to go into the question of revocation. The deed of gift provides that the donee should pay all the debts of the donor, but it does not reserve any right in the donor to revoke the gift in the event of the debts not being paid. S. 126, T. P. Act, enumerates some of the conditions under which the donor may revoke the gift; but this section is not exhaustive. It must be taken to be settled law that :

> "if a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, a Court of equity will not loose the fetters he has put upon himself, but he must lie down under his own folly : White and Tudor's Leading Cases, 6th Edn. p. 353."

An express power of revocation upon the donee not paying the debts has not been reserved in the deed of gift. It is possible that such was the understanding between the parties. It is abundantly clear that the donee did not pay the debts. It is equally clear that the donor did not deliver possession of the property to the donee. It is true that where a gift has been created by a registered instrument, delivery of possession is not necessary to complete the gift. But in determining the question as to whether the power of revocation for non-payment of debts had been contemplated, this fact cannot be lost sight of that possession was not delivered. But this was not all. The deed of gift was revoked by a registered instrument dated 17th September 1917. Baboo sold one of the houses on 25th March 1918. No protest was made by Balbhadra. The other two houses were sold to the respondent on 19th December 1922 without any demur on the part of Balbhadra. The plaintiff did not assert his title to the property till 18 months after the death of Baboo. Under Hindu law, if a person makes a gift to another in expectation that the donee will do some work in consideration of the gift, it follows that if the donee failed to do that which it has conditioned he should do, the gift is revocable : *Mahadeo* v.

(9) [1917] 39 All. 109=38 I. C. 175.
(10) [1900] 27 Cal. 190.

Badamo (11). It is arguable that in the absence of an express power of revocation for failure of a condition, the gift cannot be impugned or revoked. It is not necessary to pursue this matter further because in this case no gift was effected in favour of Balbhadra in accordance with S. 123, T. P. Act, and no title ever passed to him.

I would therefore dismiss the appeal.

Niamatullah, J.—I concur.

V.B./R.K. *Appeal dismissed.*

(11) [1873] 5 N. W. P. 5.

A. I. R. 1930 Allahabad 675

SEN AND NIAMATULLAH, JJ.

Gajanand Sita Ram—Objector—Applicant.

v.

Phul Chand Fateh Chand — Opposite Party.

First Appeal No. 188 of 1928, Decided on 18th March 1930, against order of Dist. Judge, Cawnpore, D/- 7th May 1928.

(a) Arbitration — Powers and duties of arbitrators defined.

Once the arbitrator is appointed by a party and undertakes to discharge his duty as such he becomes a Judge in the case and is bound to act impartially and with scrupulous regard to the ends of justice. He should in no sense consider himself to be the advocate of the cause of the party appointing him, nor is such party to be deemed as his client. He should refrain from identifying himself with the interest of such party and from looking forward to future employment as arbitrator, an office, which it should be mentioned carries emoluments. Each doing his utmost, in utter disregard of propriety and sense of proportion, to try to further the interests of the party nominating him, amounts not merely to a misconduct in the legal or technical sense but is grossly improper and inconsistent with their plain duty as arbitrators seriously disposed to settle a dispute referred to them for arbitration. [P 677 C 1]

(b) Arbitration Act, S. 9 (b) — More than one arbitrator — One has to be appointed convener—Effect of arbitrator not attending on date fixed will under certain circumstances be construed as refusal to act as arbitrator and on such refusal followed by non-appointment of another man one arbitrator would suffice.

Where more than one arbitrator is appointed it is absolutely necessary to appoint a convener in view of the possibility that the arbitrators may not agree as to the time and date of sitting, or one of them may refuse to attend on the date fixed by the other without refusing to act as an arbitrator, in which case alone he is to be deemed as having vacated his place giving rise to the necessity of another arbitrator being appointed. If then one of them has the power to convene the meeting of arbitrators so as to make it compulsory on the others to attend, and the latter refuse to attend, his conduct could, under certain circumstances, be construed as amounting to refusal to act as an arbitrator, in which case the party nominating him would be called upon to appoint another arbitrator; and if he has failed to do so within a certain time, only one arbitrator would suffice, under S. 9 (b), Arbitration Act of 1899. [P 677 C 2]

Iqbal Ahmad and *N. Upadhiya* — for Appellant.

P. L. Banerji and *S. N. Mukerji*—for Respondent.

Niamatullah, J.—This appeal arises from an order, dated 7th May 1928, passed by the learned District Judge of Cawnpore setting aside two separate awards made by two arbitrators appointed by the parties.

Messrs. Phul Chand Fateh Chand, the respondents, agreed to purchase and Messrs. Gajanand Sita Ram, the applicants, agreed to sell, on 23rd March 1918, 45 bales of mulls. The latter expected to be able to supply the 45 bales which they agreed to sell as Banarsi Das & Co., who are not parties to this case, in their turn, had agreed to supply that commodity to the appellants. Banarsi Das & Co. failed to perform their part of the contract with the appellant, with the result that the latter could not fulfil their undertaking with the respondents. The agreement between the parties to this case is evidenced by an indent signed by the respondents. It is on a printed form, which appears to be in vogue in the commercial circle at Cawnpore. One of the conditions stipulated for in the indent is No. 15, which runs as follows:

"Any claim or dispute arising in connexion with this contract, including claims or disputes in connexion with the non-delivery, unless an amicable settlement can be arrived at, must be referred to arbitration in Delhi, in accordance with the Survey and Arbitration Rules of the Delhi Piecegoods Association (except when we refuse to accept and pay the draft, in which case the goods may be surveyed at the port of discharge). When the arbitrators or the surveyors disagree and do not appoint an umpire, the Delhi Piecegoods Association, if applied to by either party to the dispute, shall appoint an umpire. The decision of the arbitrators or surveyors or of the umpire shall be final and binding on both parties. In all other respects the Indian Arbitration Act 9 of 1899 shall apply.

It is further agreed that if within 20 clear days . . . . . after being requested by letter addressed to his or their usual place of business either party fail to appoint an arbitrator or surveyor ready and willing to act, the decision of the arbitrator or surveyor appointed by

the other party shall be in like manner binding on both parties. . . . . ."

It should be mentioned that the Arbitration Act 9 of 1899 has been extended to Cawnpore. It is common ground that in accordance with the Survey and Arbitration rules of the Delhi Piecegoods Association the parties had to appoint one arbitrator each.

Messrs. Phul Chand Fateh Chand, respondents, instituted, in the Court of the Subordinate Judge at Cawnpore, a suit for recovery of Rs. 24,000 as damages against Gajanand Sita Ram, the appellants, for breach of their contract to supply 45 bales of mulls, which they had contracted to do in terms of the indent, dated 23rd March 1918. The appellants moved the learned District Judge of Cawnpore under S. 19, Arbitration Act, for an order of stay of the aforesaid suit on the ground that the parties were bound to submit their differences to arbitration. The suit was accordingly stayed. Each party nominated one arbitrator. Lala Dina Nath Kapoor was appointed arbitrator by the respondents, while Mr. Khosla was appointed by the appellants. The arbitrators never met. Lala Dina Nath, however, made his award on 5th May 1924. Mr. Khosla, in his turn, gave his award on 8th May 1924. Each arbitrator found in favour of the party nominating him. The arbitrators filed the so-called awards, under S. 14, Arbitration Act, in the Court of the District Judge, Cawnpore, who set them aside on 27th August 1925. The parties proceeded to nominate their arbitrators for a second time. The respondent again nominated Lala Dina Nath Kapoor, while the appellant nominated one L. Bhim Raj under protest.

Lala Dina Nath Kapoor proposed to arbitrate on 6th October 1925. Accordingly he intimated to L. Bhim Raj his intention to sit on that date, requesting him to attend. Bhim Raj did not attend. It is alleged that he replied to Dina Nath asking for postponement; but the latter denies having received any communication from Bhim Raj. No meeting was held on that date. It does not appear how the next date 13th October 1925, was fixed, when both the arbitrators met. Bhim Raj desired Dina Nath to postpone the hearing of the case till after the long vacation in the Allahabad High Court to enable the appellant to file an appeal against the order of the District Judge, dated 27th August 1925, setting aside the award made by the appellant's arbitrator. Dina Nath Kapoor did not agree and Bhim Raj left the place. The former sat for arbitration on 20th October 1925, when Bhim Raj pressed for adjournment, at least, till 3rd November 1925. The intercessions of R. M. Vikramajit Singh, an advocate, and a telegram from Dr. Katju of this Court intimating that the appeal would be filed immediately after the High Court reopens and asking for adjournment were of no avail. At this date (20th October 1925) Dina Nath made an award decreeing respondent's claim to the extent of Rs. 20,700 (the entire claim was for 24,000).

On the reopening of the High Court an appeal was filed on behalf of the present appellant; but it was dismissed on 18th March 1926. Bhim Raj then intimated to Dina Nath Kapoor that he was ready to proceed with the arbitration, inviting the latter to join him. Dina Nath replied that he had already made his award. Thereupon Bhim Raj gave his award, dismissing the claim of the present respondent in toto. The awards were filed before the District Judge of Cawnpore, who has set them aside by an order dated 7th May 1928. The present appeal is from that order.

It is greatly to be regretted that a controversy which relates to a transaction of March 1918 should be still raging and a suit instituted on 19th April 1921 should be still pending. The object of the provision in the indent that disputes between the contracting parties should be referred to arbitration evidently was to prevent delays in settlement of disputes in the interest of the commercial community at Cawnpore. The utter lack of all sense of duty and fairness on the part of the arbitrators, their total ignorance of the rules which ought to guide them and the anxiety on the part of each to support the case of the party nominating him contributed to the result which should have been the endeavour of all concerned to avoid.

We understand that the services of Messrs. Khosla, Dina Nath Kapoor, Bhim Raj and a few others are frequently requisitioned for arbitration in

commercial cases like the one before us. They and those who appoint them ought to understand that an arbitrator nominated by one of the parties is not "his arbitrator" to whose care the party nominating him commits his interests. Once the arbitrator is appointed by a party and undertakes to discharge his duty as such, he becomes a judge in the case and is bound to act impartially and with scrupulous regard to the ends of justice. He should in no sense consider himself to be the advocate of the cause of the party appointing him, nor is such party to be deemed as his client. He should refrain from identifying himself with the interests of such party and from looking forward to future employment as arbitrator, an office, which, it should be mentioned, carries emoluments. This case is a sad commentary on what the arbitrators thought to be their duty. Each did .his utmost, in utter disregard of propriety and sense of proportion, to try to further the interests of the party nominating him. Mr. Bhim Raj was determined to put off the arbitration till the appellant filed an appeal before the High Court. L. Dina Nath Kapoor, on the other hand, was equally determined to rush the arbitration through and prevent an appeal being filed before the arbitration was over. Each succeeded and failed in his efforts: Bhim Raj in preventing what would legally amount to a meeting of arbitrators, and Dina Nath in producing an award which, however, is not an award in law. It is not surprising that the attempts of both proved abortive in the long run.

The learned District Judge has observed in setting aside the award that: "there may be ample misconduct in the legal sense to make the Court to set aside an award even when there is no ground for imputing the slightest improper motive to the arbitrator."

He characterizes the conduct of the arbitrators as "legal misconduct" . . . . "sufficient to set aside the award." While agreeing with the learned District Judge we are not inclined to take as charitable a view of the conduct of arbitrators as he did. It was not merely a misconduct in the legal or technical sense but was grossly improper and inconsistent with their plain duty as arbitrators seriously disposed to settle a dispute referred to them for arbitration.

We go further than the learned District Judge and hold that there was no arbitration and that no award was made. The sitting of one arbitrator alone and the giving by him a decision cannot be considered to be arbitration. When more than one arbitrator is appointed, they must meet, hear the parties and their evidence, if any, and arrive at a conclusion after due consultation and exchange of views. If they cannot agree, they may deliver dissentient awards, in which case the last word will rest with the umpire to be appointed in accordance with the arbitration clause quoted by us in an earlier part of the judgment. We may remark in passing that there is no provision in the submission or elsewhere binding the parties and the arbitrators as to who is to be the convener of the meeting of arbitrators. This is absolutely necessary in view of the possibility that the arbitrators may not agree as to the time and date of sitting or one of them may refuse to attend on the date fixed by the other without refusing to act as an arbitrator in which case alone he is to be deemed as having vacated his place giving rise to the necessity of another arbitrator being appointed. This is exactly what happened in the present case. Dina Nath Kapoor insisted on proceeding with the arbitration forthwith; Bhim Raj did not renounce his character as an arbitrator, nor did he refuse to act as such but desired the arbitration to be put off. Each was powerless in making the other to act as he desired. If one of them had the power to convene the meeting of arbitrators so as to make it compulsory on the other to attend, and the latter refused to attend, his conduct could, under certain circumstances, be construed as amounting to refusal to act as an arbitrator, in which case the party nominating him would be called upon to appoint another arbitrator; and if he had failed to do so within a certain time only one arbitrator would have sufficed: S. 9 (b), Arbitration Act of 1899.

What purports to be the award of Dina Nath Kapoor, dated 20th October 1925, or that of Bhim Raj, dated 13th April 1926, is not an award in law. It is the ex parte opinion of each, expressed not in arbitration proceedings but at a sitting of himself alone. As regards the actual decision, they are poles asunder:

one practically decreeing the claim and the other dismissing it. The time and attention bestowed on a controversy which would have taken days before a Court were brief in the extreme for the obvious reason that each was determined to decide the case in favour of the party nominating him. It is only such adjudication by arbitrators as is the result of their joint deliberation that can be considered to be an award. The so-called awards such as we have before us are, therefore, no awards, and apart from misconduct, which has been found by the learned District Judge and by us, his order is justified on the broader ground mentioned above.

The result is that this appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 678

SEN AND NIAMATULLAH, JJ.

S. Safdar Ali — Defendant — Appellant.

v.

Ambika Prasad Dube—Plaintiff—Respondent.

Second Appeal No. 1263 of 1927, Decided on 27th March 1930, against decree of Dist. Judge, Allahabad, D/- 28th April 1927.

(a) Transfer of Property Act, S. 105—'Kabuliyat' does not amount to lease and so registered kabuliyat cannot be admissible in evidence to prove year to year tenancy or that for term exceeding one year or reserving yearly rent—Transfer of Property Act, S. 107.

A registered kabuliyat executed by the person occupying the premises and accepted by the person owning the premises is not sufficient to bestow a title upon the person occupying the premises and can in no way be considered a lease, as defined in S. 105. Hence it cannot be admissible in evidence to prove a year to to year tenancy, or that for a term exceeding one year or reserving a yearly rent : *A. I. R.* 1924 *All.* 514, *Foll.* [P 680 C 2]

(b) Landlord and Tenant—Person occupying premises executing raiyatnama in owner's favour reciting that he was occupying as raiyat, that rent for four years was paid in advance, and that be would be entitled to retain possession during period for which rent was paid—Raiyatnama created personal obligation not amounting to lease—It was unaffected by law of registration or by Ss. 105 and 107, T. P. Act and was binding on recipient of rent and his representatives.

A person occupying certain premises executed a raiyatnama in favour of the owner of the premises in which he recited that he was occupying the premises as raiyat, that he had his stock of wood on them, that a sum of money was paid as rent in advance for four years, and that he would be entitled to retain possession during the period for which rent was paid.

Held: that the raiyatnama amounted to a personal obligation to refrain from ejecting the executant during the term for which rent was accepted. It did not create a tenancy and was not affected by the law of registration or Ss. 105 and 107, T. P. Act. It is binding on the conscience of the recipient of the rent and his representives other than bona fide transferees for consideration : 25 *Mad.* 603 (*P.C.*), *Appl.* [P 681 C 1]

Mushtaq Ahmad—for Appellant.

Shiva Prasad Sinha, A. P. Pande and *Rudra Narain*—for Respondents.

Niamatullah, J. — These two appeals arise out of two suits brought by Pandit Ambika Prasad Dubey for ejectment of one Safdar Ali, who has since died and is now represented by one of his sons, the appellant in Appeal No. 1263 of 1927. The respondents in Appeal No. 6 of 1929 are all of his heirs, including the appellant in Appeal No. 1263 of 1927. The land in dispute was occupied by Safdar Ali, who had a stock of wood and some residential quarters on it. Originally it belonged to two brothers, Dwarka Prasad and Jwala Prasad. By a certain partition in the family the land in its entirety has fallen to the share of the plaintiff, who is the son of Dwarka Prasad. As the names of certain persons occur in the documents, which we shall have occasion to refer to, it is necessary to state at the outset what position they occupy in relation to this matter. The following pedigree will elucidate the facts:

Kashi Ram—Mt. Lalmati
|
Mt. Ram Dulari
|
Ram Kishen
Mt. Ketki Kunwar |
|
Bishen Kunwar | |
Jwala Prasad | Dwarka Prasad
| |
Ram Prasad | Ambika Prasad (plaintiff)

It will be seen that Jwala Prasad had a son Ram Prasad. The latter's widow was Mt. Bishen Kuer, who was minor at the time certain documents were executed on her behalf by her mother, Mt. Ketki Kuer acting as her guardian. Dwarka Prasad and Jwala Prasad became the owners of this land, while still minors some time before 1890. Their affairs were managed on

their behalf by Mt. Lalmati, their father's maternal grandmother. It was Mt. Lalmati, acting as guardian of Dwarka Prasad and Jwala Prasad, who allowed Safdar Ali to occupy the land in suit under some arrangement in 1890. It is said to have been a lease, but no lease has been produced and there is no evidence in proof of one. The first document to which the defendant's possession can be traced is a raiyat nama, dated 12th November 1894, executed by Safdar Ali in favour of Mt. Lalmati as guardian of Dwarka Prasad and Jwala Prasad. It recites the fact that Safdar Ali had been occupying certain premises as a raiyat of the aforesaid two minors, that he had his stock of wood and bamboos thereon for a certain length of time, that a sum of Rs. 136-2-8 was paid by the executant as rent (kiraya) in advance for four years, viz. 12th November 1894 to 12th November 1898, that the executant would be entitled to retain possession during the period for which rent had been paid and that on vacating the land he would remove the materials of the constructions already made by him and of those he might make thereafter. No corresponding document executed on behalf of Dwarka Prasad and Jwala Prasad came into existence, and the raiyatnama executed by Safdar Ali, which it should be mentioned was not registered, was the only evidence of relationship as existed between the grantors and the grantee.

On 21st February 1900, Dwarka Prasad issued a notice to Safdar Ali warning him that he would not be entitled to costs of 'construction which he was then making and that he would have to remove materials on ejectment. The notice concluded with a demand for a sarkhot to be executed by Safdar Ali within a week. It appears that the two brothers Dwarka Prasad and Jwala Prasad had arrived at some understanding between themselves by which each was enabled to realize his half share of rent from Safdar Ali. Accordingly we have a receipt dated 6th August 1901 for a sum of Rs. 229 executed by Dwarka Prasad in favour of Safdar Ali. There is another receipt dated 26th July 1902 executed by Jwala Prasad in favour of Safdar Ali for Rs. 220. Both the receipts cover a period of about 8 years for which rent was realized by the two brothers in advance.

On 1st September 1910 Dwarka Prasad again executed a receipt for Rs. 302-8-0 received by him as rent in advance for 11 years, namely, 1st September 1910, to 1st September 1921. On 18th October 1916, Safdar Ali executed a duly registered kabuliyat in favour of Dwarka Prasad for 11 years. Two days later, i. e., on 20th October 1916, Dwarka Prasad acknowledged receipt of rent in advance for 11 years.

As regards the other half of the land we have a receipt dated 5th September 1918 executed by Mt. Ketki Kuer acting as guardian of Mt. Bishen Kuer for a sum of Rs. 137-8-0, which represented a rent for five years in advance from 2nd March 1919 to 2nd March 1924. After the expiry of this period an unregistered lease, date 8th August 1925, was executed by Mt. Ketki Kuer as guardian of Mt. Bishen Kuer, the representive-in-interest of Jwala Prasad, in favour of Safdar Ali for 11 years, from August 1925 to August 1936, with an endorsement on its back acknowledging receipt of Rs. 198 as rent for the 11 years reserved by that lease.

These are the documents which were executed by one or the other of the parties to the transactions evidenced thereby. The half share of Dwarka Prasad devolved on his son Ambika Prasad, plaintiff. Subsequently the other half originally belonging to Jwala Prasad was assigned to the plaintiff Ambika Prasad in course of a partition in the family. It is not now in dispute between the parties that, so far as the ownership of the land in dispute is concerned, it is with the plaintiff.

It will appear from the documents already referred to that if the arrangement embodied therein and arrived at between Dwarka Prasad and Jwala Prasad or his representative on the one side and Safdar Ali on the other be legally enforcible, the plaintiff's suit is, to say the least of it, premature. The plaintiff disregards all the agreements, evidenced by or implied in these documents, in so far as they entitle Safdar to retain possession for the full term reserved thereby, on the ground that the stipulation barring ejectment during certain periods, not being embodied in a duly registered lease, as distinct from

kabuliyat, is inadmissible in evidence. On that allegation the plaintiff claims to be entitled to treat Safdar Ali as a tenant-at-will from month to month liable to be ejected on 15 days notice. Accordingly he served a notice, dated 12th May 1926, on the defendant calling upon him to vacate the premises by the 1st of the month following.

On the defendant failing to vacate the land in dispute the plaintiff instituted suit No. 311 of 1926 for ejectment of Safdar Ali, treating the latter as tenant-at-will. The defendant resisted the suit, claiming protection from ejectment and basing his right on the document already referred to by us. The Court of first instance dismissed the suit holding that the notice, dated 12th May 1926, was invalid and that the plaintiff was therefore not entitled to eject the defendant. On appeal by the plaintiff the learned District Judge decreed the suit so far as Dwarka Prasad's share of the land was concerned, and dismissed it as regards Jwala Prasad's half share. The distinction made by the learned District Judge between the two halves of the land in dispute rests on the ground that it is held under two engagements: (1) from Jwala Prasad under receipt dated 1st September 1910, and (2) from Mt. Ketki under the lease dated 8th August 1925, and that the notice dated 12th May 1926, expiring at the end of the month and requiring the defendant to vacate, is a good notice as regards the first but not as regards the second as the 15 days within which the defendant was called upon to vacate did not expire with the end of the tenancy in the latter case. Second Appeal No. 1263 of 1927 is the defendant's appeal from the decree of the learned District Judge. The plaintiff acquiesced in the decree and issued a fresh notice on 23rd May 1927 requiring the defendant to vacate on 7th June 1927, which is the end of the month of the tenancy, assuming a monthly tenancy was created by the lease dated 8th August 1925. This suit was dismissed by both the lower Courts.

The learned Subordinate Judge who heard the appeal from the decree of the trial Court held that the plaintiff was precluded from disregarding the term of 11 years by the rule of equitable estoppel, that the defendant's possession was that of a licensee who was entitled to retain possession for the full term of 11 years for which he paid rent and that, assuming that he is a lessee, he could not be considered to be a monthly tenant liable to ejectment by 15 days' notice but that he should be considered to be a year to year tenant and six months' notice, as required by S. 106, T. P. Act was necessary. The plaintiff has preferred Second Appeal No. 6 of 1929 from the decree of the learned Subordinate Judge. It has been argued by the learned advocate for the plaintiff that a year to year tenancy or that for a term exceeding one year or reserving a yearly rent can be created only by a registered lease and that a "kabuliyat" executed by the tenant alone cannot be regarded as equivalent to such a lease. Reference is made to S. 107, T. P. Act. Whatever differences of opinion might have existed before as regards the second proposition, the question is now concluded, so far, at any rate, as this Bench is concerned by *Kedar Nath* v. *Shankar Lal* (1), in which it was held by a Division Bench of this Court that:

"a registered "kabuliyat" executed by the person occupying the premises and accepted by the person owning the premises is not sufficient to bestow a title upon the person occupying the premises and can in no way be considered a lease, as defined in S. 105, Act 4 of 1882."

We must, therefore, accept the position insisted on by the plaintiff, viz., that the defendant cannot rely on any document which can amount to a lease and which may be admissible in evidence to establish his claim to retain possession of the land for a period exceeding one year from the date of the "kabuliyat" dated 18th October 1916 as regards one-half and the lease dated 8th August 1925 as regards the other half.

If the case had to be decided solely on the question of the existence of a tenancy for a term which did not expire before the institution of the suit, the plaintiff's claim to eject could not be resisted by the defendant relying on the transaction ending in the execution of the documents to which we have referred. There is, however, an important agreement by the plaintiff's predecessor-in-interest implied in their acceptance of rent advanced for 11 years which

(1) A. I. R. 1924 All. 514=78 I. C. 934=46 All. 303.

did not expire before the institution of the suit. Such an agreement amounts to a personal obligation to refrain from ejecting the defendant during the term for which rent was accepted. Such implied agreement cannot be considered to be part of any transaction of lease. It should be borne in mind that the possession of the defendant dates back to a time before the execution of the "raiyatnama" dated 12th November 1894, executed by Safdar Ali in favour of Dwarka Prasad and Jwala Prasad, then represented by their guardian, Mt. Lalmati. The unregistered lease, dated 8th August 1925, and the "kabuliyat," dated 18th October 1916, being wholly inadmissible in evidence the position of the parties is not referable to any document creating a relationship of lessor and lessee.

The "raiyatnama" above referred to does not, in our opinion, create any tenancy. It amounts to no more than a permission to Safdar Ali to continue to occupy the premises. We do not know the terms on which Safdar Ali had been first let into possession. The implied agreement which must be inferred from the receipt of payment in consideration of which the plaintiff's predecessor-in-interest agreed not to eject the person making such payments for a certain length of time is of a personal character binding on the conscience of the recipient and his representatives other than bona fide transferees for consideration. Such a covenant is not part and parcel of any lease and is not affected by the law of registration or Ss. 105 to 107, T. P. Act. The principle underlying the decision of the Judicial Committee in *Subramanian Chettiar* v. *Arunachalam Chettiar* (2), appears to us to be quite applicable to the present case. It was held by their Lordships of the Privy Council that:

"an agreement to pay Rs. 500 a month to a lessee in consideration of receiving from him a permanent lease of portion of his zamindari. which agreement was come to before but reduced to writing after, the execution of the lease was not affected by S 92, Evidence Act, nor required registration either under the Registration Act, S. 17 or the Transfer of Property Act, S. 107. It was not inconsistent with the lease, its provisions formed no part of the holding under the lease, the payment bargained for was no charge on the property and it was not rent or recoverable as rent but a mere personal obligation collateral to the lease."

(2) [1902] 25 Mad. 603=29 I. A. 138=12 M. L. J. 479=8 Sar. 316 (P.C.).

There can be no question of any inconsistency between the implied covenant to which we are disposed to give effect as we have found the 'kabuliyat" and the lease executed by the plaintiff's predecessor to be inadmissible in evidence. The "raiyatnama" of 1894, as already mentioned, is not a lease or an instrument creating a tenancy. The covenant is not a charge on the land in dispute. Whether the covenant relates to a periodical payment to be made by a lessee to the lessor in addition to the rent or it relates to the time during which the lessor is to refrain from ejecting the lessee, as in the case before us, the principle underlying it is the same. In either case it is a collateral obligation and not a stipulation forming an integral part of a lease which is sought to be enforced. We see no moral or legal objection to a promise of this kind being enforced against the maker thereof or against those claiming under him, not being persons against whom the personal obligation of the promiser cannot be enforced. In the view of the case that we have taken, we allow Second Appeal No. 1263 of 1927, and dismiss Second Appeal No. 6 of 1929, dismissing the plaintiff's suits which gave rise to these two appeals, with costs throughout, including counsel's fees in this Court on the higher scale.

S.N./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 681

MUKERJI AND BENNET, JJ.

Lakhmi Chand and *others* — Defendants—Appellants.

v.

Madho Rao and *others* — Plaintiff and Defendants—Respondents.

First Appeal No. 487 of 1926, Decided on 27th March 1930, from decree of Sub-Judge, Agra, D/- 16th August 1926.

(a) Pensions Act (1871), Ss. 4 and 11—S. 4 is wider than S. 11 and refers not only to pensions but to grants of money or land revenue.

Section 11 refers merely to pensions whereas S. 4 refers not only to pensions but to grant of money or land revenue conferred whatever may have been the consideration of any such grant. S. 4 is wider than S. 11 and includes matters which do not come under S. 11.

[P 686 C 1]

(b) Civil P. C., S. 11 — **Decrees without jurisdiction cannot be res judicata.**

Previous decrees passed without jurisdiction being invalid altogether cannot be pleaded as res judicata. [P 685 C 2 ; P 686 C 1]

(c) **Pensions Act (1871), S. 11—Assignment of revenue was held to be pension.**

An assignment of revenue for services rendered was held to amount to a pension within the meaning of S. 11 and therefore not transferable under S. 12 of the Act : *A. I. R.* 1922 *All.* 22, *Rel. on.* ; (1902) *A.W.N.* 161, *Dist.* [P 687 C 1]

Tej Bahadur Sapru and *Panna Lal*— for Appellants.

B. E. O'Conor and *N. P. Asthana*— for Respondents.

Bennet, J.—This is a first appeal by the defendants Lakhmi Chand, Parshotam Das and Parbhu Lal against a decree of the learned Subordinate Judge of Agra and a cross-objection by the plaintiff Madho Rao, minor. The suit of the plaintiff Madho Rao, aged 10 years, is brought for a declaration that the decree of the Court of the Subordinate Judge of Agra in suit No. 18 of 1914 is null and void and that the muafi rights specified in list *A* and the ancestral property specified in list *B* are not saleable in execution of the aforesaid decree. The Subordinate Judge has granted the relief in regard to the muafi rights in list *A* and has dismissed the suit in regard to the ancestral property in list *B*. The pedigree of the plaintiff is as follows :

Manaji
|
Bogaji
|
Abaji
|
Shankar Rao alies Bhau Sahib
|
Madho Rao I
Mt. Chaubai
|
Aba Sahib, defendant 4
(adopted son) |
Madho Rao, plaintiff 2

Umaji Rao alias Tentia Sahib
|
Gobind Rao
|
Umaji Rao

Lachhman Rao

The plaint sets forth that in mauza Rauta in Agra District the plaintiff and his ancestors had been muafidars for over a century under a sanad granted by Maharaja Scindhia ; that the muafi was recognized by the British Government and the name of Abaji, son of Bogaji, was entered in the papers ; that Madho Rao, the paternal grandfather of the plaintiff, whom we shall call for convenience Madho Rao I, was immoral and a spendthrift, and he executed for immoral purposes a hypothecation bond for Rs. 15,000 on 26th October 1905 in favour of the defendants-appellants, hypothecating the property both in list *A* and list *B*. The plaint alleged that the muafi was untransferable, and that the ancestral property of the joint family could not be transferred by Madho Rao I, and that the transfer was without necessity and for immoral purposes and void because Madho Rao I previously made a family settlement. The plaint further sets forth that the defendants-appellants obtained a decree in suit 18 of 1914 on the hypothecation bond against Mt. Chaubai, the widow of Madho Rao, and Aba Sahib the father of the plaintiff, and that they did not make the plaintiff a party, and further that suit 36 of 1916 was instituted by the father of the plaintiff with the allegation that the decree in suit 18 of 1914 had been obtained collusively and fraudulently, but on account of collusion and fraud that suit 36 of 1916 was struck off in default. Further, that suit 36 of 1916 was null and void in the absence of a certificate of the Collector. The written statement admitted that Madho Rao, the mortgagor of the defendants, was a muafidar in mauza Rauta, and that the muafidars realized money from the zamindar, and that Madho Rao was owner of the zamindari rights by virtue of purchase. The allegations in the plaint were otherwise denied, and it was pleaded that the present suit was barred under S. 11 and O. 9, R. 9 Civil P.C., and that the present plaintiff had been fully represented through his father Aba Sahib in suit No. 18 of 1914, which was contested by Aba Sahib, and that the muafi hypothecated in the bond was by no means a non-transferable pension, nor was it necessary to obtain

a certificate from the Collector for it. The learned Subordinate Judge framed a number of issues and held that the muafi in suit was untransferable ; that the plaintiff had failed to prove that the mortgage of 1905 was for immoral consideration ; that as regards the zamindari in that mortgage the suit of the plaintiff was barred by res judicata; but as regards the muafi the suit of the plaintiff was not barred by res judicata because a certificate was required from the Collector under the Pensions Act (Act 23 of 1871), and that certificate not having been granted, the decree in suit 18 of 1914 was void.

In first appeal in this Court the following points were argued. Firstly, whether the Pensions Act applies to the present case. Under this head Ss. 4 and 6 as well as 11 and 12 have been considered.

Secondly, whether the plaintiff is barred by res judicata as his father had brought a suit 36 of 1916, as head of the family to contest the mortgage and decree on the mortgage, and his father should have taken all possible pleas. We may first of all set forth the details in regard to the muafi property. This muafi was obtained by a sanad granted by Maharaja Scindhia to Manaji, the ancestor of the plaintiff, in the year Samwat 1842 which corresponds to 1785 A.D. The original sanad was produced before the Subordinate Judge from the custody of the other branch of the family and a copy was taken. The translation on p. 57 of the paper-book is not quite accurate and the sanad may be translated as follows :

"Sanad granted by Maharaj Dhiraj Sri Maharaja Alijah Subedarji Sri Madho Raoji Scindhia Bahadur. Be it known to zamindar, Chaudhri and kanungo of paragna Karahra, Subah Akbarabad that mauza Rohta, a village in the aforesaid paragna, has been granted to Sri Manaji, son of Sivaji, as altamgha (paper torn). Be it acted upon."

The argument has been advanced before us by the learned counsel for the appellants that this sanad is a grant of zamindari rights, and on the other hand it is contended for the respondent-plaintiff that it is a grant or assignment of the revenue. It is to be noted that internal evidence from the sanad itself shows that it is addressed among other persons to the zamindar and the zamindar is directed to take note that this village mauza Rauta has been granted to Manaji. It is clear that what was granted must be something of which the zamindar was not in possession, otherwise he would be dispossessed.

The next mention we have of this property is contained in "Treaties., Engagements and Sanad, India" Vol. 4 by Aitchison. O. 42 and onwards give the treaty dated 30th December 1803, signed by Sir Arthur Wellesley on behalf of the Hon'ble East India Company and on behalf of Maharajah Scindia of Gwalior. Art. 7 states :

"Whereas ..... lands in Hindustan ceded by the second article of this treaty to the Honourable Company and their allies, are held in jaghire by persons of the family of the late Madhajee Scindia and others by principal sirdars in his service, all of whom would suffer distress if deprived of the advantages they enjoy in those countries ; it is agreed..... that ..... Boogaji Jamdah ..... shall continue to hold their lands in jaghire under the protection of the Honourable Company."

Accordingly this Art. 7 of the treaty recognized the rights of Boogaji Jamdah to hold this village as jagir. In the khewat of the year 1263 F, printed on pp. 54 and 55 of the printed book, there are the names of a number of Jats who owned the zamindari in this village of Rohta. In each case, these Jats have mortgaged their zamindari to Tantia Sahib and Bhau Sahib, sons of Abaji, members of the family of the plaintiff, and remarks in the last column for various years between 1860 and 1864 show that these mortgages were made by the Jat zamindars to the family of the plaintiff. On p. 59 there is a "certificate of rent free tenure" dated in the original paper No. 181-C, Agra Collector 20th March 1863, which date has been omitted from the printed page. This states that the entire mauza of Rohta is released in perpetuity in favour of Abaji, son of Bogaji Jamadar, by order of the Special Commissioner dated 12th June 1838 and confirmed by the final order of Government accepting the award through the Resident of Gwalior, dated 18th September 1842. On p. 61 there is a similar extract from the list of muafidars and this states that the muafi was under the sanad of Maharaja Madho Rao Scindhia for maintenance. On p. 63 we have a sale deed by Deojit, one of the Jat zamindars, dated 12th June 1862, to Bhau Sahib, son of Abaji,

muafidar of mauza Rohta. On p. 67 we have the will of Madho Rao, and he sets forth that his property consists of: firstly, a moiety muafi share in the entire 20 biswas of mauza Rohta; and secondly, his share in the zamindari property of mauza Rohta. Further, we have the hypothecation bond by Madho Rao, dated 26th October 1905 printed on p. 79, in favour of the appellants. This bond sets forth that he holds his muafi property under a certificate dated 26th March 1863 granted by the Collector of Agra and under order of the Resident of Gwalior dated 18th September 1842, and he holds zamindari property in the said mauza which he purchased. The detail of the property hypothecated in mauza Rauta of which the mortgagor is both muafidar and zamindar is given firstly as his moiety share in the 20 biswas muafi property which comprises an area of 2098 bighas 5 biswas and of which the jama of Rs. 3,460 has been made a muafi grant by the Government and secondly all shares of zamindari held as mortgagee; and thirdly there was a further share of zamindari partly owned and partly held as mortgagee. Taking these details and also taking into consideration the admission in paras. 3, 4 and 5 of the written statement it appears to us clear that there is no doubt whatever that what was granted by Maharaja Scindhia to Manaji was the revenue of the village of Rauta. That in fact was what the Maharaja Scindhia owned at that time.

As the question, however, has been raised, it may be of some interest to consider briefly the circumstances of the times and the nature of these jagir grants. The Gazetteer of Agra District, p. 164, states that Maharaja Scindhia invaded Agra which was then held on behalf of the Moghul Emperor in the year 1784 and acquired it. It is in the next year, 1785, that the Maharaja Scindhia made the grant in question of mauza Rauta to his Sardar Manaji. That grant does not indeed specify that the land is held as jagir, but in the treaty of 1803, Art. 7, it is set out that the son of Manaji Boghaji holds a jagir. The nature of jagir tenure is stated by Al-Barni in his Memoir of the Emperor Alauddin Khilji which gives an account of the Empire about the year 1300. This account is quoted in the Revenue Administration of the United Privinces by W. H. Morland, 1911, at p. 12, as follows:

"The superior officers of the State all held military commands and were remunerated for their services not by cash salaries, but by the grant of lands (jagir) from which they were entitled to collect the revenue."

Similarly in Field's Regulations of the Bengal Code, p. 53, para. 54 of the Introduction, it is stated:

"Jagirs were grants of land to retainers still in service in lieu of wages. When granted by the Emperor, they were assignments, not of the land but of the revenue."

Similarly we find that in the preamble of Regulation 7 of 1822, it is stated:

"And whereas it appears to be expedient to declare and explain the views and intentions of Government relative to the rights to be enjoyed and exercised by the Sirdars, Malguzars, or persons admitted to engage for the payment of Government revenue, and by persons collecting the rents of the land or revenue of Government, without being subject to the payment of any portion of it to the public Treasury, such as jageerdars, and other owners or managers of lakhiraj lands."

These extracts show that jagirdars were persons who had grants without payment of revenue to Government. There were no doubt other jagirdars who received smaller grants, and at that particular time at the end of the 18th century, in Regulation 43 of 1793, provision was made that invalid sepoys and commissioned and non-commissioned officers of the Indian Army should receive grants of waste land which would be held by them rent free for life without being subject to any tax or damand whatever. This system was further amended in Regn. 1 of 1804 and Regn. 9 of 1808 and was finally abandoned in Regn. 2 of 1811 which abolished the system and substituted a scale of cash pensions. The preamble of Regn. 9 of 1808 states that land, when it was held as a jagir, was not included in the assets on which the jama payable by the zamindars to Government had been adjusted. Therefore we see that even in the case of the small grants of land as jagirs there was always the condition that no revenue would be payable to Government in respect of these grants. But the grant of the entire village as a jagir was naturally the assignment of the revenue on that village. The rights which Government possessed in a village, to-

wards the end of the 18th century were the rights to receive the assets of the village, less the sum which was usually fixed at 10 per cent for the trouble of collecting those assets. Regn. 9 of 1805 was a regulation which was issued in regard to the Provinces ceded by the Maharaja Scindhia to the East India Company and for which the Treaty of 1803 was drawn up. This regulation states that the persons who were zamindars in this property should have the option of renewing the settlement for three years and that if they did not care to renew it for three years, they would receive nankar at a rate not exceeding 10 per cent on the jama and settlement would be made with other persons (para. 8). This shows that the rights of a zamindar at the period in question were only to receive 10 per cent of the jama and Government received the other 90 per cent. The gift therefore by the Maharaja Scindhia of mauza Rohta of the revenue would be a valuable gift, whereas a gift by the Maharaja Scindhia of the zamindari rights, supposing the zamindari rights had been forfeited and had been in his power to grant, would be a gift of very much less value, only amounting to one-ninth of the value of the revenue. We find therefore that the family of the plaintiff received by this sanad from the Maharaja of Gwalior assignment of the revenue of mauza Rohta and the family of the plaintiff by subsequent deeds of mortgage and sale obtained from the Jat zamindars in mauza Rohta shares of the zamindari rights in mauza Rohta.

The next question is whether the Pensions Act will apply to the property of the plaintiff. As regards the assignment of the revenue we find that S. 4 states:

"Except as hereinafter provided, no civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted."

Section 6 states:

"A civil Court, otherwise competent to try the same, shall take cognizance of any such claim, upon receiving a certificate from such Collector, Deputy Commissioner or other officer authorized in that behalf, that the case may may be so tried."

The question, therefore, is whether the rights possessed as assignee of revenue of mauza Rohta by the plaintiff can be the subject of any suit without the certificate in question. For the present suit, the plaintiff has obtained a certificate which is printed at p. 111. In the two previous suits there were no such certificates obtained either by the present appellant or by the father of the plaintiff. For the purpose of Ss. 4 and 6, it is clear at once that a grant of land revenue requires a certificate. As we have no doubt found that the plaintiff is the assignee of land revenue in mauza Rohta, it is clear that any case in regard to this land revenue, would require a certificate under S. 6 and, therefore, without such certificate, a civil Court could not take cognizance of such a claim. This has a bearing on the question of res judicata, because S. 40, Evidence Act, lays down:

"The existence of any judgment, order or decree, which by law prevents any Court from taking cognizance of a suit, or holding a trial, is a relevant fact, when the question is whether such Court ought to take cognizance of such suit or to hold such trial."

It is, therefore, under S. 40 that the defendants-appellants would produce their decree of 1914 and the decree of 1916 dismissing the suit of the plaintiff's father.

But S. 44 lays down as follows:

"Any party to a suit or other proceedings may show that any judgment, order or decree, which is relevant under Ss. 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

It is, therefore, always open to the plaintiff to show under S. 44 that the decrees of the two Courts in 1914 and 1916 were decrees by Courts not competent to deliver those decrees. S. 9, Civil P. C., lays down:

"The Courts shall have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred."

In our opinion the civil Courts in 1914 and 1916 had no jurisdiction to try the suits in question, because their cognizance was expressly barred by Ss. 4 and 6, Act 23 of 1871. Accordingly, as those Courts were without jurisdiction, their decrees are invalid altogether, so so far as the assigned revenue in mauza Rohta is concerned, and those dec-

rees cannot be pleaded as res judicata. But as regards, the zamindari property and the mortgagee rights in zamindari property there is no such bar arising from the Pensions Act. In regard to this portion of the plaintiffs' claim which relates to relief B we agree with the finding of the Subordinate Judge expressed as follows :

" As regards the pleas of want of legal necessity the amount of the debt and the binding nature thereof in respect of the zamindari, I think S. 11 helps the contesting defendants, and the plaintiff cannot raise them."

One further question remains and that is issue 5. Was the muafi in suit transferable ? This issue was framed in accordance with the pleading in para. 7 (a) of the plaint that according to law the said muafi is untransferable. This raises a more difficult question in regard to Ss. 4 and 6, Pensions Act. For the plaintiff it is alleged that the assigned revenue is untransferable because it amounts to a pension, under S. 11, Pensions Act, and S. 12 lays down that pensions under S. 11 are not transferable. The question is : Does this assignment of the revenue amount to a pension within the meaning of S. 11, Pensions Act, or does it not ? It is to be noted that S. 11 refers merely to pensions whereas S. 4 refers not only to pensions, but to grant of money or land revenue conferred whatever may have been the consideration of any such grant, and S. 3 states that the expression " grant of money or land revenue " includes

" anything payable on the part of Government in respect of any right, privilege, perquisites or office."

Section 4, therefore, is a wider section than S. 11 and S. 4 will include matters which do not come under S. 11. Nothing will come under S. 11 except pensions. It was argued for the appellants that pensions comprise only payments in money. On the other side it was argued that pensions would also include grants made in lieu of past service. In *Harnam Das* v. *Fiazi Begam* (1) there was a case in consideration whether the Emperor Akbar had assigned some villages for the maintenance of the descendants of a saint Shaikh Salim Chisti at Fatehpur Sikri in Agra District. The head-note does not quote the points in the case very accurately, but on p. 359 it is stated :

" It is not to be doubted that the Government in 1836 came to the decision that it was just and politic to continue the grant of the land revenue which Akbar had assigned for the purposes indicated above, and we agree with the learned District Judge that the continuance of the pensions to the descendants of the saint was based upon what may fairly be called political considerations. This being so, the pension now in dispute is one of those mentioned in S. 11, and is clearly within the definition laid down by the Bombay High Court for the grant was, without doubt, originally made either in recognition of the past services of Sheikh Salim Chishti or in acknowledgment of his particular merits. It follows, therefore, that the assignment of the pension to the plaintiff-appellant upon which he founds his claim in the present suit is null and void as provided by S. 12 of the Act."

We consider that the present case is similar to this case and that in the present case the assignment of the land revenue is in the nature of a pension. The sanad does not state the exact purpose for which the pension was granted, but in the treaty of 1803 it is stated that the pension is for Manaji as a principal Sardar in the service of the Maharaja and for his maintenance. It is stated in the extract from the list of muafidars printed at p. 61 of the paper book that the grant was under sanad of the Maharaja Madho Rao Scindhia for maintenance. A similar case is reported in *Karar Hassan* v. *Mustafa Hassan* (2), where the Punjab Chief Court held that a pension does not cease to be a pension merely because it takes the shape of an assignment of land revenue. Reference for the appellant was made to *Balkrishna Bhao* v. *Gobind Rao* (3), but this was not a case of an assignment of land revenue for services, but an assignment for different reasons altogether. Reference has been made to *Lall Babu* v. *Lal Bahadur* (4) to which one member of this Bench was a party. In this case there was an assignment of land revenue to certain parties. When the zamindars died out, with the same party the zamindari property was settled, with the result that the assignees of land revenue became also the zamindars. It was held that although the rights as assignees of land revenue could not be transferred the

(1) A. I. R. 1922 All. 22=65 I. C. 645=44 All. 354.

(2) [1914] 86 P. R. 1914=26 I. C. 743.
(3) [1902] A. W. N. 161.
(4) A. I. R. 1925 All. 565=87 I. C. 569=47 All. 557.

zamindari rights conferred by the Government could be transferred. That case, therefore, does not support the defendant's appeal.

We consider, therefore, that the assignment of revenue in the present case amounts to a pension within the meaning of S. 11, Pensions Act, and, therefore, is not transferable as laid down by S. 12 of that Act. Accordingly we hold that so far as the plaintiff has rights as an assignee of land revenue those rights could not be mortgaged by the mortgage in favour of the appellants of 1905, but there is no bar from the Pensions Act on the mortgage of 1905 so far as it relates to the zamindari rights and mortgagee rights of the predecessor of the plaintiff. The result is that we dismiss this appeal with costs and we also dismiss the cross-objection with costs.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 687

MUKERJI AND BENNET, JJ.

Pokhar Singh—Appellants.

v.

Mt. Dulari Kunwar—Respondents.

Case No. 295 of 1926 and First Appeal No. 301 of 1926, Decided on 11th February 1930,

(a) Transfer of Property Act, S. 6 (1)—Partition is not transfer.

The definition of transfer excludes the idea of partition as falling within it. [P 691 C 2]

(b) Evidence Act, S. 115—Next presumptive reversioners consenting to and acting upon family arrangement agreed to on acceleration of estate by limited owner is estopped from challenging it.

Next presumptive reversioners consenting to and joining in a family arrangement thereby agreeing to an acceleration of part or whole of the estate by limited owner are estopped from challenging the same if it has been acted upon provided the agreement is not opposed to the nature of estate vesting in the reversioners: *A. I. R.* 1922 *All.* 237; *A. I. R.* 1923 *All.* 387 (*F.B.*) and *A. I. R.* 1918 *P. C.* 70, *Rel. on*: *Cases Discussed.* [P 692 C 1, 2]

(c) Family arrangement—Consideration—Converting expectancy into certainty and avoiding future litigation is good consideration.

Converting an expectancy into certainty and avoiding chance of litigation in future is good consideration for family arrangement.

(d) Family Arrangement—Validity.

For a family arrangement to be good it is not necessary that there should be a family dispute which has to be settled or composed. A family arrangement to be good need not necessarily be a "compromise of doubtful rights." *Williams* v. *Williams* (1867) 2 *Ch.* 294, *Foll.*

B. E. O'Conor and *U. S. Bajpai*—for Appellants.

Tej Bahadur Sapru, *Iqbal Ahmad Mukhtar*, *K. Verma* and *R. N. Gurtu*—for Respondents.

Mukerji, J.—This appeal and First Appeal No. 301 of 1926 arise out of the same judgment and the two appeals may therefore be decided jointly.

The facts are briefly these :

(*For pedigree table see p* 688)

The pedigree given above will explain the relationship that exists between the parties to the suit. Kuar Dalip Singh was a rich landed proprietor who died in 1893. He left him surviving his widow Rani Sundar Kuar and four daughters, namely Mt. Dulari, Mt. Bodhi, Mt. Nannhi and Mt. Kalawati .Mt. Sundar Kuar died on 2nd September 1919 ; Mt. Nannhi died in 1900 ; Mt. Kalawati died in 1915 and Mt. Kalawati's son Sheoraj Singh died in 1925.

On 1st May 1898 the mother and the four daughters, three of whom were already married (Mt. Bodhi had become a widow) the fourth daughter Kalawati being yet unmarried, agreed in executing a document which has been described by the executants as a deed of partition. By this document the immovable property left by Dalip Singh was divided in five lots. We have been told that these were lots of equal value and this allegation has not been denied. One lot was taken by the mother and one lot by each of the three daughters excepting the widowed daughter Mt. Bodhi. The fifth lot which should have gone to Mt. Bodhi was taken by her sister jointly. As Bodhi was a childless widow she did not like to take any share in the immovable property and she and her sisters agreed that the latter should give to the former, by way of maintenance, a sum of Rs. 1,400 a year. The shares of property which fell to the lots of the three sisters were made security for the payment of the maintenance. It was further agreed that, if any of the sisters (other than Bodhi) died without male issue, her share would be taken by the other sisters excluding Bodhi, but if any of these sisters died leaving a male issue, her share would go to her such issue alone. On the same day, namely 1st May 1898, two other documents were executed, one by Mt. Bodhi and the other by her sisters. Mt. Bodhi

agreed that she would have nothing but cash maintenance and the sisters mortgaged their property to Mt. Bodhi to secure her maintenance.

The plaintiff's case is that after the death of Mt. Nannhi Kuar, in 1900, her share was divided between Dulari Kuar and Kalawati Kuar. On the death of Kalawati Kuar the name of her son Sheoraj Singh was recorded. On the death of Sheoraj Singh a dispute arose as to mutation and Mt. Jamna Kuar succeeded in having her name recorded in the place of her husband. Sheoraj's father, Pokhar Singh, defendant 1, and Mt. Jamna Kuar, Sheoraj's widow, are in possession of the share of Kalawati. The plaintiffs, namely Dulari and Bodhi Kuar, are entitled to Kalawati's share in spite of the deeds of 1st May 1898. The plaintiffs also allege that the deed of partition was vitiated by the fact that Kalawati was a minor at the date of the execution of the document. They further alleged that the deeds of 1898 were valid only up to the lifetime of Sundar Kuar, but they were as of no effect after her death, specially as it was sought by that deed to create a new mode of succession which was opposed to the Hindu law. Under Hindu law the plaintiffs were entitled to succeed to the share of Kalawati by right of survivorship and the defendants have no interest in the property.

Defendant 1 contended that he had nothing to do with Kalawati's property, that he was in possession of only one house and that it was his own property, having been erected on his own land with his own money. The case of defendant 2, inter alia, was that the deeds of 1898 were valid in law and were binding on the plaintiffs and that they were estopped from impugning their validity. She denied that Kalawati was a minor in 1898.

The learned Subordinate Judge who tried the case held that Mt. Kalawati was not a minor at the date of the execution of the three documents of 1898, that the house property, which Pokhar Singh claimed as his own, was really his property and could not be claimed as the property of Mt. Kalawati. As regards the deeds of 1898 the learned Judge was of opinion that they could not be treated as a family arrangement, inasmuch as there was no dispute in the family which might have required to be settled, and that they were good in law up to the death of Mt. Sundar Kuar. As regards the claim of Mt. Bodhi the learned Judge was of opinion that, although her claim to recover possession of a half share in Mt. Nannhi's property, on the latter's death, failed in 1908, she could claim that property again and the claim was not barred by S. 11, Civil P. C. The Judge, however, held that Mt. Bodhi's claim, as regards the share which had been allotted to her but which was not given to her, but was given to her sisters, was barred by S. 11, Civil P. C. As regards the plea that a part of the claim was barred by S. 233 (k), Land Revenue Act, the learned Judge held that so far as there was a partition of the property of Pilibhit Khas, after the death of Sundar Kuar, the partition barred the suit with respect to the partitioned property. The learned Judge was also of opinion that Mt. Bodhi's claim with respect to her own share was barred by limitation. In the result the learned Judge decreed the suit for possession of the property originally allotted to Mt. Kalawati and Nannhi Kuar along with mesne profits to be determined in the execution department. He dismissed the suit with respect to the property which was the subject-matter of partition in the revenue Court in 1921 (Pilibhit Khas) and in respect of the property allotted to Bodhi Kuar.

Dalip Singh (died 17th March 1893)
=Mt. Sundar Kuar
wife, died 2nd September 1919

- Mt. Kalawati Kuar, died 1915 =Pokhar Singh (husband), defendant 1
  - Sheoraj Singh, died 23rd June 1926 =Mt. Jamna Kuar, defendant 2
- Mt. Nannhi Kuar, died childless in 1900
- Mt. Bodhi (widow) Plaintiff 2
- Mt. Dulari Kuer, plaintiff 1

Appeal No. 295 of 1926 is on behalf of the defendants, and Appeal No. 301 of 1926 is on behalf of the plaintiffs with the result that the whole suit is before this Court. It will be noticed that the learned Judge omitted to dismiss the portion of the plaintiffs' suit, as the result of his finding on Issue 2, which related to the house, being item 14 in the specification of shares appended to the plaint. The learned Judge found that the plaintiffs were not entitled to recover possession of either the house or its site. In this Court the point was not re-argued on behalf of the plaintiffs and therefore, the finding of the learned Judge that the house and its site belonged to defendant 1, Pokhar Singh, must stand. Pokhar Singh's appeal therefore with respect to the house will have to be allowed.

The finding of the lower Court that Mt. Kalawati was sui juris in 1898 has again not been challenged before this Court and that finding must be accepted for the purposes of the decision of the appeal.

The finding of the learned Judge that the claim as regards the property Pilibhit Khas was barred by S. 233 (k), Land Revenue Act, has not been contested before this Court and that finding will stand.

It has been argued on behalf of the defendants-appellants that the learned Subordinate Judge ought to have held that the documents of 1898 were, in their nature and essence, a family arrangement and were not opposed to any rule of positive law and were therefore binding on the plaintiffs. It is further urged on their behalf that the plaintiffs were estopped from maintaining the suit. These are really the only points in controversy between the parties and these points alone require determination by this Court. These points may be categorically stated as follows :

(1) Whether the documents of 1898 are in the nature of a family arrangement and are therefore binding on the parties, although there was no actual dispute between the parties at the date of these documents. (2) If the documents evidence a family arrangement whether the arrangement contravenes any rule of substantive law and is therefore not binding on the plaintiffs ? (3) Whether the plaintiffs are estopped from maintaining the suit ?

Point 1—It was urged before the Court below and it has been argued before us that there can be no family arrangement without there being in existence a substantial dispute between the members of the family. On this point there was really a difference of opinion between the learned counsel who appeared in the two cases. When F. A. 295 of 1926 was argued Sir Tej Bahadur Sapru, on behalf of the respondent, conceded that there could be a family arrangement which would bind the parties to it, without there being in existence a substantial dispute between the parties, the object of the parties being either preservation of the family property or preservation of peace. When however appeal No. 301 of 1926 was argued on behalf of the appellants, namely the plaintiffs, who are respondents in Appeal No. 295, Mr. Iqbal Ahmad argued that there could be no valid family arrangement without there being in existence a dispute among the members of the family. The counsel for the defendants, not being therefore of the same opinion, it is necessary for the Court to decide whether there could or could not be a family arrangement binding on the parties to it, without there being in existence a dispute as regards the property. On this point the law in India has been borrowed from England and it has not been disputed that the principles of English Law would apply to India. Lord Halsbury in his Laws of England (Vol. 14, p. 540) defines a family arrangement as :

"A transaction between members of the same family which is for the benefit of the family generally, as, for example, one which tends to the preservation of the family property, to the peace or security of the family and the avoidance of family disputes and litigation. or to the saving of the honour of the family."

It will be noticed that avoidance of family disputes is only one of the many grounds which go to validate a family arrangement. A family arrangement to be good need not, necessarily, be a "compromise of doubtful rights." In *Williams* v. *Williams* (1) at p. 331, it was definitely stated that for a family arrangement to be good it was not necessary that there should be a family dispute which had to be settled or com-

(1) [1867] 2.Ch. 294.

posed. The idea that the existence of a dispute is essential is due to this : that where there is a dispute the settlement of it will constitute the consideration for the parties to act as they propose to do. But where the object is the preservation of the property or preservation of the family peace there is in existence no such or any consideration for the contract. The case of *Williams* v. *Williams* (1) was approved of in India in the case of *Helan Dasi* v. *Durga Das* (2) by two eminent Judges of the Calcutta High Court. Mr. Iqbal Ahmad cited one obiter dictum of one of the learned Judges of this Court as his authority for the proposition that the existence of a dispute is essential. In *Mitter Sain* v. *Data Ram* (3) at p. 205 (*of* 24 *A. L. J.*), Sulaiman, J., expressed the opinion that for the existence of a family settlement there must be a settlement of doubtful claims. At p. 206 the learned Judges said :

"There must be a bona fide dispute which is to be settled by a private family settlement without having recourse to law. In the present case there could be no dispute whatsoever."

With all respect I am unable to accept this view and I have already quoted authorities in support of my view. I may point out that in support of his opinion the learned Judge did not quote any authority. Mr. Iqbal Ahmad also tried to support his contention from certain statements of law made in the Court of the Judicial Commissioner of Oudh. This Court is in no way bound by any expression of opinion made by the Judges of a different Court, specially of a Court which is not of the same status as this Court.

Coming to the actual arrangement arrived at there can be no doubt that it is in the nature of a family arrangement. The mother Sundar Kuar inherited the family property and she had four daughters who were likely to succeed her, if all of them survived her. There was no certainty that all the four daughters would survive her and there was no knowing how long the mother was going to live. On the principle that a bird in hand is worth two in the bush the mother and daughters agreed that what was uncertain might be made certain and what was mere expectancy might be made into a certainty. They therefore agreed to divide the entire property, at once among themselves. So far as the mother is concerned it was a case of pure love on her part that she allowed her daughters to share the property with her. So far as the daughters were concerned they agreed to accept concrete property in the place of a mere chance of surviving each other. Such an arrangement can only be regarded as nothing but a family arrangement. The consideration for the daughters to enter into the transaction was that each got a definite property while Mt. Bodhi got cash maintenance secured on immovable property. Each of the three daughters who were likely to have children had the assurance that some property would surely go to her male descendants if there happened to be any. The plaintiff Dulari already had two sons and she was assured that her sons would be sure to get her share in the property, even if the mother predeceased her own mother Sundar Kuar or her several sisters. Thus there was good consideration for the arrangement. It avoided uncertainty and chance of litigation in future. I have no hesitation in holding and I do hold that the transaction of 1898 was a family arrangement, binding on the parties, if it be not otherwise in contravention of any positive rule of law.

As to the second point the main plank of the plaintiffs' case is this : no doubt the transaction of 1898 was a good one so long as the mother lived. The mother had a life interest and she could give the property during her lifetime to anybody she pleased, but she could not continue to give a valid title after her death and, on the death of the mother, only those daughters could succeed, in law, as survived her. On the death of the mother Sundar Kuar, only two daughters survived her, namely the plaintiffs, and therefore in so far as they had agreed, by the document of 1898, not to claim their legitimate share, they had contravened S. 6 (a), T. P. Act, which has always been applied to Hindus, though the law, in terms, did not apply to them. The whole question therefore is whether this argument is sound and must be given effect to.

I have given the case my best consideration and have not been able to persuade myself that the transaction of

(2) [1906] 4 C.L.J. 323.
(3) A.I.R. 1926 All. 194=90 I.C. 1000.

1898 amounted to a transfer of a mere expectancy to inherit property.

In 1898 none of the daughters of Dalip Singh had any interest in the property nor had they possession over it. When therefore they got the property in 1898 they got the property without any title. When they got the property there was no longer any question of their having nothing but a mere chance of succession. There was no longer any question of chance of succession to the property, for the simple reason that they had already got it. It is true that their title was secure only till the lifetime of the mother, and on the death of the mother the title of only those daughters would prevail as survived the mother. But the property being actually in the hands of the daughters, could not they agree, as between themselves, that it would be in the interest equally of each of them that, in the place of uncertainty of tenure, they should have something certain and definite for themselves and for their male issues ?

There can be no doubt that the arrangement was in the best interest of the daughters themselves ; at least they thought that it was and if they themselves thought so, we have no reason to say that they were unwise. The whole question therefore is whether the transaction was one in contravention of S. 6 (a), T. P. Act. That rule of law prohibits the transfer of a mere contingency, namely a chance of succession. In my opinion the transaction that was entered into was not at all a transfer of a chance of succession. The property having already been reduced to possession there is no further question of chance. What was once a chance had become a matter of certainty. All the four sisters had the property in their hands and what they proceeded to do was to divide it definitely as if it belonged to them absolutely. If a partition of property may be regarded as a transfer within the meaning of S. 5, T. P. Act, the transactions of 1898 may also be regarded as transfers by all the four sisters. The definition of transfer in S. 5 would, however, exclude any such idea. That definition is as follows :

"Transfer of Property means an act by which a living person conveys property in present or in future to one or more other living persons or to himself and one or more other living persons; and to transfer property is to perform such act."

The definition excludes the idea of partition as falling within it. I hold that the arrangement of 1898 does not contravene S. 6 (a), T. P. Act.

Point 3 as regards estoppel. There can be no doubt that on the facts of this case no Court of justice will allow the plaintiffs to claim the property in suit, whatever the rights of the grandsons of Dalip Singh may be on the death of all his daughters. By the arrangement of 1898 each of the four daughters agreed that on her death the property allotted to her would go to her male issue. By this agreement, if the plaintiff Dulari Kuar had happened to die in the lifetime of Kalawati, Kalawati could never have asked Dulari's sons to hand over the property allotted to Dulari to her (Kalawati). Thus the agreement and promise, which Dulari gave to or made in favour of Kalawati, was the basis of Kalawati's agreement to the same effect in favour of Dulari. Having obtained therefore from Kalawati a promise in her own favour can Mt. Dulari or can Mt. Bodhi be permitted to go against the representation they made to Mt. Kalawati? I am of opinion that they cannot be permitted. The point is really concluded by two cases decided by this Court and a Privy Council case. In *Mahadeo Prasad Singh* v. *Mata Prasad* (4) two learned Judges of this Court held that where the next presumptive reversioner consented to and joined in a gift by a Hindu daughter in possession of her father's estate as a limited owner, and on the death of the daughter succeeded to the estate as the actual reversioner, the next presumptive heir was estopped from challenging the gift. This view was reaffirmed in the case of *Fateh Singh* v. *Rukmini Rawanji* (5). In this case a Hindu widow made a gift of property in favour of an idol of a large portion of property in her possession. Two of the reversioners for the time being executed a deed of relinquishment in favour of the idol. On the widow's death it was held that one of the executants of the document, who became the actual re-

(4) A. I. R. 1922 All. 297=63 I. C. 721=44 All. 44.
(5) A. I. R. 1923 All. 387=72 I. C. 8=45 All. 339 (F. B.).

versioner, was estopped from claiming the property.

In the case of *Kanhai Lal* v. *Brij Lal* (6), on the death of the survivor of three joint brothers, the family property came into the hands of the widow of the surviving brother. The widows of the predeceased brothers and one Kanhai Lal, the appellant before their Lordships of the Privy Council, who claimed to have been adopted by one of the widows of the predeceased brothers, disputed the right of the widow entitled to the property, on various grounds, including the adoption of the appellant. The result was a compromise by which the property was divided and the widow of the last survivor got some property which, it was agreed, would go to her daughters. On the death of the widow the appellant claimed as the next reversioner. It was held that his claim was barred on the ground of estoppel. The case of *Shamsuddin* v. *Abdul Husain* (7) was relied upon to show that the appellant had only a right of expectancy and he could not have validly bargained with it, so as to be estopped from asserting his right, when it became ripe. The Privy Council distinguished the case and, as already stated, held that Kanhai Lal by his acts, namely by entering into the compromise, had debarred himself from claiming as a reversioner.

In *Joy Durga* v. *Saroj Narain*. (8) two sisters, who had received nothing better than a daughter's estate from their father, under his will agreed between them that on the death of one her half share would go to her son. On the death of one of the sisters the survivor claimed the property held by the deceased in her lifetime, and since her death held by her son. It was argued for the claimant that the agreement was void. The Privy Council said that their Lordships were not impressed by the argument and there was no authority for such an argument.

In the case before me the sisters not only entered into the agreement, but they have so long acted on foot of it that it is impossible to say that it was ever in the contemplation of any of the sisters that after the death of the mother the survivor could ever possibly claim as against the male descendants of the deceased sister. On foot of the agreement in favour of herself Bodhi brought numerous suits claiming her maintenance. She brought her suits not only during the lifetime of her mother and Kalawati, but also afterwards on the death of Kalawati, in 1916, against Sheoraj, Kalawati's son: see pp. 229 and 233 of the printed record and also after the death of her mother Sundar Kuar, against Sheoraj, in 1923: see pp. 259 and 261 of the record. Similarly Mt. Dulari brought numerous suits for partition and Kalawati also brought similar suits. It will be enough to cite two instances. In 1923, after the death of Rani Sundar Kuar, Mt. Dulari sued Sheoraj for her share of the profits in Pilibhit Khas see pp. 265 and 267. Again Sheoraj brought a suit for partition against Mt. Dulari for the property of Pilibhit Khas: in 1920, subsequent to the death of Sundar Kuar: see p. 253. Not only therefore the agreement of 1898, but also the subsequent acts of the parties and their successors, constitute estoppel against all the parties to the transactions of 1898 going against them.

The Privy Council case of *Rangaswami Gounden* v. *Nachiappa Gounden* (9) was cited on behalf of the defendants in support of the argument that Suudar Kuar having retained a portion of the property of her husband there is no valid acceleration or surrender in favour of the daughters. At p. 539 of the report their Lordships point out that, although a reversioner need not impugn a transfer by the widow at its inception, there is nothing to prevent him from impugning it after the death of the widow; the reversioner might do something before that time which amounted to an actual election to hold the deed good. In this case Mt. Dulari brought her suit for profits against Sheoraj, the son of Kalawati, in 1923, four years after the death of her mother and thereby recognized the validity of the transaction of 1898: see pp. 265 and 267. Again, when Sheoraj sued for partition of Pilibhit Khas in

(6) A. I. R. 1918 P. C. 70=47 I. C. 207=45 I. A. 118=40 All. 487 (P. C.).
(7) [1907] 31 Bom. 165=8 Bom. L. R. 781.
(8) P. C. A. No. 132 of 1927, decided on 11th June 1929.
(9) A. I. R. 1918 P. C. 196=50 I. C. 498=46 I. A. 72=42 Mad. 523 (P. C.).

1920: see p. 253, no plea on the ground of invalidity of the transanction of 1898 was raised by Mt. Dulari. Further, Bodhi brought her suit against Sheoraj in 1923 on the basis of the agreement of 1898 and succeeded in her suit: see plaint at p. 259, paras. 3 and 4. These acts on the part of the plaintiffs go to show that the plaintiffs made an actual election after the death of their mother, to hold the deed good.

For these reasons I am clearly of opinion that the plaintiffs are estopped from maintaining the suit.

In the result the defendants' appeal, namely Appeal No. 295 of 1926, be allowed, and Appeal No. 301 of 1926 must be dismissed.

In view of the fact that no other point has been debated in the High Court all the points that have been decided against the parties by the Court below must be taken as finally decided and they do not call for any decision by this Court, although the correctness of those decisions have been controverted in the memorandum of appeal.

Bennet, J.—These are two first appeals, No. 295 of 1926 by the defendants and No. 301 of 1926 by the plaintiffs, brought against a decree of the Subordinate Judge of Pilibhit allowing the suit of the plaintiffs in part and dismissing it in part. The parties belong to a family of which the pedigree is as follows:

(*for pedegree see p.* 688)

Tahkur Dalip Singh owned considerable zamindari property as a separated Hindu and he died on 17th March 1893. His widow Mt. Sunder Kunwar succeeded to his estate with the limited right of a Hindu widow, and in 1898 she had, living with her, four daughters: Mt. Dulari married, with a husband and one or two children; Mt. Nanhi, married, with her husband; Mt. Budhi, a childless widow; and Mt. Kalawati, unmarried.

On 1st May 1898, under these circumstances, Mt. Sundar Kunwar and her four daughters executed and registered a deed of partition of the entire property of Thakur Dalip Singh, then held by his widow, and the relevant portions of the deed state as follows:

Dalip Singh, the ancestor of us the executants, died about six years ago. The property, e. g. zamindari detailed below owned and possessed by him alone without the participation of anyone, has been partitioned for several generations. Mt. Sundar Kunwar is the owner in possession thereof. In future it is to devolve on us: Mt. Dulari Mt. Nanhi, Mt. Budhi, and Mt. Kalawati. Now we, the executants, have in order to avoid disputes in future, with mutual consent partitioned it thus that mauzas . . . . . in Sch. 1. have been given to Mt. Dulari; mauzas . . . in Sch. 2 to Mt. Nanhi; mauzas . . . . . in Sch. 3 to Mt. Kalawati; mauzas . . . . in Sch. 4 to Mt. Dulari, Mt. Nanhi and Mt. Kalawati jointly; and Mt. Sunder Kunwar shall in her lifetime remain in possession of mauzas . . . . given in Sch. 5. After Sundar Kunwar's death whatever property has been allotted to her share shall be equally divided between Mts. Dulari, Nanhi and Kalawati. As I, Mt. Budhi, am a childless widow, I did not desire to share in the said property. On the other hand Mts. Dulari, Nanhi and Kalawati and their representatives shall pay me during my lifetime Rs. 1,400 per annum in equal shares, and the said amount will be charged on their shares. They have today executed a separate agreement in regard to the said payment to Mt. Budhi. No one shall make any objection in regard to property allotted to another. If any one of the three, Mt. Dulari, Mt. Nanhi, or Mt. Kalawati, dies and leaves male issue, then the male issue shall be owner in possession of her share in her place; but if one dies without male issue her other sisters will be owners in possession of her property. After the death of (all) the sisters their male issue shall be owners in possession. An order in mutation dated 12th March 1901 (printed on pp. 111 and 112 of the paper book of Appeal 295 of 1926) shows that the daughters Dulari, Nanhi and Kalawati obtained possession of their shares from the time of execution of this agreement. Mt. Nanhi died without male issue in 1900 and Mt. Dulari and Mt. Kalawati obtained possession of her share and got mutation under this order. Mt. Kalawati died in 1915 leaving a son Sheoraj Singh who succeeded to her share. Mt. Sunder Kunwar executed a deed of endowment on 23rd November 1916, endowing a thakurdwara with

her share, and making herself the first manager, and after her death making Mt. Budhi manager. Mt. Sundar Kunwar then died on 2nd September 1919.

Sheoraj Singh, son of Mt. Kalawati, died on 23rd June 1925 and his widow, Mt. Jamna Kunwar, defendant 2, succeeded to possession of his share under the guardianship of his father Kunwar Pokhar Singh, defendant 1.

There are now two daughters of Dalip Singh surviving Mt. Dulari and Mt. Budhi. On 30th September 1925 Mt. Dulari and Mt. Budhi, plaintiffs, brought the present suit against Mt. Jamna Kunwar and her father-in-law, Kunwar Pokar Singh, defendants. The plaintiffs claim that the agreement of 1st May 1898 was invalid as Mt. Sunder Kunwar could not partition the property which she held as a Hindu widow so as to affect the succession to it after her death, and that the defendant, Mt. Jumna Kunwar, claiming to hold for her life as the widow of Sheoraj Singh, had no right to hold any part of the property which originally belonged to Thakur Dalip Singh. The lower Court has granted the plaintiffs a decree for possession of the share of Mt. Kalawati and the portion of the share of Mt. Nanhi which went to Mt. Kalawati, but the Court has dismissed the claim for the share of Mt. Budhi, holding that to that extent the agreement of 1st May 1898 is valid.

We shall first examine the appeal of the defendants as if that appeal succeeds; the appeal of the plaintiffs cannot succeed. Mr. Iqbal Ahmad on behalf of the plaintiffs in their appeal advanced the proposition that there must be a bona fide dispute before there can be a family settlement, and that in the present case there was no bona fide dispute. That proposition of law was not advanced by Sir Tej Bahadur Sapru on behalf of the plaintiffs in the appeal of the defendants. But we shall first examine the facts of the origin of the agreement of 1st May 1898 and then examine the proposition of law. The Subordinate Judge has held that there was no bona fide dispute and therefore, he says, no family settlement, and therefore the agreement cannot affect the succession after the death of Mt. Sunder Kunwar.

The case for the defence in the written statement para. 2 is that on the death of Dalip Singh, Mt. Sunder Kunwar, his widow, wanted to build a thakurdwara and make a wakf of the entire estate of Dalip Singh in accordance with directions in an alleged will of Dalip Singh. That the daughters offered obstruction, and disputes arose. That the agreement of 1st May 1898 was executed in order to maintain peace, save the family property and avoid litigation. The plaint alleged that there was no dispute between the daughters and the mother. There is no mention in the agreement of any dispute about the endowment of a thakurdwara or anything else. The words are " in order to avoid dispute in future." It was not till 23rd November 1916, shortly before her death in 1919, that Mt. Sunder Kunwar executed the deed of endowment of the thakurdwara, so it is not probable that the matter was urgent in 1898. That deed of endowment does allege that there was a will or expression of desire by Thakur Dalip Singh for the endowment, and that for that reason Mt. Sunder Kunwar reserved property in three villages at the partition of 1898 with that intention. But there is no recitation that the partition was made on account of the endowment or disputes in regard to it. There is only one witness for the defence who alleges that there was any dispute between mother and daughters before the agreement. This is Mohanlal, the scribe of the document. On the side of the plaintiffs there are a number of witnesses who say there was no such dispute, and that the daughters were on terms of affection with their mother. Mt. Budhi, plaintiff, and some of plaintiffs' witnesses state that the partition was made because Mt. Sunder Kunwar was apprehensive that after her death Jangi Singh, a collateral of Dalip Singh, might claim the property. On 22nd April 1895 Jangi Singh executed a deed of relinquishment stating that there was a dispute of partition between him and Mt. Sunder Kunwar in respect of four villages held jointly in equal shares. This deed sets forth that Jangi Singh and his heirs are only entitled to a half-share in these joint villages and that Mt. Sunder Kunwar is entitled to the other half, and that she owns all the other propsrties of Dalip Singh. The deed continues :

"The aforesaid Musammat has power to transfer it, under a deed of gift or will, to or in favour of her daughters or daughter's son or keep part of it for endowed property."

Thus as early as 1895 Mt. Sunder Kunwar contemplated a partition with her daughters, and the retaining of part of the property for endowment.

That there was ground to fear opposition from the sons of Jangi Singh is shown by the judgments of the revenue Court in mutation applications made on the partition deed and on the death of Mt. Nanhi. On both these occasions the sons of Jangi Singh made objections against the entry of the daughters, but the second order shows that the objections were overruled on the ground that the daughters were in actual possession.

Another factor which may have produced a desire to separate off shares for each daughter is the fact that the husbands of two married daughters were living in the house of their mother-in-law Mt. Sunder Kunwar and apparently being supported from her estate. These men were P. W. Than Singh, husband of Mt. Nanhi Kunwar who says he was aged 19 at the time of the partition deed, and Khan Singh, husband of Mt. Dulari, who had been living there since the time of Dalip Singh, and who is said to have taken an active part in the partition according to the scribe Mohanlal. Khan Singh was related to Pokhar Singh, defendant 1, who says that from before the partition Khan Singh was discussing with Mt. Sunder Kunwar the marriage between Pokhar Singh and Mt. Kalawati which was carried out after the partition. Khan Singh therefore had a considerable interest in getting the partition made.

We consider that there was no dispute between the mother and daughters before the partition, but that the causes indicated above were sufficient to produce the partition, and not the least of these was the cause named in the deed "in order to avoid disputes in future."

Before dealing with the law on the subject we shall refer to the ample evidence which shows that the settlement in the deed of 1st May 1898 has all along been carried into effect by the different parties to it, including the plaintiffs who now sue to set it aside. At the same time as this deed there were two other documents executed: one a relinquishment by Mt. Budhi of her present and future claims to the estate of her father, and the other an agreement by Mt. Dulari, Nanhi and Kalawati charging their shares with the payment of Rs. 1,400 annually to Mt. Budhi. (After considering the evidence, the judgment proceeded). This evidence shows clearly that the parties have all along acted on the agreement of 1st May 1893 and treated it as valid up to the date when plaintiffs filed the present suit on 30th September 1925, a period of 27 years. We now turn to a consideration of the law on the subject. Mr. Iqbal Ahmad for the plaintiffs advanced the proposition that without a bona fide dispute there cannot be a family settlement, and for this he relied on two rulings of the Oudh Chief Court. In the first of these cases, *Dilipat Singh* v. *Kashi Nath* (10), no such rule is laid down. In the second case *Sharifunnisa* v. *Shafiquzzaman* (11), it is stated on p. 641 that:

"a family settlement implies a mutual settlement by certain contending parties belonging to the same family of disputed claims and rights."

But the case was decided on the ground that the matters in dispute were settled by arbitrators, not on the ground that there was no dispute.

Reference was also made to observations by Lindsay, J., on p. 197 and by Sulaiman, J., on p. 205 (*of* 24 *A. L. J.*) of *Mitter Sain* v. *Data Ram* (3), which were to the same effect. None of these rulings explains from whence is derived the idea that a family settlement presupposes a dispute.

For the defence Mr. O'Conor referred to *Williams* v. *Williams* (1) for the proposition that a family arrangement may be such as the Court will uphold, although there are no rights in dispute. On the other side it is argued that that case would not apply to the facts of the present case. It is true that in the present case the settlement was between persons who had limited estates, and of whom the estates had not vested, except in the case of the mother. It is for this reason that the doctrine of family arrangement is invoked, and not

(10) [1914] 17 O. C. 103=24 I. C. 542.
(11) A. I. R. 1923 Oudh 185=75 I. C. 626=26 O. C. 133.

because of a defective method of transfer, for they embodied their arrangements in a registered deed. On the other hand in *Williams* v. *Williams* (1) the persons concerned had full ownership, and the doctrine of family arrangement was invoked because no legal method of transfer of the property was employed. The plaintiff and defendant were sons of one John Williams who died leaving borough English which was inherited exclusively by his younger son and socage which was inherited exclusively by his elder son and gavelkind which was inherited equally by both. It would have been possible for the sons to make valid transfers of this property so that each would become owner of half. Instead of doing this, when they found that their father's will which intended to leave all the property to them in equal shares was invalid the elder brother declared that the invalidity of the will would make no difference, and that the property should be "not mine or thine, but ours". The property was held on these lines for twenty years. Because the arrangement between the brothers was not a formal contract under seal or one of the methods then legal for conveying real property, it was necessary to enter into the question of consideration, and consideration was found in the fact that the younger brother brought into the common stock the borough English exclusively to him. On p. 300 it is laid down:

"So far as the motives which led the appellant to admit his brother to an equal share of their father's property are concerned this case differs from those cases of family arrangement which have formerly been the subject of decision. There was here no doubtful right to be compromised, no dispute between the brothers which was to be set at rest, no honour of the family involved; the appellant was merely prompted by respect for his father's intentions and by his affection for his brother, both most excellent and praiseworthy motives, but scarcely sufficient to constitute such a consideration as would convert an act of kindness into a binding engagement. If therefore there had been no consideration for the appellant's promise to share the freehold property with his brother I should have been disposed to hold that he could not be bound by it. But it appears to me that there is quite sufficient consideration to prevent its being a mere voluntary agreement, and that the Court will not be disposed to scan with much nicety the amount of the consideration."

This rule in *Williams* v. *Williams* (1) was followed by Mookerjee, J., at p. 331 in *Helan Dasi* v. *Durga Das Mundal* (2). In *Sidh Gopal* v. *Behari Lal* (12) at p. 981 (*of* 25 *A. L. J.*) the definition of "family arrangement" in Halsbury's Laws of England, Vol. 14, p. 540 has been adopted and it was held that the only requisite to make a valid family arrangement is that it should be

"a transaction between members of the same family which is for the benefit of the family generally, as, for example, one which tends to the preservation of the family property, to the peace or security of the family and the avoiding of family disputes and litigation, or to the saving of the honour of the family."

We consider that it is not necessary for the validity of a family settlement that there should have been a dispute existing between the parties at the time of the family settlement. The case was approached by Sir Tej Bahadur Sapru for the plaintiffs from a different angle of vision. His first question was: Who could deal with the property in 1898? If by dealing with the property we mean making a valid transfer of the property, the answer is that only Mt. Sundar Kunwar could deal with the property, because her daughter has during her lifetime a mere spes successionis, which was incapable of transfer. His next question was: In what ways could Mt. Sunder Kunwar deal with the property? His answer was: (a) she might transfer the whole proprietary right for valid necessity; (b) she might transfer her life interest; (c) she might surrender her life interest and if the surrender was made to the next reverisoner he would then take the estate to which he was entitled. These were, he said, the only three ways in which she could deal with the estate. His next question was whether independently of Mt. Sundar Kunwar the daughters could deal with the property. His reply was that they could do so in no conceivable circumstances because they had only a spes successionis, a mere contingent interest. His last question was: Assuming that under Hindu law the mother could only deal with her property in the three ways (a), (b), (c), could the daughters and mother combined have dealt with it in any other manner? His reply was that they could do so only if there was

(12) A. I. R. 1928 All. 65 = 107 I. C. 247=50 All. 284.

a dispute between the mother and daughters. This brings us back to the proposition that a dispute is necessary to the validity of a family settlement; and we have already held that dispute is not necessary.

The argument was next advanced that the daughters, after the death of their mother, take as daughters not of the mother but as daughters of the father, and that any agreement by them about their life interest would not be binding on them if made before the death of their mother. There does not seem to be any reason why this conclusion should follow from these premises.

Reference has been made for the plaintiffs to numerous cases, but none of them are on all fours with the present case. For instance in *Rangasami Gounden* v. *Nachaippa Gounden* (8), their Lordships of the Privy Council quoted the dictum of Lord Morris in *Behari Lal* v. *Madho Lal Ahir Gyawal* on p. 532:

"It may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee."

At p. 536 their Lordships stated :

"The result of the consideration of the decided cases may be summarized thus: (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, not a device to divide the estate with the reversioner."

The second proposition dealt with alienations for necessity, with which we are not concerned. Now the argument of the plaintiffs based on this and similar rulings is that the agreement of 1st May 1898 is invalid because Mt. Sundar Kunwar did not surrender the whole of her life interest, but retained it in one-fifth of the estate. We consider that the rule in *Rangasami Gounden* v. *Nachiappa Gounden* (8) does not apply to the present case for two reasons. In the first place the transaction challenged in *Rangasami Gounden* v. *Nachiappa Gounden* (8) was a conveyance of part of the estate by a widow in possession to one who was no doubt then the nearest reversionary heir, but he died before the death of the widow and the property transferred passed to his heirs. The plaintiff was not one of his heirs, but was the nearest reversioner at the death of the widow. The plaintiff was not a party to the transaction challenged nor did he claim through one who was a party. The question therefore was whether the transaction was absolutely valid as against a reversioner who was in no way connected with the transaction. It was for such a question that the rule was laid down that a surrender by a widow must be of her whole interest in the whole estate.

But the question before us is a much narrower question, because the present plaintiffs were both of them executants of the deed in question. By entering into that agreement the plaintiffs recognized the validity of the partial surrender of her estate by their mother and it is not now open to the plaintiffs to claim that a partial surrender is invalid.

The second reason why the rule in *Rangasami Gounden* v. *Nachiappa Gounden* (8) does not apply is because the rule is a rule for alienation by a widow in favour of reversioners whereas the present case is one of family settlement among reversioners, two of whom have survived at the death of the widow. The next case on which the plaintiffs relied was *Debi Prasad Chowdhury* v. *Golap Bhagat* (13). That was a case of a mortgage by a Hindu widow of portion of the estate with the consent of the next reversioner for the time being, and it was challenged by the actual reversioner, who did not claim through the person who had consented. Reference was made to the four rules laid down by Mookerjee, J. at pp. 781 and 782. But the two reasons which we have given above distinguish the present case.

The plaintiffs next referred to *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (14), which quoted at pp. 394 and 395 the dictum of Lord Justice Turner in *Soorjeemoney Dossee* v. *Denobundoo Mullik* (15) :

(13) [1913] 40 Cal. 721=19 I. C. 273 (F. B.)
(14) 9 Beng. L. R. 377=18 W. R. 359 I. A. Sup. Vol. 47=2 Suther 692=3 Sar. 82 (P. C.).
(15) [1855-57] 6 M. I. A. 526=4 W. R. 114=1 Suther 291=1 Sar. 583 (P. C.).

"A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."

But in the agreement of 1st May 1898 there is no such creation or alteration. The parties to that agreement consented to enjoy their life interests in a certain way, and it is during the continuance of two of those life interests that we are asked to upset that agreement.

It was next argued for the plaintiffs on the strength of *Himmat Bahadur* v. *Dhanpat Rai* (16), that the agreement was not a proper family settlement because the daughters had only a spes successionis at the time of agreement. But the enjoyment of their life estates by the daughters was in fact accelerated by the action of their mother, and on the death of their mother the plaintiffs continued to recognize the agreement, and the rights of Sheoraj Singh under the agreement. In fact it was only on the death of Sheoraj Singh that the plaintiffs object to his rights now in the possession of his widow. The case reported in *Himmat Bahadur* v. *Dhanpat Rai* (16), dealt with a relinquishment of part of the property by a widow and her daughter in favour of the husband of a deceased daughter, who had no legal claim whatever; and the persons who challenged it were not parties to the transaction but persons who were minors at the time. On p. 338 it is stated:

"It seems to us that the very highest at which the defendant's case can be put is that he in the year 1889, put forward a baseless claim and the ladies in order to avoid being forced into litigation, consented to give him the property in suit . . . . . it does not follow from that that there was a bona fide dispute, bona fide settled by members of the family. There is a great difference between settlement of family disputes or even the screening of family scandals and yielding up property on a threat of litigation. It is reasonable that the former should bind the family even though they may have been minors at the time. A transaction of the other kind can at best only bind the parties to it."

Now it may be noted that in this case, it is stated on p. 336 that the widow gave part of her property to each of her two daughters still retaining some of the property herself. On p. 338 it is stated

"we think that the document, read as a whole clearly shows that what the mother did was to accelerate the succession of her two daughters."

(16) [1916] 38 All. 335=35 I. C. 148.

We consider that similarly in the present case the agreement accelerated the succession of the daughters, and therefore at the time of the agreement the daughters had more than a mere spes successionis with which to bargain. The agreement therefore complies with the criteria laid down in *Rama Aiyar* v. *Narayanasami Aiyar* reported in *A. I. R.* 1926 *Mad.* 609, at p. 611:

"It is well established that a bona fide family settlement of disputes or doubtful rights is binding on all the parties to the settlement. The rule in *Stapleton* v. *Stapleton* (17) and *Williams* v. *Williams* (1) has always been applied in India, but where the object of the settlement is to effect a contingent, reversionary interest in the nature of a spes successionis the only way of doing it is by means of surrender, accelerating the reversion and converting its contingent nature into a vested interest and thus destroying its character as a spes successionis."

Reference was next made for the plaintiffs to *Gauri Nath Kakaji* v. *Gaya Kuar* (18), where it is stated at p. 1176 (of 26 *A. L. J.*):

"If a Hindu dies leaving two widows they succeed as joint tenants with a right of survivorship. . . . . Each can deal as she pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner."

We consider that the action of the two plaintiffs in executing the agreement of 1st May 1898 comes within the words "each can deal as she pleases with her own life interest." The plaintiffs chose to give up their chance of obtaining a larger share of the estate on the death of their mother in return for the advantages of the annuity in the case of Mt. Budhi and the immediate enjoyment of one-fifth of the estate in the case of Mt. Dulari. Having made that agreement and acted on it, it is not now open to the plaintiffs to repudiate it.

The plaintiffs next relied on *Bai Parvati* v. *Dayabhai Manchharam* (19). In this case a widow was in possession of the estate and she, along with her daughter the plaintiff, made a gift of part of the property to the defendants who were the minor sons of a deceased daughter. After the death of her mother the plaintiff sued to recover the property on the ground that the deed was invalid as it conveyed her chance of

(17) 21 L. J. Ch. 434=2 Sim. (N. S.) 212.
(18) A. I. R. 1928 P. C. 251=111 I. C. 485=55 I. A. 399 (P.C.).
(19) [1920] 44 Bom. 488=58 I. C. 266.

surviving her mother. The gift by plaintiff was held to be invalid because it was a transfer contrary to S. 6 (a), T. P. Act, and there was no rule of Hindu law recognizing the validity of such a transfer which was of a mere spes successionis.

Now it is true that this case resembles the present case in the fact that the plaintiff was a party to the transaction to be set aside. But there are essential points of difference. In the case quoted there was an actual transfer. In the case before us we consider that the agreement did not amount to a transfer within the meaning of S. 5, T. P. Act, so far as the daughters were concerned. No daughter made any conveyance of property. What happened was that the mother made a transfer of her life interest in four parts of the property to her different daughters and the daughters agreed to that transfer by the mother, which accelerated their life estates in those parts. Further, the daughters agreed that on the death of any one of the three daughters the share of that daughter would go to her male issue if there was any male issue then alive. Such an agreement was quite a different matter from a transfer to any male issue. There was no transfer of the chance of succeeding to an estate, which would be invalid by S. 6 (a), T. P. Act, nor was there any transfer of a spes successionis which would be invalid by Hindu law. There was merely an agreement between the daughters to enjoy their life interests in a certain way. The surrender of the mother caused those life interests to commence, and therefore the agreement dealt with actual life estates in being and not with the spes successionis at some future date. Another point of difference is that in the case quoted there was no question of a family settlement, but in the case before us the agreement settled the way the property was to be enjoyed by the family. Reference was also made to *Amrit Narayan Singh* v. *Gaya Singh* (20) at p. 603 (*of* 45 *Cal.*):

"A Hindu reversioner has no right or interest in praesenti in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere spes successionis."

The present case is differentiated on two grounds: the action of the mother accelerated the life interests, and after the death of the mother the plaintiffs continued to act on the agreement. Another argument of the defence is that the plaintiffs are estopped under S. 115, Evidence Act, from setting up a claim contrary to their agreement. In executing that agreement the plaintiffs made a representation that they agreed to that division of the estate for the period of their lives, and that they would not put forward any claim on the death of their mother to a larger share of the estate. These representations have been acted upon by the parties and we consider that the plaintiffs are estopped from setting up their present claim.

We consider that both on the grounds of family arrangement and on the grounds of estoppel the case of the plaintiffs fails, and we allow the appeal of the defendants with costs and we dismiss the appeal and the suit of the plaintiffs with costs in both Courts.

V.B./R.K. *Order accordingly.*

(20) A. I. R. 917 P. C. 95=44 I. C. 408=45 I. A. 85=45 Cal. 590 (P.C.).

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* A. I. R. 1930 Allahabad 699

BOYS, J.

Noor Muhammad — Judgment-debtor —Applicant.

v.

Mahmud Khan Fayaz Khan and *another*—Opposite Parties.

Civil Revn. No. 39 of 1930, Decided on 29th May 1930, from order of Sm. C. C. Judge, Allahabad, D/- 30th November 1929.

*** (a) Civil P. C., S. 11—A decision in judgment-debtor's absence without notice to him is not res judicata.**

A matter decided behind the back of the judgment-debtor without notice to him may well have been decided in accordance with law, but it cannot be held to be res judicata.

(b) Limitation Act, S. 3—Executing Court must determine the question of limitation.

Any Court having an application for execution made to it must suo motu determine the question of limitation. It has not only power but duty to determine such question: 16 *All.* 390 and 15 *Bom.* 28, *Ref.*; *A. I. R.* 1924 *Mad.* 673, *Dist.* [P 700 C 2]

Zamir-ul-Haq—for Applicant.

Gajadhar Prasad Bhargova—for Opposite Parties.

Judgment.—This is the judgment-debtor's application in revision of an order of a Court to which a Small

Causes Court decree had been transferred for execution rejecting an objection by the judgment-debtor that the application for execution was barred by limitation, the rejection being founded on the view that the question of limitation had already been decided and was therefore res judicata. The judgment-debtor contends that though the question of limitation was decided by the Court transferring the decree, that decision was not res judicata. The facts are as follows :

On 27th April 1922 the decree-holder, respondent here, obtained a simple money decree. On 18th July 1924 he applied for transfer of the decree for execution to Allahabad, but allowed that application to be dismissed in default. On 23rd May 1928 the decree-holder certified to the Court a payment in part discharge of the decree. On 19th December 1928, the decree-holder applied for transfer of his decree to Allahabad to enable him to execute for the balance against property of the judgment-debtor situated in Allahabad. It is the order on this application that has been held to constitute the question of limitation res judicata and in my view wrongly held. Upon receipt of this application the munsarin of the Court detailed certain of the preliminary history of the case and expressed some doubts as to whether the application was not beyond time, but the learned Judge of the Court of Small Causes upon that report recorded a brief order that the application was "within time" and ordered the transfer as asked for. The order as to limitation and the order as to transfer were made without notice to the judgment-debtor. On 12th March 1929 the decree-holder applied to the Allahabad Court for execution, and on 22nd May 1929, the judgment-debtor filed an objection that the application was barred by limitation. The learned Judge of the Court of Small Causes dismissed this objection saying :

"The decree under execution has been received from the Small Cause Court, Agra, and before that Court the question as to limitation arose. That Court decided that the execution petition is within time. The question as to limitation being thus once decided between the parties it cannot be reopened subsequently in another Court."

This was in fact a finding that the question of limitation was res judicata. In this I cannot agree. A matter decided behind the back of the judgment-debtor without notice to him may well have been decided in accordance with law, but it cannot be held to be res judicata. For the respondent decree-holder it is contended that the case should not be sent back to the lower Court to decide the question of limitation because that Court, as it is contended, would have no jurisdiction to decide the question, and any such question must be decided by the Court which passed the decree. In support of this proposition I have been referred to certain cases, but in my view none of them is in point. It was held in *Ramu Rai* v. *Dayal Singh* (1) that the Court which passed the decree had power to decide a question of limitation. But there was no finding that a Court receiving the decree and having an application for execution made to it had no power in any circumstances to decide that question of limitation. I have been also referred to *Rajitagiripathy* v. *Bhavani* (2). That case, however, is clearly distinguishable, for notice had been given to the judgment-debtor and the matter could therefore be held to be res judicata. The decision reported in *Husein Ahmad* v. *Saju Mohammad* (3), so far as it is applicable, is rather against the respondent than otherwise. But it is a judgment of a few lines and the facts are not apparent in their entirety. The answer to the question of the Court's jurisdiction appears to me to be found in S. 3, Lim. Act. It is admitted in this case that no application for execution was made to the Court passing the decree, but merely an application for transfer of the decree. But even had it been otherwise we have clearly an application for execution made to the receiving Court at Allahabad, and by S. 3, Lim. Act, any Court having an application made to it must suo motu determine the question of limitation. The answer to that question may be easy or it may be difficult, but it is manifest that it has not merely power but a duty to determine the question.

(1) [1894] 16 All. 390=(1894) A. W. N. 131.
(2) A. I. R. 1924 Mad. 673=80 I. C. 103=47 Mad. 641.
(3) [1891] 15 Bom. 28.

I therefore set aside the order of the lower Court and return the case to that Court to decide the objection of the judgment-debtor. Costs of this revision will abide the result.

G.P./R.K. *Case remanded.*

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* A. I. R. 1930 Allahabad 701 (1)

SEN, J.

Kallan—Applicant.

v.

Nanhe—Opposite Party.

Civil Revn. No. 44 of 1930, Decided on 23rd May 1930, from order of City Munsif, Bareilly, D/- 5th December 1929.

*** Civil P. C., S. 151 — Inherent jurisdiction to overset former order—Courts can strike out defence and pass ex-parte decree against defendant.**

The Court has an inherent jurisdiction to overset the former order, striking out the defence and passing an ex parte decree against the defendant. The mere fact that the defendant had a right of appeal under Civil P. C., O. 43, R. 1, Cl. (f), from the order striking off his defence does not preclude the Court below from exercising jurisdiction in setting aside exparte decree which has been wrongly and illegally passed. [P 701 C 1]

G. S. Pathak—for Applicant.

P. M. L. Verma—for Opposite Party.

Judgment.—This Court in its exercise the revisional jurisdiction is reluctant to interfere with an order passed by the Court below upon a technical ground of either an error of law or an irregularity of procedure. The revisional jurisdiction has to be exercised with a view to prevent a miscarriage of justice. The order passed by the Court below is preeminently just. The Court had beyond all doubt an inherent jurisdiction to overset its former order, striking out the defence and passing an ex parte decree against the defendant. The mere fact that the defendant had a right of appeal under O. 43, R. 1, Cl. (f), Civil P. C., from the order striking off his defence does not preclude the Court below from exercising its inherent jurisdiction in setting aside an ex parte decree which had been wrongly or illegally passed. The present application for revision does not satisfy the conditions laid down in S. 115, Civil P. C. I accordingly dismiss this application with costs including in this Court fees on the higher scale.

G.P./R.K *Application dismissed.*

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* A. I. R. 1930 Allahabad 701 (2)

SULAIMAN, J.

Sital Prasad—Applicant.

v.

Pearey Lal and *others* — Plaintiffs and Defendants—Opposite Parties.

Civil Revn. No. 18 of 1930, Decided on 6th May 1930. from order of Munsif, Meerut, D/- 19th December 1929.

*** (a) Civil P. C., O. 30, R. 6 — Right of partner sued against in name of firm to appear in suit — Partner's opinion that his rights will not be represented properly by impleaded partner or that his interest is adverse to that of latter — Individual appearance should justly be allowed.**

Rule 6 implies the right of any partner who has been sued against in the name of firm to appear in the suit. If any partner considers that his rights will not be adequately represented by the other partner who has been impleaded, or that his interest is adverse to that of the other partner, it is just and fair that he should be allowed to appear individually and resist the claim. [P 702 C 1]

*** (b) Civil P. C., S. 115 — Suit against firm—Filing of written statement by a partner not permitted — Court's order is final finding as against that partner — Case is "case decided" within S. 115.**

In a suit against a firm an order refusing permission to a partner to file a written statement to resist the claim was passed.

Held : that as the order passed was not appealable and the partner would have no right of appeal from decree which would be passed against the firm in his absence, the case is "case decided" within S. 115. [P 702 C 2]

K. N. Laghate—for Applicant.

S. N. Gupta—for Opposite Parties.

Judgment. — This is an application in revision from an order dated 19th December 1929, passed by the Munsif of Meerut refusing permission to Sital Prasad to file a written statement. The suit was brought by the plaintiffs against the firm of Upper India Trading Company through its proprietor Mahabir Prasad and another defendant. Mahabir Prasad filed a written statement on behalf of the firm pleading inter alia that there was another partner of the firm. At a late stage in the case Sital Prasad appeared claiming to be one of the partners of the firm and applying for permission to file a written statement. His application was resisted by the plaintiffs and has been dismissed.

Under O. 21, R. 50 where a decree has been passed against a firm, execution may be granted against the property of the partnership or against any person who has appeared in his own name under R. 6 or R. 7, O. 30 or who has admitted on the pleadings or has been adjudged to

be a partner as well as against any person who has been individually served as a partner with a summons and has failed to appear. If therefore a decree is allowed to be passed against the firm the partners of it would be handicapped when the time for its execution arrives and they would hardly have any defence to resist its execution against the property of the partnership. An ordinary firm is not a registered corporation, but is merely a partnership which under O. 30 is allowed to be sued in the name of the firm under which business is carried on.

But the real defendants are partners in the firm who are the owners in common of its assets and are liable for its debts. R. 6 of that order provides that when the partners are sued as partners in the name of the firm they shall appear individually in their own names, but that the suit shall nevertheless be continued in the name of the firm. This obviously implies the right of any partner who has been sued against to appear in the case. If any partner considers that his rights will not be adequately represented by the other partner who has been impleaded or that his interest is adverse to that of the other partner, it is only just and fair that he should be allowed to appear individually and resist the claim. In the present case the plea put forward by Sital Prasad is to the effect that the debt sued upon is not one due from the firm at all but from Mahabir Prasad personally and that therefore the firm is not liable. Mahabir Prasad cannot adequately represent Sital Prasad in such a controversy. If Sital Prasad is deprived of the right to defend the claim he would find himself in a helpless position when the time for the execution of the decree comes, and it seems to be against natural justice that Sital Prasad should be prevented from filing the written statement at this stage and yet be held bound by the decree which may be passed against the firm behind his back.

A preliminary objection is taken on behalf of the respondent that no revision lies from this interlocutory order and that therefore this Court has no jurisdiction to set the matter right. The word "case" occurring in S. 115 has not been defined anywhere in the Code, and all that the recent Full Bench has laid down is that no revision lies from the order determining one of the several issues arising in the case while the suit is still pending. So far as Sital Prasad is concerned the Court has come to a final finding as against him and his right to file a written statement has been taken away. So far as he is concerned he is out of Court and the proceeding initiated by him has come to an end. He has no right of appeal from the order nor would he have a right of appeal from the decree which will ultimately be passed against the firm, as he will be no party to it. Much less would it be of any advantage to him when he has not been allowed to produce any evidence to substantiate his plea. I would therefore think that this is a case decided against Sital Prasad within the meaning of S. 115, Civil P. C., and is not a mere adjudication on an issue in a case while the suit is still pending against him.

Even if there were any doubt as regards the applicability of S. 115, I think this Court should interfere in exercise of its power of superintendence under S. 107, Government of India Act, because the order of the Court below is against natural justice. I accordingly allow this application in revision and setting aside the order of the Court below direct that Sital Prasad should be given an opportunity to appear individually in his own name and file a written statement. The applicant will have his costs of this revision from the respondents.

G.P./R.K. *Revision allowed.*

A. I. R. 1930 Allahabad 702

MUKERJI AND BOYS, JJ.

Harbans Deo Rai—Judgment-debtor—Applicant.

v.

Raj Kumar Rai—Decree-holder—Opposite Party.

Execution Second Appeal No. 48 of 1929, Decided on 13th May 1930, from decree of Dist. Judge, Gorakhpur, D/- 2nd May 1928.

(a) Civil P. C., S. 102—Suit on simple bond—Additional prayer to restrain defendant from transferring his immovable property—Suit remains one cognizable by Court of Small Causes.

A suit for money to be recovered on foot of a simple bond remains a suit cognizable by a Court of Small Causes in spite of an additional absurd and fictitious prayer for an injunction to restrain defendant from transferring his im-

movable property : 28 *All.* 293 ; 21 *Bom.* 248 ; 25 *Bom.* 625 and 24 *Mad.* 508, *Foll.*

[P 703 C 2 ; P 704 C 1]

(b) Civil P. C., S. 115—Error in arriving at conclusion cannot be set right in revision.

An error in arriving at the conclusion at which lower Court did arrive cannot be set right by taking up the matter in revision, for error is not an irregularity : 11 *Cal.* 6 (*P. C.*), *Foll.*

[P 704 C 1]

Haribans Sahai—for Applicant.

M. L. Agarwala—for Opposite Party.

Mukerji, J.—This second appeal arose under the following circumstances :

The respondent Rajkumar Ram brought a suit for recovery of a small sum of money, viz. Rs. 185, on foot of a simple bond alleged to have been executed by the appellant Harbans Deo Rai. To the suit, besides the prayer for recovery of the sum of Rs. 185, the plaintiff added a prayer for an injunction restraining the defendant from disposing of his immovable property on the ground that he was likely to dispose of the property on hearing of the suit. The suit was not defended. It was decreed so far as the prayer for recovery of money went, but was dismissed as regards the prayer for injunction. The prayer for injunction was obviously a dodge to oust the jurisdiction of the Court of Small Causes, or to give a right of appeal to the plaintiff if the suit was decided against him. In any case by no conceivable means could the plaintiff have ever thought of there being a chance of his getting an injunction against the defendant restraining him from transferring his immovable property in the very suit in which he claimed the money.

The decree was put into execution and it was transferred for execution to the Court of the Munsif of Deoria. The Court which passed the decree was the Munsif of Gorakhpur.

In the Court of the Munsif of Gorakhpur an objection was filed by the judgment-debtor, the present appellant Harbans Deo Rai, objecting to the execution on the ground that it was barred by limitation. The Munsif held that the execution was not barred by time. Ignoring this judgment the judgment-debtor went before the Munsif at Deoria and raised the same plea of limitation. The Munsif of Deoria held that the application for execution was barred by time. The decree-holder thereupon appealed to the learned District Judge of Gorakhpur, and the Judge in an elaborate judgment came to the conclusion that the judgment of the Munsif of Gorakhpur to the effect that the execution was time barred was an effective judgment and operated as res judicata and the Munsif of Deoria was therefore precluded from coming to a contrary conclusion.

Against this judgment of the learned District Judge of Gorakhpur the judgment-debtor filed an application in revision to this Court. When the application came up for hearing, the judgment-debtor asked that the application might be converted into a second appeal. It was accordingly done.

The first question that arises is whether a second appeal is competent. The suit was no doubt one cognizable by the Court of Small Causes, being a suit for money to be recovered on foot of a simple bond. But it it is said that there was the prayer for an injunction to be issued against the defendant restraining him from transferring his immovable property and thereby hindering the execution of the decree. As we have already stated, that was a prayer which the plaintiff could never hope to gain. It was as absurd a prayer to be added to a suit for money as could possibly have been conceived. It has been held in numerous cases decided by this and other High Courts that a jurisdiction of a Court of Small Causes (for the matter of that of any other Court) could not be ousted by adopting any dodge which is capable of being discovered. The prayer was not bona fide one and, if it was added, it could not oust the jurisdiction of the Court of Small Causes from taking cognizance of the case. No authority is needed for such a clear proposition of law, yet the following cases may be referred to : see *Chhotu* v. *Jawahir* (1), *Narayan Bhaskar* v. *Balaji Bapuji Khot* (2), *Vinayak Gangadhar* v. *Krishnarao Sakharam* (3) and *Harischandra Deo* v. *Narayan* (4). We are therefore of opinion that the suit remained a suit for recovery of money on a simple money bond and therefore

(1) [1906] 28 All. 293=3 A. L. J. 23 =(1906) A. W. N. 29.
(2) [1897] 21 Bom. 248.
(3) [1901] 25 Bom. 625=3 Bom. L. R. 239.
(4) [1901] 24 Mad. 508.

a suit cognizable by a Court of Small Causes in spite of the fictitious prayer added to it. That being our conclusion we are bound to and do hold that no second appeal lay to this Court from a matter arising in the execution of the decree.

The next point is whether we should not take up, as desired by the learned counsel for the judgment-debtor, the matter in revision. To this prayer we find this difficulty that the judgment complained of is the judgment of the learned District Judge. He took cognizance of the matter by way of an appeal and he was competent to hear the appeal. His competence to hear the appeal not being denied, the whole question remains whether, assuming that he made an error in arriving at the conclusion at which he did arrive we can set him right by taking up the matter in revision. There was no question of jurisdiction, for the learned District Judge had jurisdiction to hear the appeal. He committed no irregularity in the matter of hearing the appeal. An error is not an irregularity. The utmost that he may have committed was an error of judgment—we do not suggest that he committed an error. We hold therefore that no revision lies : see *Amir Husain* v. *Sheo Baksh* (5). In the result we dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

(5) [1885] 11 Cal. 6=11 I. A. 237 (P. C.).

A. I. R. 1930 Allahabad 704

KING AND BENNET, JJ.

Dr. Bishambhar Sahi Gupta—Plaintiff—Appellant.

v.

Babu Shambhu Dayal and *another*—Defendants—Respondents.

Second Appeal No. 70 of 1927, Decided on 21st February 1930, against decree of Addl. Sub-Judge, Etawah, D/- 29th May 1926.

(a) Civil P. C., S. 80—Act purporting to be done in official capacity—Meaning explained.

If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term "purport." The motives with which the act was done do not enter into the question at all: *A. I. R.* 1924 *All.* 851, *Foll.*; 7 *A. L. J.* 301 and 26 *All.* 220, *Dist.* [P 705 C 2]

(b) U. P. Municipalities Act (11 of 1916), S. 326—Suit for libel arising out of act done by Municipal Officer prima facie in official capacity—Notice under S. 326 is necessary.

Suit for libel, against a member of the Municipal Board or an officer of the Municipality for an act which prima facie appears to be done in his official capacity requires a notice under the Municipalities Act : 33 *All.* 540, *Ref.* [P 705 C 2]

K. N. Katju—for Appellants.

S. N. Mukerji and *Mukhtar Ahmad*—for Respondents.

Bennet, J.—This is a second appeal brought by the plaintiff whose suit for damages for libel has been dismissed by both the lower Courts. The sole question before us is whether the suit is barred by limitation. The plaintiff is a medical practitioner of the town of Etawah, and as such he was bound to report to the Municipal Board cases of infectious diseases. The facts, as found proved, are that on 29th January 1924 the plaintiff treated a case of plague, and that on 30th January, he wrote a letter reporting the case to the Municipal Board, and sent that letter to the office of the Board, but as no one was there, the letter was returned. He sent the letter again on 31st January, at 6 p. m., and at that time the Municipal Secretary was absent from the office. The head clerk was in the office, and he received the letter. It was accompanied by a despatch book, and in that despatch book no date for sending this letter was entered. The two letters entered above it are dated as sent on 29th January. Accordingly it appeared to the head clerk that an attempt was being made to represent that this letter also was sent on 29th January, whereas the letter itself bore the date 30th January. The head clerk apparently considered that he might get into trouble if he endorsed on the letter or the despatch book that he had received the letter on 31st January. He, therefore, referred the matter to defendant 1, B. Shambhu Dayal, a member of the Municipal Board, who was present in the office. This defendant is also a member of the public health committee, and the reporting of cases of infectious diseases was under the rules of the public health committee. Defendant 1

thereupon made an entry in the despatch book which runs as follows :

"This was received before me at 6-10 p. m. on 31st January 1924, by the office head clerk and brought before me. The letter No. 231 is dated 30th January 1924, and is entered in the despatch register on 29th, i. e., one day before the plague case was examined. What a fancy falsehood."

The cause of action arose on 31st January 1924. On 5th February 1924, plaintiff served a notice to the defendants, claiming from defendant 1, Rs. 2,000 as damages for defamation and an apology. The plaint sets forth in para. 6 that as defendants did not pay the damages and did not apologize, hence the suit is brought. The date of bringing the suit was 30th January 1925, that is it was brought just within the period of one year allowed by the Limitation Act. But the period allowed by S. 326, sub-S. (3), Municipalities Act (Act 11 of 1916) is six months from the date of the cause of action. The question, therefore, is whether S. 326, Municipalities Act applies or not. The plaintiff, although he gave notice to the defendants, now claims in his grounds of appeal that no notice under S. 326, sub-S. (1) was necessary. We may note that the case is now proceeding against defendant 1 only, because a compromise has been entered into with defendant 2 under which the plaintiff has withdrawn the suit against defendant 2.

Both the Courts below have found as a matter of fact that the defendants acted in their capacity of public servants. These findings are based on the circumstances under which the act complained of took place. It has, however, been argued before us that the question as to whether a man acted in an official capacity is not such a question of fact as is concluded by a finding of a lower appellate Court, and reference is made to *Mumtaz Husain* v. *Lewis* (1) where a Bench of this Court had reversed apparently a finding of fact of a lower appellate Court that the defendant had acted in an official capacity. Reference is made to this ruling where it was held that when a public officer employs insulting language to a subordinate and assaults him, the public officer is not entitled to notice under S. 424, Civil P. C., 1882. Reference is also made to *Muhammad Sa*[illegible] *Ahmad* v. *Panna Lal* (2) which was a suit for damages against a Sub-Inspector for wrongful confinement not in good faith, but maliciously and without cause. It was held on p. 222 :

"In the present case it has been found that the defendant did not purport to act in good faith in pursuance of the law, but took advantage of his position as a police officer to commit illegal and tortious acts, maliciously and without cause. He was not, therefore, entitled to any notice under the sections referred to above."

There is, therefore, a distinction in this case of *Muhammad Saddiq Ahmad* v. *Panna Lal* (2), that the defendant did not purport to act in good faith, and therefore it could be said that no notice was required under S. 424, which provides that no suit shall be instituted against a public officer in respect of an act purporting to be done by him in his official capacity. We consider that the two rulings above mentioned are also to be distinguished on the grounds that the acts committed were acts of violence, whereas in the present case the writing of a note in the Municipal Board office is not an act of violence, but is an act which prima facie appears to be done in an official capacity. We would refer to *Abdul Rahim* v. *Abdul Rahman* (3) where it was held that notice was required under S. 80, Civil P. C., for a suit for libel against a Sub-Inspector for entering the name of the plaintiff in the history sheet, although that entry was made maliciously and from improper motives. It was held that S. 80 does not require that the acts should be done in good faith. Further, it was held on p. 886 (*of* 46 *All.*) :

"If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term "purport." The motives with which the act was done do not enter into the question at all."

In *Jugul Kishore* v. *Jugul Kishore* (4) it was held that a suit against a member of the Municipal Board for damages for malicious prosecution [illegible] tiated on his report to th[illegible]

(1) [1910] 7 A. L. J 301=5 I. C. 467.

(2) [1903] 26 All. 220=(1903) A.

(3) A. I. R. 1921 All. 851=46 All

(4) [1911] 33 All. 540=10 I. C. 1 509.

quires notice under the Municipalities Act. Having regard to the principles laid down in these rulings, we consider that the lower appellate Court was correct in holding that defendant-respondent 1 was acting in his official capacity and purported to act in his official capacity when he made the note in question. There is no need to consider whether the note was written from malice or improper motives. The mere fact that the defendant purported to act in his official capacity renders it necessary for the plaintiff to comply with the provisions of S. 326, Municipalities Act, and one of those provisions is that the suit must be brought within six months of the cause of action arising. Accordingly we hold that the suit of the plaintiff-appellant was brought beyond the period of limitation, and we dismiss this appeal with costs to defendant-respondent 1.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 706

SULAIMAN AND KENDALL, JJ.

Sheopujan Rai — Defendant—Appellant.

v.

Bishnath Rai and *others* — Plaintiffs and Defendants—Respondents.

Second Appeal No. 185 of 1928, Decided on 28th March 1930.

(a) Agra Pre-emption Act (11 of 1922), S. 18—Consolidation of suits but separate decrees and judgments—No separate appeals are necessary—Civil P. C., S. 96.

When two suits undoubtedly are in respect of the same transaction and have been connected by making the plaintiff in one, the defendants in the other, and vice versa, it must be assumed that they were consolidated, and even though separate copies of the judgment and the decree be placed on the record of the cases it must be held that there was one consolidated decree and it is not necessary for a party to file more than one appeal provided the party against whom he wants to press his appeal is impleaded as respondent, pro forma or otherwise. [P 707 C 1]

(b) Agra Pre-emption (amended) Act (9 of 1929)—No retrospective effect.

There is absolutely nothing either in the body of the Act, its title, preamble or marginal notes which would indicate that it was intended to have a retrospective effect : *A. I. R.* 1922 *P. C.* 107; *A. I. R.* 1927 *All.* 1 and *A. I. R.* 1927 *Cal.* 763, *Ref.* [P 709 C 1]

(c) Interpretation of Statutes—New enactment passed during pendency of action is not retrospective unless so expressed or enactment procedural.

A new enactment or amendment of already existing enactment passed during the pendency of an action has not a retrospective effect unless either it expressly says so or it lays down a mere rule of procedure which it is the duty of Court to follow. [P 709 C 1]

(d) Interpretation of Statutes — Right to appeal is substantive right and cannot be taken away by subsequent enactment passed during pendency of action—Civil P.C., S. 96.

Right of appeal to a higher tribunal is a substantive right quite different from procedure and cannot be taken away by a subsequent enactment, even though no occasion for the exercise of that right had occurred due to the pendency of the suit : *A. I. R.* 1928 *All.* 437, *(F.B.), Foll.* ; *Colonial Sugar Refining Co. Ltd.* v. *Irving*, (1905) *A. C.* 369, *Ref.* [P 709 C 1]

(e) Agra Pre-emption Act (11 of 1922), S. 20—Deed of gift in favour of ostensible vendee when other vendees have defined and separate interest—Decree in pre-emption suit — All except ostensible vendee submit—Ostensible vendee can resist pre-emptor's claim to the extent of his share.

When sale is in favour of more than one person, all of whom have acquired distinct and defined share, but the sale deed ostensibly stands in the name of one of them and this vendee obtains a deed of gift in his favour during the pendency of the suit even though the other vendees may submit to the pre-emption decree, the ostensible vendee can resist the claim of the pre-emptor on the strength of his gift to the extent of his own fractional share : *A. I. R.* 1926 *All.* 661 and *A. I. R.* 1929 *All.* 53, *Ref.* [P 707 C 2]

Shiva Prasad Sinha—for Appellant.

Krishna Murari Lal — for Respondents.

Kendall, J.—This is an appeal by Sheopujan Rai, defendant, arising out of a pre-emption suit. The facts of this case are complicated and it is therefore necessary to recite them in some detail.

On 22nd July 1925 a sale deed was executed by the vendor in favour of Sheopujan Rai. On 23rd July 1926 a suit, No. 537, was filed by Bishnath Rai to pre-empt this sale. There was another suit No. 538 filed by Tulshi to pre-empt the same transaction. The rival pre-emptors were made pro-forma defendants in each other's suits, and the two suits were connected and tried together. During the pendency of these suits Sheopujan, the vendee, obtained a document purporting to be a deed of gift from one Bindhachal, and on the basis of it took the plea that he was on the same footing as the plaintiffs and had therefore a right to defeat their claim. On 25th August the plaintiffs in both the suits applied to the Court to implead three other persons whose names had not been entered in the sale deed of 22nd August 1925, but whose names had at the instance of Sheopujan Rai been mutated

in the revenue papers. Two more suits were filed to challenge the transaction effected by the deed of gift on the ground that it was really a sale transaction and was liable to pre-emption. It is not necessary to refer to these latter suits any further, inasmuch as there is now a final finding of fact that the transaction was in reality one of gift and not a sale.

The trial Court overruled the defence of Sheopujan, the vendee, on the ground that he had associated with himself three other purchasers, although he had concealed their names, and that the gift being in his favour alone he could not take advantage of it. Both the suits were decreed.

No appeal was preferred nominally in Suit No. 538 by any party ; but two appeals were filed from the main decree in Suit No. 537, one of which was by Bishnath and the other by the vendee Sheopujan Rai.

Bishnath did not pay the pre-emption money in time and his claim stood dismissed. His appeal therefore failed. The lower appellate Court, however, did not allow Sheopujan to press his appeal even as against Tulsi on the ground that he had not preferred any appeal in Suit No. 538 brought by him. The lower appellate Court has also held that the vendee Sheopujan is not entitled to take advantage of the gift because he had in the sale associated with himself certain other strangers.

We think that the lower appellate Court was wrong in not allowing Sheopujan to press his appeal against Tulsi. Apparently his attention was not drawn to the provisions of S. 18, Agra Pre-emption Act. Under that section when two suits for pre-emption in respect of the same transfer are pending, they have to be consolidated and disposed of by a single decree, and it is not necessary for any party aggrieved by such decree to file more than one appeal. The two suits undoubtedly were in respect of the same transaction and had been connected. We must assume that they were consolidated, and even though separate copies of the judgment and the decree were placed on the record of the other case it must be held that there was one consolidated decree, and it was not necessary for Sheopujan to file more than one appeal. Tulsi had been impleaded by him in appeal as a pro forma respondent, and it was therefore open to him press his appeal as against Tulsi.

Having read the judgment of the lower appellate Court we have no doubt in our minds that it intended to find that the three other persons had in fact been associated by Sheopujan in the sale. We must therefore take the finding to be that the sale was really in favour of four persons, although the sale deed ostensibly stood in the name of one of them.

We do not think that it was not permissible to the Court below to record such a finding on the evidence. Sheopujan had himself admitted that these other persons had paid part of the sale consideration and that he had got their names mutated to the extent of one-fourth share each. The plaintiff was no party to that sale deed, and there was nothing to prevent him from establishing a fraud committed by Sheopujan in this way : that he took the sale deed in his own name although there had been a secret arrangement between him and his three associates to purchase the property together, and he actually put them in possession of their respective shares.

If the sale had been a joint one in favour of all these four persons, the view taken by the Courts below would have been perfectly correct. Sheopujan, by taking a gift could not have improved his position when his other three associates were still strangers to the mahal and could be defeated by the plaintiff. But it is clear that each of these four persons has got a defined one-fourth share in the property purchased. In this respect their interests are distinct and separate. The explanation to S. 22, Agra Pre-emption Act, makes it quite clear that the right to claim pre-emption against several joint purchasers cannot be enforced when each purchaser has acquired a defined interest. The other purchasers have submitted to the decree and have not appealed, but Sheopujan has appealed from the whole decree. We think that Sheopujan was entitled to resist the plaintiffs' claim on the strength of his gift to the extent of his own one-fourth share, though that gift was of no avail to him *qua* the remaining shares.

The learned advocate for the plaintiff has next argued that in view of the recent enactment (Act 9 of 1929) it is

not open to Sheopujan to set up this deed of gift in his favour at all. This argument involves a consideration of the question whether this amending Act is applicable to the gift in this pending action. According to the law as it stood before the Agra Pre-emption Act was passed it was quite clear under a series of rulings of this Court that a defendant who took a gift pendente lite and before the first Court's decree could successfully defeat the claim if he thereby acquired the same status as the pre-emptor. After the passing of the Agra Pre-emption Act it was first held by a Bench of this Court in *Qudratunnissa Bibi* v. *Abdul Rashid* (1) that the effect of Ss. 19 and 20 of the Act was to leave the old law intact. The matter came up for consideration before a Full Bench of this Court in *Ram Saran Das* v. *Bhagwat Prasad* (2) which did not agree with the view expressed by the Bench as regards the interpretation put on S. 20, but agreed that the effect of S. 19 of the Act was to maintain the old law. It had been pointed out in *Qudratunnissa's* case (1) that there was a great hardship on pre-emptors, and that this position of the law opened a wide-door for fraud and perjured evidence.

The legislature has intervened and passed Act 9 of 1929 called the Agra Pre-emption (Amended) Act of 1929. The question for our consideration is whether this Act applies to this pending case.

It was open to the legislature to consider that the view taken of the old S. 19 by the Full Bench of this Court was erroneous and to declare the correct law and indicate its original meaning. On the other hand the legislature could have accepted the interpretation put on that section by this Court and amended the law in order to remove the hardship. If the object were to declare the law as it has always stood we would expect that a declaratory Act with retrospective effect explaining the meaning of the legislature would be enacted. On the other hand if the law is to be altered and the hardship removed one would expect the Act to be amended.

The preamble to this Act states :

"Whereas it is expedient further to amend the Agra Pre-emption Act, 1922 . . . . . it is hereby enacted as follows":

There is nothing in the preamble to indicate that the legislature is declaring the law as it has always stood and that its object is merely to remove a doubt and explain its meaning.

Certain words in S. 20 have been removed from one place in the section and inserted at another place. This is obviously to meet a technical objection that had been previously raised. But the most important one is that a new proviso to S. 19 has been added in the following words:

"Provided that no voluntary transfer made in favour of the vendee after the institution of a suit for pre-emption shall defeat any right which the plaintiff had at the date of such institution".

This proviso is in the nature of an exception to the section and not by any means an explanation of it. Prima facie therefore there is no reason to suppose that the Act is a mere declaratory Act with retrospective effect. We may point out that in the case of other Acts which stood on a much stronger footing it has been held that there was no presumption of rerospectiveness. Act 6 of 1913 was described as an Act to declare the rights of Mussalmans to make settlement, and the preamble stated:

"Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith, etc., and whereas it is expedient to remove such doubts."

Nevertheless their Lordships of the Privy Council held in *Solehman Quadir* v. *Salim-Ullah Bahadur* (3) that in view of the phraseology used in the body of the Act it was not retrospective. We may also mention that with regard to Act 27 of 1926, in which the preamble stated:

"whereas it is expedient to explain certain provisions of the Transfer of Property Act etc."

a majority of the Full Bench in *Girja Nandan Kalwar* v. *Hanuman Das Marwari* (4) held that in view of the previous legislation the Act not retrospective. This view was also accepted by the Calcutta High Court in *Napra* v. *Sajer Pramanik*, *A. I. R.* 1927 *Cal.* 763. The legis-

(1) A. I. R. 1926 All. 661=96 I. C. 549=48 All. 616.
(2) A. I. R. 1929 All. 53=113 I. C. 442=51 All. 411 (F.B.).
(3) A. I. R. 1922 P. C. 107=69 I. C. 138=49 I. A. 153=49 Cal. 820 (P. C.).
(4) A. I. R. 1927 All. 1=99 I. C. 161=49 All. 25 (F. B.).

lature then intervened to clarify the law.

The Act before us is nothing like either of these two enactments and there is absolutely nothing either in the body of the Act, its title, preamble, or marginal notes which would indicate that it was intended to have a retrospective effect. We may add that in this Act there are amendments of some other sections also with which we are not at present concerned.

It is well settled that a new enactment passed during the pendency of an action has not a retrospective effect unless either it expressly says so or it lays down a mere rule of procedure which it is the duty of Courts to follow. On the other hand, if the amendment relates to substantive rights, as distinct from the adjective law, it cannot effect vested rights, and therefore would not be applicable to pending actions. In the case of the *Colonial Sugar Refining Co. Ld.* v. *Irving* (5) their Lordships of the Privy Council held that a right of appeal to a superior tribunal was a substantive right quite different from procedure and could not be taken away by a subsequent enactment, even though no occasion for the exercise of that right had occurred because the original suit was still pending. This view was of course accepted by a Full Bench of this Court in the case of *Ram Singh* v. *Shankar Dayal* (6).

It cannot be disputed that a right of pre-emption is a substantive right and is not a mere matter of procedure, even though that right has been conferred by specific provisions of this Act. On the view of the Full Bench which is binding upon us, the defendant under S. 19 has a right to defeat the plaintiffs' claim for pre-emption if he can acquire the same status as the plaintiffs during the pendency of the suit. If a right to appeal is not a mere matter of procedure, a right to defeat the plaintiffs' claim in this way also must be a substantive right. This right was acquired by the defendant on the date when he took the deed of gift, which was before the first Court disposed of the case. It therefore seems to us that that right cannot be taken away by the new enactment which came into force only during the pendency of this second appeal.

The result therefore is that we allow the appeal in part, and modifying the decree of the Courts below decree the plaintiffs, claim with regard to three-fourths share in the property covered by the sale deed dated 22nd July 1925 on payment of three-fourths of the sale consideration within six weeks from the date of the preparation of this Court's decree. His claim with regard to the one-fourth share of Sheopujan will stand dismissed. If there is default in the payment of the pre-emption money within the time fixed the plaintiffs, claim with regard to the three-fourth share also will stand dismissed. As regards costs: in view of the fact that the deed was taken during the pendency of the suit and the defendant has been guilty of fraudulent conduct as well as because the appeal has substantially failed, we direct that the plaintiff should have his costs from the defendant in all Courts including in this court fees on the higher scale, and the defendant shall bear his own costs throughout.

V.B./R.K *Appeal partly allowed.*

(5) [1905] A. C. 369=74 L. J. P. C. 77=92 L. T. 788=21 T. L. R. 513.

(6) A. I. R. 1928 All. 437=111 I. C. 6=50 All. 965 (F. B.).

A. I. R. 1930 Allahabad 709

SEN, J.

Muhammad Ahmad Khan —Applicant.

v.

Jai Chand Lal and *another*—Opposite Parties.

Civil Revn. No. 43 of 1930, Decided on 23rd May 1930, from order of Sm. C. C. Judge, Aligarh, D/- 18th December 1929.

Evidence Act, S. 92—Suit on pro-note—One defendant having "witness" before his signature denying liability — Oral evidence to prove that defendant was executant and hence liable under terms of contract was held to be admissible.

In a suit on pro-note alleged to have been executed by two defendants one of them denied the execution and receipt of consideration and averred that he had signed as an attesting witness, oral evidence to prove that money had been borrowed by both the defendants and that defendant having " witness" before his signature, was one of the executants and not a witness, was allowed.

Held : that the evidence adduced is not at variance with the terms of the contract which is not affected by the word "witness" before defendant's signature and is admissible under S. 92. [P 710 C 1]

M. A. Aziz—for Applicant.

S. B. L. Gaur—for Opposite Parties.

Judgment.—The plantiff's suit was for recovery of Rs. 146 on a promissory note dated 15th June 1926, alleged to have been executed by the two defendants Ali Akbar and Mohammad Ahmad Khan. Defendant 1 did not contest his liability. Defendant 2 repudiated his liability altogether. He denied the execution and the receipt of consideration and averred that he was not the executant of the instrument but only an attesting witness and had signed as such.

The Court below overruled this contention and decreed the suit against both defendants. The finding is clear and categorical and is couched in these terms:

"The evidence of the plaintiff convinces me that both the defendants borrowed Rs. 85 from the plaintiff, that both of them executed and signed the promissory note in suit in Urdu and that defendant 2 was not only an attesting witness as is alleged by him".

It is contended that inasmuch as the defendant had put in the word "witness" before his signature .in Urdu, the Court below was not justified in allowing oral evidence to prove that the money had been borrowed by both the defendants and that defendant 2 was one of the executants of the document and not a witness. No evidence has been adduced in this case at variance with the terms of the contract. The fact that the defendant put the word "witness" before his nose did not affect the contract, the terms of which are not disputed. Where evidence is adduced by the plaintiff that a person signing his name in the promissory note (a document which is not required to be attested) was one of the principal debtors and signed the document in evidence of his due execution, it would have been erroneous on the part of the Court below to rule out the evidence on the ground that it was not admissible under S. 92, Evidence Act. I hold that the evidence was clearly admissible and the finding rests upon legal evidence. The application for revision is therefore not tenable on any valid or reasonable ground. It is accordingly rejected with costs, including in this Court fees on the higher scale.

G.P./R.K. *Revision rejected.*

A. I. R. 1930 Allahabad 710

SEN AND NIAMATULLAH, JJ.

Khunni Mal Narain Das—Plaintiffs—Applicants.

v.

Dwarka Das Baij Nath—Opposite Party.

Civil Revn. No. 99 of 1929, Decided on 13th May 1930.

Evidence Act, S. 34—Scope.

Relevant entries in account books unless corroborated are not sufficient to fasten liability upon a person. [P 711 C 1]

A. P. Bagchi—for Applicants.

S. N. Gupta—for Opposite Party.

Sen, J.—This is an application under S. 25, Provincial Small Cause Courts Act (Act 9 of 1887). Plaintiff applicant instituted a suit for recovery of Rs. 406-14-0 principal and Rs. 77-13-0 interest, in all, Rs. 484-11-0, on the allegation that there were certain transactions between the parties about the purchase and sale of silver bars which terminated in a loss to the plaintiff and that the said loss was recoverable from the defendant.

Plaintiff alleged that he sold 13 bars of silver to the defendant and in his turn purchased four bars from him. The defendant alleged that the plaintiff did not sell more than four bars to him and that, as a matter of fact, he had sold 13 bars of silver to the plaintiff. The findings of the Court below may be summarized:

(1) The defendant purchased 13 bars from the plaintiff and sold four bars to him, and

(2) that these transactions were not of the nature of wager.

The Court below threw out the plaintiff's claim on the ground that the plaintiff had failed to substantiate the loss alleged by him in the plaint. Certain oral evidence was adduced by the plaintiff in support of his claim. This evidence consisted mainly of his statement and that of his munim. The Court below has given reasons for not accepting the said statements. The plaintiff had further produced his account books in support of his case. Entries in the account books are relevant evidence, but they are not by themselves sufficient to charge a person with liability. S. 34, Evidence Act, provides that:

"entries in books of account regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to enquire, but such statements shall not alone be sufficient evidence to charge any persons with liability."

In other words relevant entries in account books unless corroborated are not sufficient to fasten liability upon a person. This is the view which has been taken by the Court below. We are of opinion that this application is without force. It is accordingly dismissed with costs including fees in this Court on the higher scale.

S.N./R.K. *Revision dismissed.*

A. I. R. 1930 Allahabad 711

SEN AND NIAMATULLAH, JJ.

Gayan Singh—Plaintiff—Applicant.

v.

Harbilas and *another*—Defendants—Opposite Parties.

Civil Revn. No. 91 of 1929, Decided on 13th May 1930, from order of Dist. Judge, Agra, D /5th September 1928.

Limitation Act, Art. 158 — "Parties" includes pleaders and other persons authorized to take notice.

"Parties" in Art. 158 cannot be confined to parties personally and includes pleaders and other persons specially authorized by the parties to take notice. [P 712 C 1]

G. Agarwala—for Applicant.

G. N. Kunzru—for Opposite Parties.

Sen, J.— Hakim Gayan Singh had instituted a suit in the Court of the Subordinate Judge of Agra for rendition of accounts on a dissolution of partnership. The suit was directed against Lala Harbilas and three other defendants. The matter was referred to arbitration and an award was given on 27th July 1927. We do not know when this award was filed in Court; and notwithstanding our pressing for this information we have not been able to elicit the exact date when the award was filed. The Court, however, without waiting for the ten days within which an objection could be preferred to the award, made the award a rule of the Court on 29th July 1927. An appeal was preferred. The lower appellate Court set aside the decree passed on the award and remanded the case to the trial Court with the direction that notice of the award should be given to the appellant and an opportunity given to him to file an objection to the award if he were so advised, within the period of limitation prescribed by Art. 158, Lim. Act.

On 17th March 1928, the trial Court made an order in express terms:

"that the parties are to file objections, if any, to the award within the period prescribed by law and the case be put up for orders on 30th March 1928."

This order was communicated to the pleaders of the parties concerned and their initials were obtained on the order-sheet. No objection was filed to the award till 28th March 1928. Admittedly the objections were filed beyond the time prescribed by Art. 158. The plaintiff, however, prayed for the period of limitation being extended in his favour under S. 5, Lim. Act, upon the ground that his son had mysteriously disappeared from home and that he was away from his house in search of his son for a number of days and did not return till the evening of 27th March 1928. He prayed that this period should be deducted. The Court below very properly refused to accede to this request. It was not within the descretion of the Court to enlarge the time prescribed by Art. 158 by invoking the aid of S. 5. It held that the objections were filed beyond ten days prescribed by law, overruled the objection and made the award a rule of the Court.

An appeal was presented to the lower appellate Court on the ground that the period ought to have been extended under S. 5, Lim. Act. The lower appellate Court held and rightly held that the plaintiff applicant was not entitled to invoke the aid of S. 5, Lim. Act. It further found that the decree having been passed in accordance with the award no appeal lay to it. It therefore dismissed the appeal.

The applicant comes before this Court in revision under S. 115, Civil P. C. This is not a case in which there has been an erroneous assumption of non-exercise or irregular exercise of jurisdiction. It is clear to us that under the circumstances the present application for revision is not competent under S. 115, Civil P. C. Reliance has been placed upon the phraseology of Art. 158, Lim. Act (Act 9 of 1908) under which the period for objections is ten days from the date when the award is filed in Court and notice of the filing has been

given to the parties. It has been contended that no notice of the award was given to Hakim Gayan Singh, plaintiff, and that the notice given to his pleader was not a notice given to the party concerned within the meaning of this article. No authority has been cited in support of this proposition. "Parties" in Art. 158 cannot be confined to parties personally and includes pleaders and other persons specially authorized by the parties to take notice. The pleader to whom notice was given was a person so authorized. This application is without force and is dismissed with costs including in this Court fees on the higher scale.

S.N./R.K. *Revision dismissed.*

A. I. R. 1930 Allahabad 712

SULAIMAN, J.

Sheo Das and *others*—Defendants — Appellants.

v.

Sheo Dayal Singh—Plaintiff — Respondent.

Second Appeal No. 1752 of 1928, Decided on 6th May 1930.

Evidence Act, Ss. 74 and 75—Abstract statement prepared by patwari even though based on papers in his possession and filed in suit is only private document.

An abstract statement prepared by a patwari, even though based on papers in his possession and filed in a suit, is only a private document, and a certified copy of it does not by itself prove the original. The original should be summoned and formally proved. [P 712 C 2]

K. C. Mital and *Kedar Nath Sinha*—for Appellants.

K. N. Laghate—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for a perpetual injunction against the defendants restraining them from interfering with the plaintiff's possession over plots included is Lists A and B of the plaint. The main question in dispute was whether the plaintiff, who was the lambardar, was in exclusive possession of these plots and the defendants were wrongfully interfering with his possession by granting leases of some of those plots. The first Court decided in favour of the defendants holding that the plots in dispute have not been in sole possession of the plaintiff and dismissed the suit. On appeal by the plaintiff the lower appellate Court has held otherwise and decreedt he claim. The finding as to the exclusive possession of the plaintiff over the plots in question is prima facie a finding of fact and binding in second appeal.

The learned advocate for the defendants, however, contends that the learned Judge has based his finding on Ex. 4 and a chart which were not admissible in evidence. The first Court had rejected these as unreliable and inconclusive. Ex. 4 purports to be a certified copy of some statement prepared by a patwari and filed in a revenue Court. The copy has apparently been obtained from that record. The lower appellate Court has treated this copy as if it were a certified copy of a public document, which is admissible without further proof. This is not so. An abstract statement prepared by a patwari, even though based on papers in his possession and filed in a suit, is only a private document and a certified copy of it does not by itself prove the original. The original should have been summoned and formally proved.

The chart was really prepared by the plaintiff's vakil for the guidance of the Court and submitted after the arguments were nearly over. So far as it was prepared merely for the sake of convenience there could be no objection to it, but it also is based substantially on Ex. 4 which is inadmissible. I therefore think that the Court has acted illegally in basing its finding on Ex.4 and the chart, and the finding, though one of fact, is vitiated in consequence. The trial, however, is not vitiated so long as it is possible to base the finding on the other evidence excluding those that are inadmissible: S. 167, Evidence Act. I accordingly send down the following issue for a finding by the lower appellate Court:

"Excluding from consideration Ex. 4 and the chart so far as it is based on that exhibit, has the plaintiff proved that he has been in exclusive possession of all or any of the plots in dispute ?"

No further opportunity for producing fresh evidence would be allowed. The finding may be returned within two months from this date if practicable. The usual ten days will be allowed for objections.

S.N./R.K. *Case remanded.*

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* A.I.R. 1930 Allahabad 713
Full Bench

SULAIMAN, MUKERJI AND NIAMATULLAH, JJ.

Ram Iqbal Rai — Defendant—Applicant.

v.

Telessari Kuari and *another*—Plaintiff and Defendant — Opposite Parties.

Civil Revn. No. 72 of 1929, Decided on 27th June 1930, from order of Addl. Sub-Judge, Ballia, D/- 22nd Decembe 1928.

(a) Agra Tenancy Act (1926), Ss. 268 and 269 — Suit initially cognizable by revenue Court — No provision for appeal to civil Court—S. 269 is not applicable.

Section 269 refers to the same class of suits as are referred to in S. 268, and such suits are those which may be instituted in a civil or revenue Court and from which an appeal lies to the District Judge or the High Court. S. 269 is not applicable to a case where the suit is initially cognizable by a revenue Court and in which under the provisions of the Tenancy Act no appeal is provided for to the civil Court : 3 *A. L. J.* 226 ; 24 *I. C.* 700 and *A.I.R.* 1922 *All.* 372 *Appr.* 2 *A. L. J.* 119 ; 16 *I. C.* 1007 ; 33 *All.* 479 ; *not. Foll* : *A.I.R.* 1926 *All.* 58, *Ref.* [P 716 C 1P 719 C 2]

***(b) Civil P.C., S. 115—Subordinate Court legally incompetent to try suit—Appellate Court ordering it to hear and dispose of it —Appellate Court acts without jurisdiction.**

An appellate Court has no jurisdiction to order a subordinate Court, which is legally not competent, to try a suit and dispose of it, and that if it does actually order the subordinate Court to dispose of the case it acts without jurisdiction and also acts illegally in the exercise of its jurisdiction. If therefore an order of this kind is passed it is open to be revised both under Cl. (a) and Cl. (c), S. 115, Civil P.C.; *A. I. R.* 1926 *P.C.* 142 ; *A. I. R.* 1930 *All.* 434 ; 39 *Mad.* 195 ; *Davies* v. *Kennedy*, (1869) *Ir.* 3 *Eq. R.* 31 ; 8 *All.* 111 ; 15 *Bom.* 148 ; 32 *Cal.* 146 and *A. I. R.* 1930 *All.* 158, *Ref.* 25 *All.* 509. *Doubted.* [P 717 C 1]

Ambika Prasad and *Jwala Prasad Bhargava*—for Applicant.

Baleshwari Prasad — for Opposite Parties.

Niamatullah, J. — This revision arises in the following circumstances : The plaintiff filed a suit in the Court of the Munsif of Ballia for a declaration of her title to 17 bighas odd of tenancy including two groves, and in the alternative for recovery of possession against the defendants. She of course did not implead the landholder. In paras. 6, 7 and 8 it was admitted that defendant 1, although he had no right to the property had got his name entered in the column of remarks as being in possession of a portion of the plot, that the name of defendant 2 was recorded in the revenue papers though merely for her consolation, that the zamindar applied for the expungement of the name of the defendant (defendant 1), from the record on which defendant 1 took objections ; later on the zamindar in collusion with defendant 1 had his application struck off and although the plaintiff has been in possession of the lands in dispute defendant 1 on the strength of the said order was interfering with the plaintiff's possession. She alleged that although the name of defendant 2 stood recorded in the papers jointly with that of the plaintiff she was really not objecting to the plaintiff's rights. She claimed a declaration of title and in the alternative recovery of possession if by reason of the entry of the name of defendant 1 along with that of the plaintiff it be considered that the plaintiff has been dispossessed.

The defendant denied that the plaintiff was the tenant of the lands in dispute and set up his own tenancy and claimed that he was paying rent to the zamindar. He further pleaded that the suit was not cognizable by the civil Court. The learned Munsif came to the conclusion that the suit ought to have been filed in the revenue Court and returned the plaint for presentation to the proper Court. On an appeal from this order preferred by the plaintiff the lower appellate Court has come to the conclusion that the suit was cognizable by the civil Court and has accordingly set aside the order returning the plaint and remanded the case to the Court of first instance for restoration to its original number and disposal according to law.

Defendant 1 has come up in revision before us and challenges the propriety of the order of the lower appellate Court.

On a perusal of the plaint the substance of which has been given by us above we are of opinion that the plaintiff was admitting that defendant 1, on the strength of the entry of his name in the revenue papers, was really claiming to be himself the tenant and was interfering with the plaintiff's possession. It was on this account that she

claimed recovery of possession in the alternative. The suit therefore was undoubtedly one against a person claiming through the landholder within the meaning of S. 99 (1) (b), Agra Tenancy Act, so far as the relief for possession was concerned and within the meaning of S. 121 (2) so far as the relief for a declaration went. In view of the pronouncement of the Full Bench in the case of *In re Ananti* v. *Chhannu* (1) we are of opinion that on the plaint as it was filed this was a case which was cognizable by the revenue Court and not by the civil Court, and that therefore the conclusion of the Munsif was right.

The next question for consideration is whether S. 269, Tenancy Act, applied to the case in which event the District Judge would have jurisdiction to remand the case either to the subordinate civil or revenue Court and his order would be final and no objection can be taken or raised in appeal or otherwise to his order. If however S. 269 were wholly inapplicable to this case then the second question would be whether the case falls under S. 115, Civil P. C. and a revision lies from that order.

On the first point there appears to be a considerable conflict of opinion in this Court. The language of S. 269 is similar to that of S. 197, Agra Tenancy Act (Act 2, 1901), which was interpreted differently in several cases while that Act was in force. On the one hand we have *Badam Singh* v. *Mt. Sabta Kuar* (2), *Ram Narain* v. *Rampat* (3) and *Naubat Singh* v. *Baldeo Singh* (4) which seem to lay down that old S. 197 would apply where an appeal has been preferred to the District Judge. As against these there are the cases of *Ram Charan Ram* v. *Sheoraj* (5), *Bechu Sahu* v. *Nandram Das* (6) and *Jagannath* v. *Balwant Singh* (7) which suggest the contrary view.

The former view is based on a liberal interpretation of the section and lays down that so long as the decision of the Court in which a suit has been instituted, whether made rightly or wrongly, is a decision from which an appeal lies to the District Judge, the section is applicable.

The view accepted in the latter set of cases is that the provisions of the section apply only to suits in which an appeal lies in any event to the District Judge or the High Court, whether that suit was instituted in the first instance in the civil Court or revenue Court, and that if the suit were instituted in the revenue Court and no appeal would lie in the District Judge, this section is not applicable. A further difference of opinion has arisen on the question whether if on a plea of proprietary title or jurisdiction raised by the defendant an appeal would lie to the District Judge under S. 242, the applicablity of S. 269 would or would not follow as a matter of course. The point has not been so far considered by any Full Bench and we have therefore no final authoritative pronouncement on this question. It seems advisable that this conflict of opinion should be set at rest, particularly as the question is one which arises frequently.

There is some difference of opinion on the second question as well. The argument on behalf of the applicant is that the District Judge, by ordering the Munsif who had no jurisdiction to hear the suit to try it, has acted without jurisdiction or acted illegally in the exercise of his jurisdiction by compelling that Court to try that case. It is contended that the order of the Judge by which he sends a case to be tried by a Court not competent to try it can be revised. The learned advocate for the respondent however contends that an appeal from the order returning the plaint was provided under the law and the District Judge had jurisdiction to hear the appeal and dispose of it, that he has heard the appeal, expressed his opinion as regards the interpretation of the plaint and remanded the case. He has therefore acted within his jurisdiction and even though his judgment on the question of law may be erroneous, he has neither acted without jurisdiction nor acted illegally in the exercise of his jurisdiction and therefore the case does not fall within the purview of S. 115, Civil P. C. The cases which show some conflict even on this point are as follows:

(1) A. I. R. 1930 All. 193=124 I.C. 540 (F.B.).
(2) [1905] 2 A. L. J. 119.
(3) [1912] 16 I. C. 1007.
(4) [1911] 33 All. 479=9 I. C. 666.
(5) [1906] 3 A. L. J. 226.
(6) [1914] 24 I. C. 700.
(7) A. I. R. 1922 All. 372=68 I. C. 217=44 All. 692.

Jwala Prasad v. *E. I. Ry. Co.* (8) and *Chandu Lal* v. *Koka Mal* (9), where it was held that no revision would lie from an order of the District Judge passed in appeal deciding which Court had jurisdiction. On the other hand we have *Bisheshar Prasad Panday* v. *Raghubir* (10) and *Abdul Hakim* v. *Mukarram Ali*.(11). It is unnecessary to mention other cases on this point.

We are therefore of opinion that it is necessary to refer the following two points for the consideration of a higher Bench :

(1) Whether S. 269 is applicable to a case if the appellate Court on a wrong view of the admissions contained in the plaint sets aside an order returning the plaint and remands the case to the Munsif's Court for disposal although the suit was really not cognizable by that Court.

(2) If S. 269 is inapplicable to such a case whether the High Court can interfere with the order in revision.

We accordingly direct that this case be laid before the Honourable Chief Justice for the constitution of a Full Bench.

Sulaiman, J. — This is a reference to a Full Bench on two questions of law on which there has been conflict of opinion. The suit was filed in the Court of the Munsif, who held that it was not cognizable by a civil Court and returned the plaint for presentation to the revenue Court. On appeal to the District Judge, the latter came to the conclusion that the suit was triable by the Munsif and set aside the order returning the plaint, and remanded the case to that Court for being restored to its original number on the file and disposed of according to law.

The defendant has come up in revision to the High Court and challenges the order of the District Judge on the ground that he had no jurisdiction to send the case to the Munsif's Court which was incompetent to try the case. A preliminary objection is taken on behalf of the respondent that no revision at all lies from this order.

The Bench which first heard the case came to the conclusion that having regard to the allegations contained in the plaint, the plaintiff must be deemed to have admitted that the defendant was claiming title to the agricultural lands in dispute through the landholder, and that therefore the suit was one whichfell within the scope of S. 99 (1) (b) of the new Agra Tenancy Act and was cognizable by the revenue Court only, and that even as a suit for declaration of title as to the tenancy it was of the nature of a declaratory suit within the meanof S. 121, sub-Cl. (2) of that Act. The Bench accordingly came to the conclusion that the Munsif had no jurisdiction to entertain the suit and that the order of the Judge holding that he had jurisdiction was quite wrong.

The two points which have been referred to us are as follows :

"(1) Whether S. 269 is applicable to a case if the appellate Court on a wrong view of the admission contained in the plaint sets aside an order returning the plaint and remands the case to the Munsif's Court for disposal although the suit was really not cognizable by that Court ?

(2) If S. 269 is inapplicable to such a case, whether the High Court can interfere with the order in revision ?"

On the question of the applicability of S. 269, which corresponds to the old S. 197, there has undoubtedly been a conflict of opinion. It is not necessary to review all the authorities, but it may simply be pointed out that in the case of *Badam Singh* v. *Mt. Sabta Kuar* (2) followed in the case of *Naubat Singh* v. *Baldeo Singh* (4) it was laid down that where an appeal lies to the District Judge in a suit filed in the civil Court the Judge has authority to proceed under S. 197 and remand the case either to the civil or to the revenue Court. On the other hand, in the case of *Ram Charan Ram* v. *Sheoraj* (5), followed in the case of *Bechu Sahu* v. *Nandram Das* (6) and in the case of *Jagannath* v. *Balwant Singh* (7) it was specifically laid down that S. 197 would be applicable only to those cases in which an appeal would have lain to the District Judge if the suit had been instituted in the revenue Court.

The language of the corresponding section in the new Act has not been in any way materially altered. S. 268 provides that

"when a suit is instituted in a civil or revenue Court an appeal lies to the District Judge or High Court,"

an objection that the suit was in the wrong Court should not be entertair

(8) [1918] 46 I. C. 99.
(9) A. I. R. 1921 All. 226=61 I. C. 86=43 All. 334.
(10) A. I. R. 1926 All. 58=90 I. C. 353=48 All. 168.
(11) A. I. R. 1930 All. 158=124 I. C. 478.

by the appellate Court unless it had been taken in the Court of first instance. S. 269 lays down that if in any such suit such objection was taken in the Court of first instance but the appellate Court has before it all the materials necessary for the determination of the suit, it shall dispose of the appeal as if the suit had been instituted in the right Court. But if the appellate Court has not before it all such materials and remands the case, or remands and refers issues for trial, it may direct its order either to the Court in which the suit was instituted or to such Court as it may declare to be competent to try the same.

There can be no doubt that S. 269 refers to the same class of suits as are referred to in S. 268, and such suits are those which may be instituted in a civil or revenue Court and from which an appeal lies to the District Judge or the High Court. The language unfortunately is not very happy to me and this has been the main cause of the conflict of opinion. But it seems to me that that section refers to a suit which is of such a nature that an appeal is provided to the civil Court and not to the revenue Court. Ordinarily, in every suit filed in the Court of a Munsif an appeal would lie from his decree to the District Judge.

If Ss. 268 and 269 were to be given a wide scope, the result would be that all suits which are expressly laid down to be cognizable by revenue Courts could be filed in a civil Court, with a power in the District Judge to direct that they should be disposed of by the subordinate civil Court. This would be tantamount to ousting the jurisdiction of the revenue Courts in most cases. In the Tenancy Act a large number of suits are expressly made triable by revenue Courts with appeals to the Collector or the Commissioner, in which the District Judge or the High Court has been given no power of interference. It could not have been the object of the legislature to take these cases out of the cognizance of the revenue Court.

Section 230, Tenancy Act, in particular provides that subject to the provisions of S. 271, all suits and applications of the nature specified in Sch. 4 shall be heard and determined by the revenue Courts, and no Courts other than a revenue Court shall, except by way of appeal or revision as provided in this Act, take cognizance of any such suit or application. It therefore appears to be contrary to the purposes of S. 230 that the District Judge should have power to direct cases cognizable only by the revenue Court to be tried by the civil Court, merely by reason of the fact that the plaintiff has chosen to file a suit in such Court.

From the mere fact that the defendant has objected to the jurisdiction of the civil Court, it does not follow that he would have equally objected to the jurisdiction of the revenue Court, if the suit had been filed there. So it is impossible to treat the suit as one in which an appeal lies to the District Judge under S. 242 (3).

I am therefore in full agreement with the view expressed by Richards and Piggot, JJ., in the cases of *Ram Charan Ram* v. *Sheoraj* (5) and *Bechu Sahu* v. *Nandram Das* (6) which has been accepted in the most recent case of *Jagannath* v. *Balwant Singh* (7), that S. 269 would be applicable to only those classes of cases where, if the suit were filed in the revenue Court an appeal would still lie to the civil Court.

The same view was accepted to some extent in the case of *Bisheshar Prasad Pandey* v. *Raghubir* (10). There is however a passage on p. 86 (of 24 *A.L.J.*) of the report, which passage does not appear in the authorized reports (46 *All.* 168) to the effect that

"both (Ss. 196 and 197) assume that the trial Court has entertained the suit and disposed of it on the merits."

I regret that I did not appreciate the full significance of this passage in the judgment of my learned colleague Daniels, J., at the time when the judgment was delivered or I overlooked it. On a reconsideration I am of opinion that there is no justification for confining the operation of S. 269 to only such a class of cases. It therefore follows that the view taken by the learned Judge that the Munsif had jurisdiction to entertain the suit was quite wrong and the result of the order passed by him is to compel the Munsif, who is not competent to try the suit, to hear it and dispose of it.

Section 269 not being applicable it is clear that its sub-S. (3) does not stand in the way of our interfering in revision in case we can do so under S. 115, Civil P. C.

The next question is whether under such circumstances we have power to interfere on the revisional side and can set aside the order. The learned advocate for the respondent contends strongly that the learned Judge had jurisdiction to entertain the appeal and to hear it and to dispose of it. He might have come to an erroneous conclusion of law but he had power to remand the case, and accordingly he has neither acted without jurisdiction nor has acted illegally or with material irregularity in the exercise of his jurisdiction, and that therefore the High Court has no power to interfere under S. 115, Civil P. C.

As to the scope of this section also the authorities are not all one way. Their Lordships of the Privy Council have recently laid down that S. 115, Civil P. C., has application to cases of absence of jurisdiction, refusal to exercise jurisdiction and illegality or irregularity in the exercise of jurisdiction. That section would not be applicable where no question of jurisdiction is at all involved: vide *Umed Mal* v. *Chand Mal* (12).

It seems to me that an appellate Court has no jurisdiction to order a subordinate Court which is legally not competent to try a suit, to hear it and dispose of it and that if it does actually order the subordinate Court to dispose of the case, it acts without jurisdiction and also acts illegally in the exercise of its jurisdiction. If therefore an order of this kind is passed it is open to be revised both under Cl. (a) and Cl. (c), S. 115, Civil P. C. Section 115 was applied by a Bench, of which I was a member, in a case which was somewhat similar in facts, namely, *Khelari* v. *Har Prasad* (*A.I.R.* 1930 *All.* at p. 434), in which also the plaint had been returned by the Munsif for presentation to the revenue Court and the District Judge had set aside that order. We interfered in revision. In a somewhat similar case, *Vuppuluri Atchayya* v. *Sir Kanchumarli Chandra Rao* (13) Wallis, C. J., came to the conclusion that the High Court could interfere under the third part of S. 115, whereas Sundara Ayyar, J., came to the conclusion that he could interfere under the first part, but a third Judge thought that none of the two parts of the section was applicable. It seems to me that in a case of this kind the order of the Judge amounts both to an assumption of jurisdiction which was not vested in him, namely to compel a Court not competent to try a case to hear it, as well as to acting illegally in directing that Court to dispose of the suit. The High Court therefore has power to interfere. It is not necessary to rely on the case of *C. Ross Alston* v. *Pitamber Das* (14), in which Banerji, J., delivered a dissenting judgment. That case, to my mind, is of doubtful authority inasmuch as there is a clear distinction between a civil Court having no jurisdiction to try a suit and the plaintiff not having a cause of action or locus standi to maintain it. If in that case the Munsif had come to the conclusion that the plaintiff had no right to sue, the suit would have been dismissed on the merits and the plaint would not have been returned for presentation to another Court.

The result therefore is that the mere fact that there was an appeal preferred to the District Judge did not cure the initial defect that the Munsif had no jurisdiction to entertain the suit and did not confer upon the Judge power to direct the Munsif to dispose of it; and therefore the High Court has power to set aside the order of the District Judge.

I would accordingly answer the first question in the negative and the second question in the affirmative.

Mukerji, J.—This is a reference to a Full Bench to decide two questions of law, namely:

(1) Whether S. 269, Tenancy Act, 1926, is applicable to a case if the appellate Court on a wrong view of the admissions contained in the plaint, sets aside an order returning the plaint and remands the case to the Munsif's Court for disposal although the suit was really not cognizable by that Court? (2) if S. 269 is inapplicable to such a case, whether the High Court can interfere with the order in revision?

To answer this reference, we have to assume that the suit instituted in the Court of the Munsif was one not cognizable by a civil Court, according

(12) A. I. R. 1926 P. C. 142=99 I. C. 749=53 I. A. 271 (P.C.).

(13) [1916] 39 Mad. 195=18 I.C. 555.

(14) [1903] 25 All. 509=(1903) A.W.N. 104 (F.B.).

to the provisions of the Tenancy Act of 1926, and further that, in it, no appeal, if the case had been tried by a revenue Court, lay to the civil Court. The Munsif being of opinion that the suit was not cognizable by him directed that the plaint be returned to the plaintiff for presentation to the proper Court. The plaintiff was not satisfied with this order and he filed an appeal to the learned District Judge. The learned District Judge came to the conclusion that the suit was cognizable by the Munsif. Thereupon he set aside the order of the return of the plaint and directed the Munsif to take cognizance of the suit.

The defendant has come up in revision and the two questions that have been set forth for our decision have arisen.

First, it is urged that the fact that the District Judge took cognizance of the appeal cured the defect of jurisdiction, if there was any. Secondly, the District Judge having taken cognizance of the case, no application in revision lay and this Court has no power to revise the order of the District Judge: see sub-S. (3), S. 269, Tenancy Act.

On both the points there is mass of conflicting case law and in view of the fact that my learned brother has noticed some of the cases, I do not propose to go into the case law at all. The object of this Bench is to settle the law once for all for this Court, and no useful purpose will be served by examining the conflict of opinion. It is clear that on both the points much can be said.

As regards the first question that has been referred to us we have to see, to start with, what is the meaning of S. 268, Tenancy Act of 1926; for the interpretation to be put on S. 268 would determine the interpretation to be put on S. 269. S. 269 reads as follows:

"When in a suit instituted in a civil Court or revenue Court, an appeal lies to the District Judge or High Court, an objection that the suit was instituted in the wrong Court shall not be entertained by the appellate Court unless such objection was taken in the Court of first instance; but the appellate Court shall dispose of the appeal as if the suit has been instituted in the right Court."

The words that require special consideration are:

"In a suit instituted in a civil or revenue Courtan appeal lies to the District Judge or High Court."

The question is whether the words "civil or revenue Court" have any material bearing on the interpretation of this section or whether they are more or less redundant. It will be noticed that the section is talking of appealable suits. Therefore, so far as the civil Courts are concerned, the Small Cause Court is out of contemplation. That being so a suit can be instituted either in a civil Court or in a revenue Court and there is no third Court which can take cognizance of it. No "suit" can be intituted in a criminal Court, which is the only kind of Court that is not mentioned in S. 268. In my opinion therefore the words "instituted in a civil or revenue Court" have no bearing on the interpretation of the section. The important words are in my opinion:

"when in a suit an appeal lies to the District Judge or High Court."

That this interpretation is correct would appear from the fact that S. 230, Tenancy Act, lays down that except by way of an appeal or revision, in respect of suits and applications described in the several schedules, furnished at the close of the Act, a civil Court is prohibited from taking cognizance. Apparently on the provisions of S. 230 a conflict of jurisdiction was likely to arise. It was to settle the difficulties that might arise owing to this conflict of jurisdiction that Ss. 268 and 269 were enacted. What the legislature contemplates by Ss. 268 and 269 is this: Here is a suit, and it may be filed, according as the plaintiff is advised, in the civil Court or in the revenue Court. A dispute about jurisdiction may arise. What then is to be done? The legislature provides by S. 268 that in the case of a suit in which, from its nature, an appeal would lie according to the provisions of the Tenancy Act to the District Judge or to the High Court, no objection as to jurisdiction shall be taken in appeal, unless that objection has been taken in the Court of first instance. The reason for this rule would be that in certain cases the civil Court has jurisdiction to hear the appeal. Where the civil Court (either the District Judge or the High Court) rightly hears the appeal the initial mistake in the institution of the suit may be cured, because the appellate Court being the Court which would hear an appeal from civil and revenue Courts, sets the

matter right. On the other hand there may be suits in which no appeal lies under the Tenancy Act to the District Judge or to the High Court at all. It is not likely that in such cases it was contemplated that a decision of an appellate Court, which has no jurisdiction to hear the appeal, would cure the defect in the initial institution of the suit.

If the contention to the contrary is accepted, the result would be as has been pointed out by my learned brother Sulaiman, J., that the safest course for a plaintiff would be to institute his suit in the civil Court. When he files a suit either before a Munsif or a Subordinate Judge an appeal would go as a matter of course to the District Judge or to the High Court and then no question of jurisdiction would be allowed to be urged, and even if it be heard, the suit can never be thrown out on the ground of want of jurisdiction. I would not lay much stress on the argument of expediency. I would like to look at the section in the light of the entire frame of the Act of 1926. It is not necessary to repeat what I have said. I however lay emphasis on the point that the Act itself divides the suits, with which it deals, into several classes and for some cases it provides the civil Court as the appellate Court. In other cases the appellate Courts are the Collector or the Commissioner. It was therefore necessary to mention in S. 230 that of the suits of which cognizance had to be taken by the revenue Court, no other Court should take cognizance, except by way of appeal or revision. In S. 268 it follows that the reference to the suit is to the nature of the suit and to its character and not to the fact where it has been instituted.

If I am right in this view it follows with regard to S. 269 that the District Judge or High Court would properly exercise jurisdiction only where, having regard to the nature of the suit and to its character an appeal is provided for in the Tenancy Act itself, as lying in their Court.

We have assumed for the purposes of the reference that from the nature of the suit no appeal would lie to the civil Court from the decision of the revenue Court. That being the case the District Judge would not be in a position to pass an order contemplated by S. 269, Tenancy Act. In this view the order of the District Judge as to what Court should try the case is open to question in appeal or in revision.

My answer therefore to the question No. 1 is that S. 269 is not applicable to a case where the suit is initially cognizable by a revenue Court and in which, under the provisions of the Tenancy Act no appeal is provided for to the civil Court.

I now come to the second question which relates to the jurisdiction of the High Court to interfere.

The Munsif having held that he had no jurisdiction an appeal was filed to the District Judge by the plaintiff and the learned Judge held that the Munsif had jurisdiction. It is contended before us that the District Judge in hearing the appeal acted within his jurisdiction and therefore S. 115, Civil P. C., has no application. Cl. (a), S. 115, states as one of the cases in which the High Court can exercise revisional jurisdiction :

"Where a Subordinate Court appears to have exercised a jurisdiction not vested in it by law."

There can be no doubt that in this particular case, the District Judge, if the suit had been filed before him, would not have been competent to exercise jurisdiction and could not try the suit. The argument that has been advanced on behalf of the plaintiff, the respondent before us, is that although the District Judge himself could not exercise the jurisdiction and hear the suit, if it had been instituted in his Court, he having directed the Munsif to go on with the suit and to try it, the High Court is powerless to interfere. In other words, if the District Judge who is the principal Court of original civil jurisdiction, if he himself had taken cognizance of the suit, we could interfere on the ground that he was exercising a jurisdiction not vested in him. Yet, if he directs a subordinate Court to do what he himself could not do, we have no power to interfere. This is a very anomalous position and certainly is a position which could not have been allowed by the legislature. When we interpret an Act we are entitled to see what was the mischief contemplated of the correction of which the rule to law was directed. This was held in the case of *Davies* v. *Kennedy* (15) by Chris-

(15) [1869] 3 Ir. Eq. R. 31=17 W.R. 305.

tian, L. J. Although the actual decision in the case was upset by the House of Lords later on this dictum of Christian, L. J., was never taken exception to. We find that S. 115, Civil P. C., is a remedy given to the High Court to apply in order to rectify mistakes as to jurisdiction. When a Court trying a suit has no jurisdiction it is necessary that the mistake should be corrected as speedily as possible. We must, therefore, take it that we have jurisdiction to correct a District Judge, if he sat as the principal Court of original civil jurisdiction. We have also an authority within S. 115, Civil P. C., to correct him, when he, the District Judge, sitting as an appellate Court, directs his subordinate Court to do what he himself could not do. I take it that in thus reading Cl. (a), S. 115, Civil P. C., I am interpreting it in its true spirit.

Coming to authorities, I find that except in a few cases which are comparatively small, this jurisdiction has been exercised by the High Court in a large number of cases. The Allahabad High Court, in a Full Bench case, decided by five Judges, *Badami Kuer* v. *Dinu Rai* (16), interfered where there had been an appeal to the District Judge. The same view was taken in *Vuppuluri* v. *Sir Kanchumarli*(13), *Visvanath* v. *Rambhat* (17) and *Zamiran* v. *Fateh Ali* (18), and lastly in this Court in *Abdul Hakim* v. *Mukarram Ali* (11).

I have no doubt as to the jurisdiction of this Court and I would therefore answer the second question in the affirmative.

Niamatullah, J.—I agree with my learned colleagues in answering the first question in the negative and the second in the affirmative, and would make a few observations of my own in support of the conclusions they have arrived at.

Sections 268 and 269, Agra Tenancy Act 3, 1926 should, in my opinion, be read with other sections of that Act, specially S. 242, which provides for appeals in certain cases lying to the District Judge and not on the revenue side. Those cases are specified in Group A, Sch. 4, appended to it. Reading Ss. 268 and 269 with S. 242 and the particulars of suits in Group A, Sch. 4, the language employed in S. 269 should present no difficulty. To bring out the substance of the material part it may be paraphrased as follows:

If in a suit whether instituted in a civil or revenue Court the form of appeal is necessarily the Court of the District Judge or the High Court and an objection that the suit was instituted in the wrong Court was taken before the Court of first instance, the appellate Court may direct the trial of the suit either by the civil Court or the revenue Court subordinate to it.

Section 269 applies only to cases in which, if rightly instituted in civil or revenue Court, an appeal lies to the District Judge according to law and cannot, consistently with the other provisions of the Act, apply to suits wrongly instituted in a civil Court in which if rightly instituted in the revenue Court, an appeal would have lain on the revenue side. I base the above view on the context in which the words "instituted in civil or revenue Court" occur in S. 268, some such word as "whether" being understood before "instituted." I also base it on the expression "appeal to the District Judge" which implies that the law provides for an appeal to the District Judge in either case.

I would like to notice an argument which appealed to the learned Judges who decided *Naubat Singh* v. *Baldeo Singh* (4). Referring to S. 177 (1), Tenancy Act 2, 1901, which corresponds to S. 242, sub-S. (3) (b), Act 3, 1926 and which provides for an appeal to the District Judge from the decree of an Assistant Collector of the First Class or of a Collector in all suits except suits under Chap. 11, in which a question of jurisdiction has been decided and is in issue in appeal, the learned Judges expressed the opinion that in a suit instituted in a civil Court in which a question of jurisdiction was raised in the first Court and in the Court of the District Judge, he is empowered to act under S. 269 (S. 197, Act 2, 1901), the argument being that a question of jurisdiction having been raised the suit becomes one in which an appeal necessarily lies to the District Judge. With the utmost respect I would point out that the view so widely expressed in that case is not borne out by the provisions of Ss. 242 and 269. If a

(16) [1886] 8 All. 111=(1886)A.W.N. 28 (F.B.).
(17) [1891] 15 Bom. 148.
(18) [1905] 32 Cal. 146.

suit is instituted in a revenue Court and the question of jurisdiction is raised it is perfectly correct to say that an appeal lies to the District Judge, if such question is decided by the revenue Court. But where a suit is instituted in a civil Court and the defendant raises a question of jurisdiction to the effect that the suit lies not in the civil Court but in the revenue Court, I do not think the provisions of S. 242, sub-S. (3), already referred to, can be invoked so as to make S. 269 applicable, because if the suit had been instituted in the revenue Court, an objection raised by the defendant in the civil Court would in the very nature of things not exist. We are not justified in assuming that if the suit had been instituted in the revenue Court the defendant would have maintained the contrary of what he did in the civil Court.

Sections 268 and 269 are intended to apply to a class of suits which lie on the border line between those clearly cognizable by revenue Court and those cognizable by a civil Court. For such suits a common Court of appeal has been provided for and its order as regards the Court which should try it on remand is made final.

On the second question, while I do not differ from the view expressed by my brother Mukerji, J., that S. 115 (a), Civil P. C., applies to the circumstances of this case, I am of opinion that Cl. (c) of that section is more appropriate. It cannot be disputed that the District Judge had a perfectly good jurisdiction to hear the appeal preferred in his Court. It is equally undeniable that one of the ways in which he could decide the appeal before him was by remanding the case. So far no illegality or irregularity can be attributed to his decision. It is only in the view that he took of the question of jurisdiction that he should be considered to have been in error. He held wrongly that the suit was maintainable in the civil Court. Acting on that erroneous view as to jurisdiction he passed his order of remand in deciding the appeal. I think that the learned District Judge exercised a jurisdiction vested in him illegally—illegally because he directed the civil Court to hear a case which it had no jurisdiction to hear.

As I have already said I am not prepared to controvert the view that his order, looked at from another standpoint, can be considered to be one without jurisdiction. He had no jurisdiction to direct the Munsif to try a suit which is within the exclusive jurisdiction of the revenue Court. It appears to me that Cls. (a) and (c), S. 115, Civil P. C., overlap each other in a number of cases, so that the circumstances of a particular case may make both of them applicable.

By the Court.—Our answer to the first question is in the negative and the second question in the affirmative. Let this case accordingly be sent to the referring Bench.

Sulaiman and Niamatullah, JJ.—In view of the pronouncement by the Full Bench, we allow this revision, set aside the order of the District Judge and restore that of the Court of first instance. The defendant will have his costs throughout.

K.N./R.K. *Revision allowed.*

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* A. I. R. 1930 Allahabad 721
Full Bench

MUKERJI, BANERJI AND YOUNG, JJ.

Collector of Etah—Defendant—Appellant.

v.

Kishori Lal and *another*—Plaintiffs—Respondents.

First Appeal No. 429 of 1926, Decided on 14th July 1930, from decision of 2nd Addl. Sub-J., Aligarh, D/- 31st May 1926.

(a) Evidence Act, S. 92 (4)—By proviso 4, oral evidence, varying or modifying terms of a written contract, is entirely inadmissible.

Under proviso 4, in certain cases, a subsequent oral agreement to modify any previous contract may be proved, but this is not permitted where the law requires that the terms of the contract should be reduced into writing, as in the case of a mortgage or where the terms of the contract have been registered. By proviso 4 oral evidence is entirely inadmissible to vary or modify the terms of such a contract.

[P 723 C 1]

Where the defendants pleaded that some time before any payment was made an oral agreement with the plaintiffs was reached by which they (plaintiffs) were to receive, in full satisfaction of the mortgage deed, less money than was due to them under the mortgage bond.

Held: that the oral agreement set up on behalf of the defendant is calculated to vary the terms of the written instrument by trying to establish that although the plaintiffs were entitled to something under the terms of the mortgage, they were not entitled to it by virtue of a subsequent oral agreement, and that S. 92

was a bar to the plea : 42 *Mad.* 41 and 119 *I.C.* 92, *Rel. on.* [P 723 C 1]

☆ (b) **Evidence Act, S. 92—Interpretation—Oral evidence to prove satisfaction of debt by part payment and remission of reminder is admissible—Contract Act, S. 63.**

Section 63, Contract Act, has nothing to do with the interpretation of S. 92, Evidence Act. In some cases, where the promisee exercises any of his privileges given him under S. 63, Contract Act, with the consent of the promisor the act may amount to a variance etc., of the terms of the original contract and in that case, unless the variance is made by a document in writing, evidence would not be admissible to prove the fact. For example, where the mortgagee agrees to extend the time for payment, if the promise is merely oral and if the mortgage is by a registered document, the promise cannot be proved by oral evidence. But in the case of a satisfaction of the debt or remission of a part of the debt there is no contradicting, or varying, or adding to, or subtracting from the terms of the contract, and oral evidence may be adduced to prove the payment of a part of the debt and remission of the balance. For, in that case, it would not be the plea of the mortgagor that the mortgagee is not entitled to the whole of his money. On the other hand his plea would amount to this, that although the mortgagee was entitled to the whole of his money he, in consideration of prompt payment of a certain amount (and for other possible considerations) agreed to accept a part in satisfaction of the full promise: 44 *Bom.* 55, *Diss. from*; *A. I. R.* 1926 *All.* 445, *Expl.*; *A. I. R.* 1928 *Bom.* 522; *A. I. R.* 1928 *Mad.* 233 and *A. I. R.* 1926 *All.* 693, *Discussed.* [P 723 C 2, P 724 C 1]

U. S. Bajpai—for Appellant.

P. L. Banerji, *Benod Behari Lal* and *Baij Nath Sahai*—for Respondents.

Mukerji, J.—This is a reference to a Full Bench by the learned Judges of a Division Bench, the points for decision being as follows :

(1) Whether an agreement can be proved (by oral evidence) by the defendant to show that on payment of a sum of money less than what would be due on calculating the correct amount of principal and interest at the stipulated rate entered in the mortgage deed, the debt would be discharged.

(2) Whether such evidence would be admissible to prove (and accord) satisfaction of the debt.

(*N.B.* In question No. 1 the words in brackets were agreed to be added during the hearing of the case by the Full Bench, and in question No. 2 it was agreed that the words within brackets should be taken out).

The facts which are necess ry to be considered in order to appreciate the reference are given in the order of reference and are briefly these : One Rao Maharaj Singh, whose estate is now under the management of the Court of Wards executed a mortgage deed on 21st March 1918 for a sum of Rs. 85,000 in favour of the plaintiffs' late father Lala Kishen Lal, and agreed to repay the same with interest at 12 per cent per annum compoundable every year. The Collector of Etah, as the manager of the Court of Wards of the estate of the mortgagor is the defendant. The plaintiffs' case is that when the Court of Wards took over the management of the estate of the mortgagor, the Collector, on behalf of the Court of Wards reduced the rate of interest payable by the mortgagor to 6 per cent per annum, but as the debt due to the plaintiff was not paid off within two years the plaintiffs are entitled to the stipulated rate of interest. The Court of Wards paid certain amounts of money and the balance is still due. The plaintiffs accordingly claimed recovery of Rs. 27,379-4-0.

The defence was that on 28th February 1922 the plaintiffs agreed with the Collector that they would remit a sum of Rs. 5,679 and take 1 lakh and 20 thousand in full satisfaction of their claim on the bond. In pursuance of that agreement the Court of Wards paid different sums of money on different dates, the total amount coming up to the stipulated amount of Rs. 1,20,000, that when the last payment of Rs. 55,631 was made on 14th February 1923 the plaintiffs were told that this payment had been made in full satisfaction of their claim, that the plaintiffs took the money without protest and after the expiry of the period of two years claimed the money in suit and that they were not entitled to anything as the mortgage had already been satisfied. The learned Subordinate Judge decreed the claim and thereupon the Court of Wards filed this appeal. It appears that the learned Subordinate Judge held that evidence was inadmissible to prove the alleged agreement of 28th February 1922.

The learned Judges before whom the appeal came for hearing were of opinion that there was a certain amount of conflict of rulings in this Court and felt that the case should go before a larger Bench. Hence this reference.

Point 1—As already pointed out there was a verbal omission in framing point No. 1 and this was supplied at

the hearing of the case before the Full Bench. Apart from the decided cases it seems to be abundantly clear to us that the answer to the first question should be in the negative. The defendant's case is that some time before any payment had been made, the plaintiffs and the then Collector of Etah, Mr. Stowell agreed that the plaintiffs should have Rs. 1,20,000 instead of the full amount of mortgage money due to them under the terms of the mortgage bond. This means that, according to the defendant, by reason of an oral agreement coming into existence at a time subsequent to the execution of the registered mortgage deed, the plaintiffs were not entitled to the money to which under the terms of the written agreement they were entitled. S. 92, Evidence Act, runs as follows :

"When the terms of a contract ..... have been proved according to the last section (S. 91 by the production of the original document) no evidence of any oral agreement ..... shall be admitted, as between the parties to any such instrument or their representatives-in-interest for the purpose of contradicting, varying, adding to, for subtracting from its terms."

The oral agreement set up on behalf of the defendant in our opinion is calculated to vary the terms of the written instrument, by trying to establish that although the plaintiffs were entitled to something under the terms of the mortgage they were not entitled to it by virtue of a subsequent oral agreement.

S. 92 therefore is a bar to the plea.

There are certain provisos attached to S. 92 and proviso 4 runs as follows :

"The existence of any distinct subsequent oral agreement to rescind or modify any such contract..... may be proved except in cases in which such contract ....is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents."

Under this proviso, in certain cases, a subsequent oral agreement to modify any previous contract may be proved; but this is not permitted where the law requires that the terms of the contract should be reduced into writing, as in the case of a mortgage or where the terms of the contract have been registered, as in the present case. By proviso (4) therefore the oral evidence is entirely inadmissible. Basing our opinion then on the statute alone, we have no difficulty in answering the question in the negative.

As to the case-law: it appears that all Courts are uniformly agreed on this point. No case has been cited before us in which it has ever been held that oral evidence may be adduced to vary the terms of a written and registered mortgage. Indeed the learned counsel for the appellant the Court of Wards, had to concede that he could cite no case in which the contrary may have been held. The Full Bench case of *G. P. Mallappa* v. *Naga Chetty* (1) and *Behari Lal* v. *Abdul Aziz* (2) and numerous other cases support our view.

Point 2. — Coming to the second point: Before we discuss the law on the subject we may point out that the Hon'ble Judges who constituted the Bench referring the case to the Full Bench being parties to the Full Bench, agreed that the word "accord" might be removed from the second question, the reason being that the word "accord" is a term, although frequently employed in England, has not been used by the Indian legislature in the Contract Act or any other law relating to contract. S. 63, Contract Act, which speaks of dispensation on the part of the promisee of the performance of the terms by the promisor, uses the word "satisfaction" alone and does not use the word "accord." In our opinion this alteration does not in any way alter the substance of the question.

The question that we have to answer is whether a plea of satisfaction of a debt evidenced by a registered document amounts to a plea "contradicting, varying, adding to, or subtracting from" the terms of the contract. In our opinion it does not amount to any of these things. The satisfaction may be brought about by payment in full or by payment in part, but in the latter case the promisee must agree that he will not claim more and that he agrees to remit wholly or in part the performance of promise made to him. The substantive law on the point is contained in S. 63, Contract Act, which runs as follows:

"Every promisee may dispense with or remit wholly or in part the performance of the promise made to him or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit."

Section 63, Contract Act, has nothing to do with the interpretation of S. 92,

(1) [1919] 42 Mad. 41=48 I. C. 158.
(2) [1929] 119 I. C. 92.

Evidence Act. In some cases, where the promisee exercises any of his privileges given him under S. 63, Contract Act, with the consent of the promisor, the act may amount to a variance etc., of the terms of the original contract and, in that case, unless the variance is made by a document in writing, evidence would not be admissible to prove the fact. For example, where the mortgagee agrees to extend the time for payment, if the promise is merely oral, and if the mortgage is by a registered document, the promise cannot be proved by oral evidence. But in the case of a satisfaction of the debt or remission of a part of the debt there is no contradicting, or varying, or adding to, or subtracting from the terms of the contract, and oral evidence may be adduced to prove the payment of a part of the debt and remission of the balance. For in that case it would not be the plea of the mortgagor that the mortgagee is not entitled to the whole of his money. On the other hand his plea would amount to this: that although the mortgagee was entitled to the whole of his money, he, in consideration of prompt payment of a certain amount (and for other possible considerations), agreed to accept a part in satisfaction of the full promise. This is our reading of S. 92, Evidence Act, and our answer to the question on a mere reading of the statute is in the affirmative. Coming to the case-law the decisions seem to be in the main in favour of our view.

We shall examine at once the single case in which a completely contrary view has been taken. It is the case of *Jagannath* v. *Shankar* (3). The case was heard by Macleod, C. J., and Heaton, J. In the case before their Lordships the plea was that instead of the sum of Rs. 2,000 due to the mortgagee on his mortgage bond, he accepted a sum of Rs. 800 in full discharge of the mortgage debt. It was held that oral evidence could not be adduced by the mortgagor to prove the alleged payment. The reason was given in the following language:

"The defendant's case must be that the mortgagee agreed to receive Rs. 800 in full satisfaction of the much greater amount which was due on the mortgage and although he might have said when receiving Rs. 800: "I now discharge you from the mortgage," there was none the less an agreement which modified the original agreement of the mortgage."

In our opinion this is not the right view of the law. It is open to a mortgagee to remit any portion of the debt due to him and the remission does not involve any change in the terms of the original contract. It is true that when the mortgagee accepted a sum of Rs. 800 and remitted Rs. 1,200 out of the mortgage money the parties entered into a contract. But the question is:

"Did the contract in any way seek to alter the terms of the original mortgage contract?"

In our opinion it did not.

In the case of *Sukhlal Rambakas* v. *Jetha Opajishet*, *A. I. R.* 1928 *Bom.* 522, two learned Judges of the same Court expressed grave doubts as to the correctness of the view expressed in *Jagannath* v. *Shankar* (3), and the learned Judges were prepared, if necessary, to refer the matter to a larger Bench. Except for this solitary case, which has gone to the length of holding that satisfaction of a mortgage debt by payment in part and by remission of the balance cannot be proved by oral evidence, there is no case brought to our notice where this view may have been taken.

Coming to Madras: It seems that there the view has been uniformly taken that such satisfaction as described above may be proved. In *G. P. Mallappa* v. *Naga Chetty* (1) it was held by a Full Bench of three learned Judges that it was not open to a mortgagor to plead a subsequent agreement to take less than is due on a registered mortgage in view of the provisions of S. 92, Evidence Act. The question of satisfaction did not directly arise in that case. In *Balam* v. *Sadireddi*, *A. I. R.* 1928 *Mad.* 233, it was held that it was open to the debtor to prove that he had discharged the debt by putting the simple mortgagee in possession over certain property. Many *Madras* cases have been cited, but we do not think it necessary to discuss all of them in our judgment, though of course we have considered all the cases. Coming to our own High Court, there are two cases, namely *Jhabba Singh* v. *Chajju* (4) and *Jwala Prasad* v. *Mohan Lal* (5). It was because of the supposed conflict

(3) [1920] 44 Bom. 55=54 I. C. 689.

(4) A. I. R. 1926 All. 445=94 I. C. 169.

(5) A. I. R. 1926 All. 693=97 I. C. 162=48 All. 705.

of these two cases that the reference has been made.

In *Jhabba Singh's* case (4) a lessee was granted certain properties by a registered document and among the leased property was a grove. Later on the lessor and the lessee agreed that the lessor would cut down the grove and appropriate the timber. It was held that it was open to the lessee to prove that the lessor was not entitled to claim the entire rent. The learned Judges, after referring to a large number of cases, came to the conclusion that the transaction was "a mode of payment or discharge or waiver of a portion of the rent" on account of the loss of the profits from the grove to the lessee. There can be no doubt that this decision should be treated as good law, because it is always open to one of the parties to a contract to prove failure of consideration with respect to the whole or a part of the transaction. Nobody could expect a lessee to pay the whole of the rent when by an act of the lessor a part of the leased premises disappeared from the possession of the lessee. Proviso (1) expressly refers to want of failure of consideration as one of the facts provable by one of the parties to a contract.

Coming to the case of *Jwala Prasad Mohan Lal* (5). In this case, there was a mortgage of a house for a sum of Rs. 200 by one Debi Das to one Durga Prasad. Durga Prasad's assignees were Mohan Lal and Salig Ram. Debi Das sold his house for Rs. 500 and left a sum of Rs. 200 with the vendee Jwala Prasad for payment to the mortgagees. Jwala Prasad paid the sum of Rs. 200 to one of the assignees viz., Salig Ram. Salig Ram granted a receipt and promised to return the mortgage deed. Mohan Lal brought a suit to recover his mortgage money and the mortgagor's representative's plea was that the mortgagees had agreed to forgo all the interest due on the mortgage and that Salig Ram had accepted Rs. 200 in full discharge of the mortgage debt and the receipt which he had granted was binding upon Mohan Lal, his co-mortgagee, and operated to extinguish the mortgage. The Court of first instance gave a decree for the amount claimed after giving credit for Rs. 200 actually paid. The lower appellate Court upheld this decision. In second appeal it was urged that the mortgagees relinquished their right to interest. A Bench of this Court consisting of Daniels and King, JJ., held that any oral evidence to prove a relinquishment of a claim for interest was inadmissible under S. 92, Evidence Act. There was a further question as to whether the receipt which was construed as a document purporting to have been granted "in full satisfaction of the whole mortgage debt" was admissible in evidence or not, having regard to the provision of S. 17, sub-S. 2, Cl. 11, Registration Act, 1908. In this case, we are not concerned with the admissibility or otherwise into evidence of any receipt and we need not consider that point at all. On this point, we may mention, the Hon. Judges differed from a previous decision of this Court. As regards the question whether the decision as to the inadmissibility of oral evidence to prove the relinquishment of a claim as to interest, it was probably right. The plea was not, it appears, that payment of Rs. 200 was in full satisfaction of the mortgage money, but the plea was that by a subsequent agreement between the parties, the mortgagee had agreed not to claim any interest at all. In this aspect, as we have said, the judgment may be right. But we have no doubt that if the judgment was meant to be a decision that it was not open to the mortgagor to prove that the mortgagee accepted the sum of Rs. 200 in full discharge of his debt, with all respect, we must regard the decision as laying down bad law. We are of opinion, as we have explained above, that a plea of payment and discharge does not involve any plea of a subsequent contract in any way altering the original contract.

A number of Calcutta cases have been cited to us and it seems to us that in Calcutta it is clearly recognized that it is open to a debtor to plead payment and remission of the balance in order to prove satisfaction of a debt. In the result, our answer to question 2 is that it is open to a mortgagor to prove satisfaction of a debt by proving payment on his part and by proving remission of the balance on the part of the creditor. We need hardly mention that we have nothing to say as to the weight to be given to the oral evidence that may be produced before a Court. That would

be a matter for the Court to decide, before whom the plea of payment is taken. All that we are anxious to say is that the mere fact that we are deciding that oral evidence is admissible must not be taken as an authority that any evidence however worthless it may be to prove satisfaction, is to be accepted simply because oral evidence is admissible. We direct that the record be returned to the Bench making the reference with our answers as recorded above.

K.N./R.K. *Reference answered.*

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* A. I. R. 1930 Allahabad 726

BOYS, J.

Bisheshwar Nath— Objector—Applicant.

v.

Narmadeshwar Prasad Upadhia—Opposite party.

Execution First appeal No. 296 of 1929, Decided on 28th May 1930, from decision of Sub-Judge, Moradabad, D/- 13th April 1929.

(a) Civil P. C., S. 100—New plea.

It is not fair to ask that a lower Court's decision should be upset when the provisions of law relied on in the High Courts were never brought to the attention, much less pressed upon, the lower Court, and the lower Court has therefore, been given no opportunity of acceding to such argument. [P 726 C 2]

*** (b) Civil P. C., O. 21 R. 19—Judgment-debtor objecting to attachment and being successful in obtaining decree for costs—In execution of that decree, decree-holder asking for set off against amount due under his decree in suit—R. 19 would not apply as the two claims are not under one decree.**

The words "a decree under which two parties are entitled" suggest the simultaneous birth of two sets of rights under the decree. [P 727 C 2]

A judgment-debtor objected to the attachment of certain property, and his objection having succeeded obtained a decree for costs against the decree-holder. When the judgment-debtor sought to execute his decree for costs the decree-holder asked for a set off for decree for costs against amount due to him under his decree in the suit.

Held: that R. 19 would not apply as the two claims were not under one decree: *A. I. R.* 1930 *All.* 193, *Dist.* [P 727 C 2]

Shabd Saran—for Applicant.

Judgment. — This is a judgment-debtor objector's appeal. The appellant Sahu Bisheshwar Nath obtained a simple money decree for a large sum, about two lakhs, against Kunwar Suraj Singh and Dalip Singh. The defendants had a decree against Rani Phul Kunwar who deposited a sum of Rs. 50,000 in Court for payment, if the Court so ordered, to Sahu Bisheshwar Nath, the decree-holder. Sahu Bisheshwar Nath applied for attachment of this sum and was resisted by the defendants. Their objections were upheld by the High Court and they got a decree for costs for Rs. 764-15-0. The decree-holders of this decree for costs transferred their decree to Pt. Narbadeshwar Prasad the respondent in the present appeal. He applied for execution of this decree for costs and was met by objections by Bisheshwar Nath, decree-holder in the original suit, asking for a set off of this decree for costs against him against the balance of the amount due to him under his decree in the suit. The lower appellate Court has dismissed his objections and he now appeals. It is noticeable that the judgment of the lower Court deals only with O. 21, R. 18, and manifestly as the Court held, that rule has no application. Whatever else may or may not be clear in this matter it is manifest that the decree in the suit and the decree for costs were not decrees in separate suits.

Before I had heard counsel for the appellant I had not unfortunately read the judgment of the lower Court, or I should have found that the rule on which counsel based his argument here was never mentioned to the lower Court. Counsel assured me that the objection to the application for execution had been based on R. 19, O. 21 as well as other provisions of the law; but this is not the case. I have looked at the objection and it is headed as made under R. 18 and R. 18 only.

Had that come to my knowledge before, I should have hesitated much about allowing the appellant to rely on R. 19 now. It is not fair, and this had been constantly stated by one Judge or another of this Court, to ask that a lower Court's decision shouldbe upset when the provisions of law relied on in this Court were never brought to the attention of, much less pressed upon, and the lower Court has therefore been given no opportunity of acceding to such argument.

I had however heard counsel as to R. 19 before I discovered that it had never been mentioned to the lower

Court. It so happens that it was I before whom this appeal came for admission originally and I stated there that I was not disposed to hold O. 21, R. 19 applicable to a case like this. But I was prepared to allow the point to be argued. R. 19 says:

"Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then ....."

It is manifest here that the two decrees bear all the literal characteristics of two different decrees. But it is urged that there can only be one decree in one suit, and that the decree for costs obtained by the judgment-debtor should be regarded as a subsidiary part of the main decree in the suit. This would manifestly be a straining of the words "a decree" in R. 19. But I am asked to hold that the words "a decree" should be so interpreted by analogy with the decision of this Court held in *Ananti* v. *Chhannu*, (1) that there cannot be two decrees in one suit and that two decrees in two cross-appeals arising out of one suit must be regarded as in fact one decree.

In the first place I am of opinion that that case is distinguishable from the present in this, that in that case it would be quite impossible to hold that the two decrees had a separate existence with such a result as was contended for in that case, that matter would be res judicata when one decree was looked at and not res judicata when another decree was looked at. Such a result would manifestly be impossible, and the treating of the two decrees as one is an inevitable consequence. This is not so in the present case. There is no question of its being absolutely necessary to regard both decrees as one, or the later decree for costs as a subsidiary part of the main decree. I am therefore of opinion that there is no sufficient analogy between the two cases to justify the application to this case of the proposition which may be literally wide enough to cover it that there cannot be two decrees in one case. Moreover the second decree in the present case is in execution proceedings.

But this is not all. Apart from the straining of the language that would be necessary the actual language used, "a decree under which two parties are entitled", seems to me to more clearly suggest the simultaneous birth of two sets of rights under one decree. It is not even contended here that R. 18 could be applicable. For the reasons I have given I am of opinion that R. 19 is also inapplicable, and the appeal is dismissed with costs.

Counsel for the appellant asks for leave to appeal. He has not been able to show to me any authority in support of his contention, and the sets of material facts which appear in this case are such as must be of frequent occurrence. He has therefore this much against him that interpretation for which he asks has never been, so far as he has been able to find authority, adopted by this Court. I have given my reasons for holding that the interpretation is not justified, and in view of the absence of any authority supporting such an interpretation I do not think this is a case in which I should give leave to appeal. Leave is refused.

S.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1930 All. 193.

A. I. R. 1930 Allahabad 727

MUKERJI AND BOYS, JJ.

Aidal Singh and *others*—Plaintiffs—Appellants.

v.

Khazan Singh and *others* — Defendants—Respondents.

Second Appeal No. 1366 of 1928, Decided on 9th May 1930, from a decree of Sub-Judge, Meerut, D/-24th April 1928.

Civil P. C., S. 11—In execution of decree against *X*, member of joint Hindu family, house belonging to joint family attached—*X* objecting on ground that it was house belonging to agriculturist—Objection dismissed for default of prosecution and house sold—Wife and sons of *X* bringing suit alleging that house was ancestral and could not be sold as it belonged to agriculturist—Wife of *X* had no personal interest—Suit by sons was not barred as res judicata by mere dismissal of father's objection—Suit by sons was maintainable—Civil P. C., S. 60.

In execution of a money decree obtained against *X*, a member of a joint Hindu family, a house belonging to the joint family was attached. *X* raised the objection that the house as it belonged to an agriculturist could not be attached, but for default of prosecution the objection petition was dismissed. The house was subsequently sold. The wife and

sons of *X* then brought a suit alleging that the house was ancestral property in *X*'s hand and that being agriculturist's house it could not be sold in execution.

Held : that the wife of *X* had no personal interest although in the case of a partition between the father and sons she would be entitled to a share.

Held : further that the suit would not be barred by res judicata because the order dismissing the objection petition had not decided whether the house belonged to an agriculturist and because the property being ancestral the father did not represent the sons.

Held : further that the suit was maintainable as the sons were interested in the property and as they could not raise objection before the execution Court. [P 729 C 1, 2]

(b) Civil P. C. S. 60—**Scope.**

Even if an objection is not taken in the execution department if the Court otherwise becomes cognizant of the fact that the property attached was the house of an agriculturist it would be its duty to withdraw the attachment. [P 729 C 1]

Bhagwati Shankar and *L. M. Banerji* —for Appellants.

S. N. Gupta—for Respondents.

Mukerji, J.—This appeal raises a rather novel question of law. The facts are simple and are these : Khazan Singh obtained a decree for money on foot of a promissory-note executed by one Bhagwana in his favour. Bhagwana is an agriculturist. In execution of his decree his house and enclosure were attached. His brother objected to the attachment of the entire property, and at his instance one-half was exempted from attachment. Bhagwan himself raised the plea that he was an agriculturist, and under the provisions of S. 60, Civil P. C., the property was not liable to attachment and sale. Unfortunately for him and his sons, there was a default in the prosecution of the objection by Bhagwana and the objection was dismissed. The property has been sold and has been purchased by the decree-holder Khazan Singh himself.

Soon after the sale, the three sons of Bhagwana and his wife instituted the suit out of which this appeal has arisen. The plaintiffs' case was that the house and the *gher* (half-share belonging to Bhagwana) was an ancestral property in the father's hand and, being an agriculturist's house and appurtenance thereto could not be attached and sold in execution of the decree. They accordingly asked for a declaration that the sale was null and void and was not binding on the plaintiffs.

Khazan Singh defen ded the suit and he denied the statement made in the plaint that the property was ancestral, but nowhere, further in his written statement, he stated specifically that the property in suit was the self-acquired property of Bhagwana. The plaintiffs had taken exception to the decree on the ground that no debt really existed. On this point the rejoinder of Khazan Singh was that he did lend money and the decree obtained by him was a lawful one.

No issue was framed in the Court of first instance as to whether the property was ancestral. The other issues that were framed related to the consideration of the promissory-note, and were, whether the suit was barred by S. 11, Civil P. C., and S. 47 of the same Code, whether the plaintiffs were bound by the acts of Bhagwana, whether the house was exempt from attachment and sale and whether the mother had a right of residence in the house.

The Court of first instance decided all the points except the question of consideration in favour of the plaintiffs. It held that there was good consideration for the promissory-note, but it held that the property was not liable to be attached and sold in execution of the decree, being the property of an agriculturist. The mother's claim was dismissed on the ground that she had no interest. Defendant 1 appealed and his appeal succeeded. The learned Subordinate Judge was of opinion that the order dismissing Bhagwana's objection to the attachment of the property was binding on the sons and therefore they were precluded from maintaining the suit.

In this Court it has been urged that the plaintiffs are not bound by the order dismissing the objection of Bhagwana and that their suit should have been decreed by the lower appellate Court as well. Before entering into the discussion of the merits of the case we find that there was ample evidence on the record to show that the *gher* and the house were ancestral properties in the hands of Bhagwana. Two witnesses on behalf of the plaintiffs have sworn to the fact. They were not cross-examined on the point and Khazan Singh himself in his own evidence did not state that the property was not ances-

tral. We are thus relieved from remitting an issue as to the character of the property. The property in suit being ancestral the sons have an interest in the property by right of their birth. Plaintiff 4, that is to say, the wife of Bhagwana, has no personal interest in the property, although in the case of a partition among the father and the sons she would be entitled to a share.

Now the question is whether the present suit is maintainable. The order dismissing Bhagwana's objection to the attachment cannot operate as res judicata against the plaintiffs. There is no decision one way or the other as to whether the property attached was or was not belonging to an agriculturist. That question was never decided. There being no decision the order merely dismissing the objection cannot operate as res judicata on the ground that a decision has been obtained against the father and the father represented the sons in the objection case. Further the property being ancestral the sons have a right to assert their claim to it even as against the father. We do not think that the case comes within the purview of the Full Bench rulings* of this Court where it has been held that a father in a joint Hindu family, when he sues or when he is sued, represents his sons in the litigation.

The next question is whether in the circumstances of the suit the claim is maintainable. It is clear that the sons, as such, are bound to pay their father's debt. If the property in suit were saleable, on the finding that there is no taint in the debt incurred by the father, the property would have been liable to be taken in execution. An attachment and sale of the property is prohibited by law. Even if an objection has not been taken in the execution department by Bhagwana, if the Court had otherwise become cognizant of the fact that the property attached was the house of an agriculturist, it would have been its duty to withdraw the attachment. This follows from the very language of S. 60, Civil P. C. It runs as follows :

"Provided that the following particulars shall not be liable to such attachment or sale."

We take it that this is imperative and it prohibits the Court from levying execution over the properties detailed in the section under the proviso.

The sons not being parties to the execution proceedings could not appear before the executing Court and raise the objection. Their remedy therefore, if any exists, must be by way of suit. We are of opinion that the plaintiffs have a remedy for the simple reason that they have an interest in the property, and the property is of such a nature that it could not be attached and sold in execution of a decree howsoever binding it might be on the judgment-debtor.

In the result the suit should have succeeded in the lower appellate Court as well. We allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. The costs here and in the Court below will be paid by defendant 1 to the plaintiffs.

S.N./R.K. *Decree set aside.*

*The Hon'ble Judge evidently refers to *Hori Lal* v. *Munman Kunwar*, I.L.R. 34 All. 549=9 A.L.J. 819=15 I.C. 126, Ed.]

A. I. R. 1930 Allahabad 729

SULAIMAN AND KENDALL, JJ.

Jawala Shanker Sahai—Defendant—Appellant.

v.

Bohra Sri Ram and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1689 of 1927, Decided on 10th January 1930, from decree of Dist. Judge, Aligarh, D/- 25th August 1927.

Cosharer — Cosharers in mahals — Proprietors without fractional shares cannot be so considered—Pre-emption.

Proprietors who do not own any fractional share in the entire property in mahal cannot be considered as cosharers in the mahal : 19 *A. L. J.* 859, *Ref.* [P 730 C 1]

A. Sanyal—for Appellant.

G. Agarwala—for Respondents.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for pre-emption. The plaintiff relied on an extract from a wajibularz, and neither he nor the defendants filed a complete khewat to explain the constitution of the village. A complete khewat has now been produced under our direction.

The property sold is situate within the municipal limits of Jalesar, and as held under the order, dated 27th May 1927, the Act does not apply to it and

the case is governed by the customary law if any.

The property sold consists of a share in a milak consisting of resumed muafi lands. An examination of the khewat makes it quite clear that the body of cosharers, whose names are shown against serial number 1, own the entire 20 biswas in the mahal. After them come proprietors, who own these milaks and who are serially numbered but against their properties no fractional share is entered in the column of shares. It is therefore quite clear that these proprietors do not own any fractional share in the 20 biswas of the mahal and therefore are not cosharers in the mahal.

Merely because the printed heading of the claim has stated "Name of patti or khewat," the Court below has assumed that all these other proprietors own property in separate pattis. This is a wholly erroneous assumption. A patti is a sub-division of a mahal in an imperfect partition and represents distinct fractional part of a mahal. This is not the case here. These proprietors are not cosharers in the patti at all.

The translation of the entry in the wajibularz on which the plaintiff relies, is given by the learned District Judge, and it is clear that a partner in the property can only have a right of pre-emption and if he also happens to be a brother, a nephew or a cousin but if he is not any such relation, he must be a hissedar patti. As remarked above, the plaintiff is not a hissedar or a cosharer at all, and has therefore no right to sue under the alleged custom: vide *Radha Kishun* v. *Abbai Begum* (1).

In the result we allow the appeal, set aside the decree of the lower appellate Court and dismiss the plaintiff's suit with costs in all Courts including fees in this Court on the higher scale.

V.B./R.K. *Appeal allowed.*

(1) [1921] 19 A. L. J. 859.

A. I. R. 1930 Allahabad 730

SEN AND NIAMATULLAH, JJ.

Hasan Ali—Defendant—Appellant.

v.

Waliullah and *another*—Plaintiffs—Respondents.

Second Appeal No. 2294 of 1927, Decided on 19th May 1930, from a decree of Dist. Judge, Allahabad, D/- 31st August 1927.

(a) Contract Act, S. 129 — Continuing guarantee is determined by the terms of instrument—Document to be interpreted as a whole—Nature and character of business and relative position of parties and surrounding circumstances must be considered.

Whether or not the transaction is a continuing guarantee is to be determined by the terms of the instrument. It is mainly a question of construction. The document should be interpreted as a whole and is not to be confined merely to the operative part. If there is any ambiguity, it is permissible to press into consideration the nature and character of business, the relative position of parties and surrounding circumstances. [P 731 C2]

(b) Contract Act, S. 129—Guarantee given for performance of definite arrangement—Consideration not variable as a result of future dealings between parties—Contract is not contract of continuing guarantee.

When the guarantee has been given for the performance of definite arrangement which has already come into existence and is not contingent and the consideration for which is not variable as a result of future dealings between parties, the contract is not one of continuing guarantee. [P 731 C 2]

(c) Contract Act, S. 129—Grant of lease for definite period—Stipulations for payments were definite and constituted single transaction—Guarantee given for due fulfilment of engagements for whole term of continuance of lease—Guarantee was held to be not a continuing guarantee.

Lease was granted for a definite period of five years. The stipulation for the several payments stipulated for were definite engagements constituting one transaction. The guarantee was given for the due fulfilment of these engagements stipulated in the lease during the whole term of its continuance.

Held: that this cannot be called a continuing guarantee within S. 129: 10 *All.* 531, *Lloyds* v. *Harper*, (1880) 16 *Ch. D.* 290, *Rel. on.* [P 732 C 1]

S. P. Sinha and *Zamirul Haq*—for Appellant,

A. M. Khwaja and *Mahmudullah*—for Respondents.

Sen, J.—This is an appeal by the defendant and asises out of a suit for recovery of Rs. 2,569 from the defendant under the following circumstances:

Syed Nabiullah owned certain zamindari property in mauza Rampur in the province of Agra. Under an

instrument, dated 20th March 1921, he leased the said property to one Murtaza Husain for a period of five years certain. It was agreed that the lessee would pay the Government revenue, all expenses relating to the management of the property and Rs. 900 a year to the lessor in two instalments. Murtaza Husain, the lessee, was not possessed of any property. The lessor insisted upon the lessee finding a surety for the due fulfilment of his engagements. On 21st May 1921, Syed Hasan Ali, the defendant, executed a contract of guarantee in favour of Syed Nabiullah under which he ensured the due fulfilment of the engagements on the part of the lessee under the instrument, dated 20th March 1921.

The lease was to run from 1329 F to 1331 F. The lessee having failed to pay rent from 1329 F to Kharif 1331 F, Syed Nabiullah sued him for the rent of that period and obtained a decree on 17th September 1924. On 28th September 1924, the defendant guarantor gave a notice to the lessor revoking his contract of guarantee. Syed Nabiullah died on 2nd July 1925.

The present suit was instituted by the heirs of the lessor for recovery of Rs. 2,569 being the rent due from Rabi 1331 F up to 1333 F.

The suit was resisted inter alia on the ground that the guarantor having revoked his contract of guarantee by notice, dated 28th September 1924, he was not liable for the rent claimed. This plea substantially prevailed with the Court of first inisance, which gave the plaintiff a decree for Rs. 450 only, and dismissed the rest of the suit. The trial Court was of opinion that the contract entered into by Syed Hasan Ali was in the nature of a continuing guarantee, which under the law, he was competent to revoke. Reliance was placed upon Illus. a, S. 129, Contract Act :

"*A*, in consideration that *B* will employ *C* in collecting the rents of *B's* zamindari, promises *B* to be responsible to the amount of Rs. 5,000 for the due collection of payment by *C* of these rents. This is a continuing guarantee."

There was a contract of service which imposed a recurring obligation from day to day. We do not see what this illustration has to do with the facts of the case. Murtuaza Husain was not engaged by Syed Nabiullah with the object of collecting rents on his behalf for five years. No guarantee was given by Syed Hasan Ali for the due performance of an engagement of this character. We are therefore of opinion that the Court of first instance clearly misdirected itself and the illustration referred to above was not pertinent to the case.

The lower appellate Court upon a due consideration of the terms of the contract came to the conclusion that it was not one of continuing guarantee and that Syed Hasan Ali was not competent under S. 129, Contract Act, to revoke it. In this view it modified the decree of the trial Court and decreed the plaintiff's claim in its entirety. The defendant impugns the correctness of this decision. Whether or not the transaction is a continuing guarantee is to be determined by the terms of the instrument. It is mainly a question of construction. The document should be interpreted as a whole and is not to be confined merely to the operative part. If there be any ambiguity, it is permissible to press into consideration the nature and character of the business, which necessitated the lease, the relative position of the parties and the surrounding circumstances.

There is no ambiguity in the document under review. The agreement to pay an ascertained sum of money every year partakes of the character of a debt. The consideration for the contract has flowed once for all and is confined to a single transaction and cannot be extended to a series of transactions. Where the guarantee has been given for the performance of a definite engagement, which has already come into existence and is not contingent and the consideration for which is not variable as the result of future dealings between the parties the contract is not one of continuing guarantee.

In the circumstances of the case the guarantee given by the defendant-appellant did not extend to a series of transactions. The grant of lease by Syed Nabiullah to Murtaza Husain for a period of five years in consideration of the payment of a certain sum of money as rent was a single transaction. Equally, the guarantee was one transaction ensuring the due performance of the

lessee during the continuance of the lease. The successive payments of rent upon each instalment falling due cannot be treated as successive transactions and the guarantee with reference to the same cannot be held to be "a continuing guarantee" under S. 129, Contract Act. The above view is supported in principle by the decision of this Court in *In re, Gopal Singh* v. *Bhawani Prasad* (1) in which it was held that

"assuming that the guarantee sought to be construed was a continuing guarantee within the meaning of S. 131, Contract Act, still having regard to the object for which the two guarantees were given it must be concluded that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease."

A similar view was taken by Fry, J., in *Lloyd's* v. *Harper* (2) in which he observed :

"It appears to me that there are cases which certainly go to show that, where a continuing relationship is constituted on the faith of a guarantee, there is a strong reason for holding that the guarantee cannot be annulled during the continuance of that relationship. This seems to me to be a sound principle of interpretation."

The learned Judge further held that a guarantee, the consideration of which is given once for all, could not be determined by the guarantor and did not cease at his death.

The lease was granted once for all for a definite period of five years. The stipulations for the several payments stipulated for were definite engagements constituting one transaction. The guarantee was given by the defendant-appellant for the due fulfilment of these engagements stipulated in the lease during the whole term of its continuance. It would be unduly straining the language of S. 129 to call it a continuing guarantee.

We are therefore of opinion that the view taken by the lower appellate Court was justified. We accordingly dismiss this appeal with costs including in this Court fees on the higher scale.

G.P./R.K. *Appeal dismissed.*

(1) [1888] 10 All. 531=(1988) A. W. N. 211.
(2) [1880] 16 Ch. D. 290.

A. I. R. 1930 Allahabad 732

MUKERJI AND BENNET, JJ.

Mani Ram Misra — Plaintiff — Appellant.

v.

Purshotam Lal and *another* — Defendants—Respondents.

First Appeal No. 60 of 1927, Decided on 20th May 1930, from decree of Addl. Sub-Judge, Benares, D/- 16th September 1926.

Contract Act, S. 23 — Railway company refusing to grant contract to plaintiff—Plaintiff agreeing with defendant that latter should put himself forward as applicant for contract and then serve plaintiff who was real contractor—Agreement was void—Benami.

Plaintiff, to whom a railway company had refused to grant any contracts, entered into an agreement with the defendant that the defendant should put himself forward as the applicant for the contracts, and when the same were secured he would serve the plaintiff, the real contractor. The plaintiff sued for declaration that he was the real person who held the contract.

Held : that the object of the agreement was to commit fraud on the railway company and therefore was void : 40 *Bom.* 64, *Dist.*; 63 *P. R.* 1884 and *Begbie* v. *Phosphate Sewage Co., Ltd.* 1 *Q. B. D.* 679, *Rel. on.* [P 733 C 2]

B. E. O'Conor and *Ram Nama Prasad* —for Appellant.

P. L. Banerji and *Kalindi Prasad* —for Respondents.

Mukerji, J.—The plaintiff in the Court below is appellant before us. He sued the respondents for a declaration that he the plaintiff was the person who held a particular set of contracts obtained from the railway company, that the defendants worked as the plaintiff's servants and that all the profits received by the carrying out of the contract ought to go to the plaintiff. He sued for accounts besides for declaration.

The plaintiff alleged in the plaint that he used to take contracts from the railway company, but for certain reasons the railway company refused to grant him any further contract. In order to secure further contracts from the railway company he agreed with the defendants that defendant 1 would put himself forward as the applicant for the contracts and when the same were secured defendant 1 and defendant 2 would serve for a pay the plaintiff the real contractor.

The defence to the suit was twofold. One was that the plaintiff's case was not true and the defendants were the real contractors, and secondly, the agreement alleged by the plaintiff was void under S. 23, Contract Act. The learned Subordinate Judge gave effect to both the pleas. He held that on evidence the plaintiff had failed to make out his case and that the agreement set up by the plaintiff was void under the provisions of the Contract Act. In this appeal we have heard the point of law raised by the defendants and we are of opinion that it succeeds. In the result we have decided not to hear the case on the facts.

Section 23, Contract Act, reads as follows :

"The consideration or object of an agreement is lawful unless * * * * it is fraudulent * * *."

The question is whether the agreement set up by the plaintiff had for its object something which was fraudulent in its nature and therefore the contract could not be enforced at the instance of the plaintiff. On the admitted facts the plaintiff was refused contracts and if it was known to the railway authorities that the plaintiff was the person who was offering himself for the contracts, he would not have been accepted. In order therefore to secure the contracts the plaintiff put forward defendant 1 as the real contractor. In doing this the plaintiff committed "fraud" on the railway company as defined in S. 17, Contract Act. There the word "fraud" is defined as meaning and including any of the acts mentioned there committed by a party to a contract. One of the acts is :

"the suggestion as to a fact of that which is not true by one who does not believe it to be true."

Here the suggestion was made by defendant 1 to the railway company that he was the real contractor and not the plaintiff, who was not acceptable to the railway company. The object of the agreement between the parties therefore was that a suggestion might be made to the railway company by one of the persons who were parties to the agreement that defendant 1 was going to be the contractor and this was not a fact. It was further to the knowledge of defendant 1 that the plaintiff was the contractor and not he himself. Therefore, when defendant 1 represented it to the railway company that he was the contractor, he represented a matter which was not believed by him to be true. In the result the object of the agreement was to commit a fraud on the railway company, and this fraud was successfully committed, according to the plaintiff's own allegations.

A large number of cases were cited before us as to whether the agreement was vitiated, as found by the learned Judge of the Court below. Most of the cases cited before us however have no bearing on the point in question. They relate to sub-letting or assignment of a contract contrary to the terms on which the contract was granted. For example, there are cases in which a contractor in the Forest Department was prohibited from sub-letting or assigning his contract and he did so; it was held that this contract between the contractor and the sub-lessee or assignee was not prohibited by S. 23, Contract Act. One case that came near to the case before us will be found reported in *Nazaralli Sayad Imam* v. *Babamia Dureyatimsha* (1). There two persons previously to the bidding for grass, agreed that they would share in the profits of the contract and they did not tell the officer who was selling the grass that there was such a partnership existing between the bidder and another person, such a contract being prohibited by the rules. In this case however the learned Judges did not consider the aspect of the case that has been put forward before us, viz., the agreement implied a fraud on the officer selling grass.

The case that comes nearest to the case before us is *Saheb Ram* v. *Nagar Mal* (2). The facts of this case were these. There was a standing rule of the Commissariat Department that no servant of the department shall obtain a contract with the department. In contravention of this rule a servant of the department, in agreement with another person, took a contract in the name of the partner. It was held that this agreement between the servant of the department and his partner im-

(1) [1916] 40 Bom. 64=30 I. C. 913.
(2) [1884] 63 P. R. 1884.

plied fraud on the Commissariat Department and was void under S. 23. Contract Act. The case is based on an English case, viz., *Begbie* v. *Phosphate Sewage Co. Ltd.* (3) which was upheld on appeal in *Begbie* v. *The Phosphate Sewage Co. Ltd.* (4).

In our reading of the Act and on authorities therefore it seems to be clear that the plaintiff's case as brought was not maintainable in a Court of justice. In the result the appeal fails and we hereby dismiss it with costs.

S.N./R.K. *Appeal dismissed.*

(3) [1875] 10 Q. B. 491=33 L. T. 470=24 W. R. 115.

(4) [1877] 1 Q. B. D. 679=25 W. R. 85=44 L. J. Q. B. 233=35 L. T. 350.

A. I. R. 1930 Allahabad 734

SEN AND NIAMATULLAH, JJ.

Bechu Ahir—Plaintiff—Appellant.

v.

Hansraj Ahir and *others*—Defendants—Respondents.

Second Appeal No. 2254 of 1927, Decided on 29th May 1930, from decision of Addl. Sub-Judge, Jaunpur, D/- 1st September 1927.

(a) **Hindu Law—Reversioner—Suit against alienations to next presumptive reversioners—Contingent reversioner only can challenge transaction.**

Where a suit is directed against alienations in favour of next presumptive reversioner the contingent reversioner from the nature of things is the only person entitled to challenge the transaction, and there does not seem to be any reason for holding that a suit by him is not competent: 34 *All.* 207 and 46 *I. C.* 85, *Ref.* [P 735 C 2]

(b) **Hindu Law—Alienation— Declaration of rights depending on proof of circumstances is useful in cases of transfers for consideration but not in case of gift by widow—No question of legal necessity or validity arises—Specific Relief Act, Ss. 39 and 42.**

In cases of transfers for consideration in which questions of legal necessity may arise, the grant of a declaratory relief ordinarily serves the useful purpose of declaring rights which depend upon proof of circumstances as to which evidence may disappear by the time succession to the estate opens. But in a case where the transfer is a gift pure and simple made by Hindu widow no question of legal necessity or its validity as such can arise. [P 736 C 2]

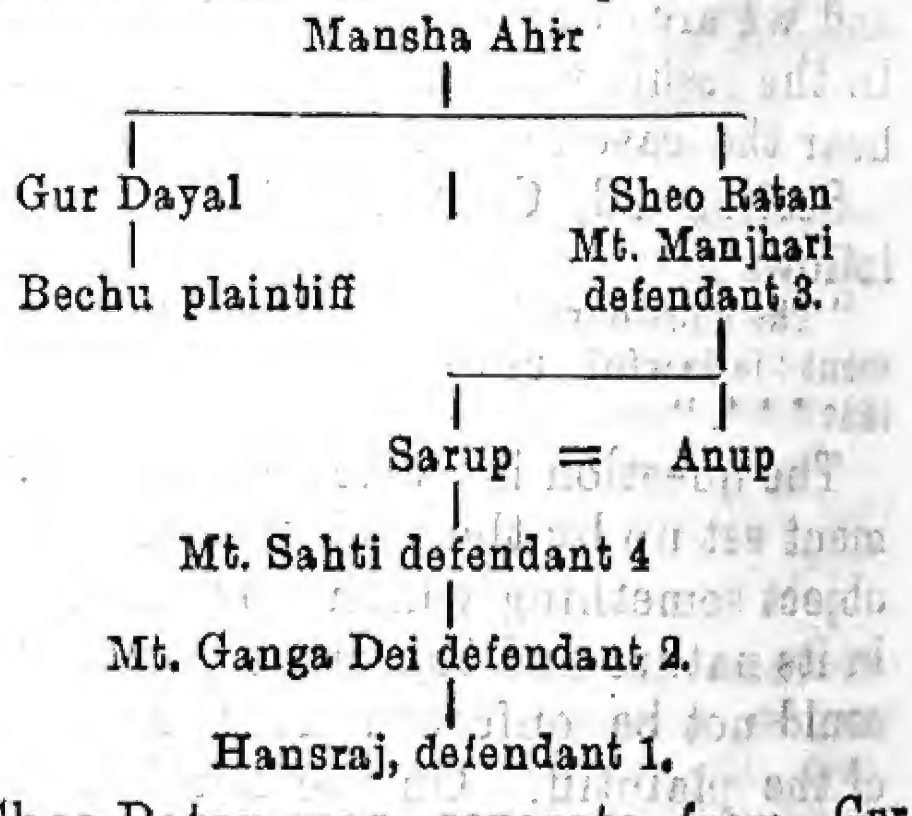
(c) **Practice — Pleadings— Although allegations regarding status to maintain suit are false, if fact found vest the status, then, suit for declaration lies.**

The fact that the plaintiff made certain false allegations to establish his right as the presumptive reveaioner does not disqualify him from maintaining the suit if the facts found invest him with a status in which he can sue for the declaration he seeks. [P 736 C 1]

S. M. Husain—for Appellant.

M. Waliullah—for Respondents.

Sen, J.—This is an appeal by the plaintiff and it arises out of a suit for a declaration that a deed of gift, dated 30th March 1922, executed by defendants 3 and 4, in favour of defendants 1 and 2, was null and void and not enforceable against the plaintiff's reversionary right. The following genealogical table will elucidate the relation of the parties:



Sheo Ratan was separate from Gur Dayal and Bechu. Sheo Ratan had two sons, Sarup and Anup. Anup predeceased his father, so that upon Sheo Ratan's death Sarup became the sole owner of the property by rule of survivorship. On 30th March 1922 Mt. Sahti, who on the death of Sarup had only a limited interest in the property, executed a deed of gift in favour of her daughter Ganga Dei and her daughter's son Hansraj. Mt. Manjhari had no interest in the property, but she was joined in the execution of the deed of gift. Plaintiff claimed to be the next presumptive reversioner of Sheo Ratan. He alleged that upon the death of Sheo Ratan, Mt. Manjhari took to evil ways and that Sarup and Anup were not born in wedlock. The finding of the Court below is that Mt. Manjhari was the wedded wife of Sheo Ratan and Sarup and Anup were the lawful issues of that marriage. It is patent therefore that the plaintiff was not the next presumptive reversioner of Sarup. The next presumptive reversioner is Mt. Ganga Dei who, if she succeeds to the estate of Sarup, would also have a limited interest in the property. She was to be followed by Hansraj, the daughter's son. The succession of the plaintiff thus depends

upon the happening of a remote and uncertain contingency.

The plaintiff did not state in the plaint that he was entitled to maintain the suit either because the next presumptive reversioners had colluded with the life-tenant, or had otherwise precluded themselves from interfering. The suit was resisted on the ground that the plaintiff was not the next presumptive reversioner and therefore was not competent to maintain the suit. This plea found favour with the Courts below which dismissed the suit. Plaintiff impugns the correctness of the decision of the Courts below. The law regulating the right of action in suits by reversioners has been laid down by the Judicial Committee in *In re Rani Anand Kunwar* v. *The Court of Wards* (1) The following pronouncement has been made in this case:

"It cannot be the law that anyone who may have a possibility of succeeding on the death of a widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue."

This view has been reiterated in later decisions such as *Venkatanarayana Pillai* v. *Subbammal* (2). Referring to the earlier decision, their Lordships observe at p. 412:

"But in laying down this broad rule their Lordships pointed out in clear terms that under certain circumstances the next presumable reversioner would be entitled to sue."

In *Jhandu* v. *Tarif* (3) their Lordships held that a contingent reversioner was not competent to maintain a declaratory suit unless he showed that the nearer reversionary heir had precluded himself from suing.

It is unfortunate that the plaintiff came into Court with a number of false allegations and put forward his pretension as the next presumptive reversioner, which he was not. He was, as a matter of fact, a contingent reversioner. He had not stated in the plaint that the presumptive reversioner had either colluded with the life-tenant or had otherwise precluded herself from suing. At the same time one cannot shut one's eyes to the fact that the deed of gift has been executed by the life-tenant in favour of persons who are nearer than the plaintiff in the order of succession under the Hindu law. These must be taken to have either colluded with the life-tenant in the wrongful act complained of or to have concurred in the said act. The act complained of is one which is clearly to their benefit and which passes the property from the life-tenant to them. Where the suit is directed against alienations in favour of the next presumptive reversioner the contingent reversioner from the nature of things is the only person entitled to challenge the transaction, and there does not appear to be any reason for holding that a suit by him is not competent. Under those circumstances the only person who was left in the field to challenge the legality or validity of the act of Mt. Sahti, the widow of Sarup, was Bechu Ahir, the plaintiff and no other person. I am fortified in this view by the decision of this Court in *Raja Dei* v. *Umed Singh* (4) in which a Hindu widow in possession gifted the property in favour of a daughter's son during the lifetime of her daughter. It was held that a contingent reversioner was entitled to maintain a suit for declaration that the transfer was invalid, when the next reversioner was a female entitled to a life interest only.

It was further held that where the donee was the next reversioner presumptively entitled to the absolute ownership of the property the suit by the contingent reversioner was not barred. This view was followed in *Jaint Singh* v. *Gosain* (5). The lower appellate Court has relied upon *Meghu Bai* v. *Ram Khelawan* (6). In this case the presumptive reversioner had not concurred in the alienation made by the widow; nor was he the transferee under the alienation impugned in the action. The presumptive reversioner had not by any acts or omissions precluded himself from challenging the act of the widow. Under those circumstances there was no

(1) [1891] 6 Cal. 764=9 C. L. R. 381=8 I. A. 14=4 Sar. 195 (P. C.).
(2) A. I. R. 1915 P. C. 124=29 I. C. 298=42 I. A. 125=38 Mad. 406 (P. C.).
(3) A.I.R. 1914 P.C. 34=27 I.C. 892=37 All. 45 (P.C.).
(4) [1912] 34 All. 207=13 I.C. 632.
(5) [1918] 46 I.C. 85.
(6) [1913] 35 All. 326=19 I.C. 814.

excuse on the part of a contingent reversioner to assume the carriage of the suit.

Both upon general principles and the authorities set out above the right of suit clearly belonged to Bechu, and his claim ought not to have been dismissed upon the mere fact that he was not the next presumptive reversioner. I would therefore reverse the decrees of the Courts below and decree the plaintiff's suit.

Niamatullah, J.—I entirely agree with the conclusion of my learned brother that the plaintiff is entitled to maintain the suit for the declaratory relief he seeks in his plaint. The fact that he made certain false allegations to establish his right as the presumptive reversioner of Sheo Ratan does not disqualify him from maintaining the suit if the facts found invest him with a status in which he can sue for the declaration he seeks. On their own showing of the contesting defendants the deed of gift was executed by the widow of the last male holder in favour of his daughter and her son. The plaintiff cannot be denied the right to impeach a deed of gift which is in favour of a reversioner nearer than himself. It cannot be humanely expected that such reversioners would challenge the deed of gift in their own favour. The case, therefore, comes within the rules enunciated in the cases to which reference has been made in the leading judgment. Defendants 1 and 2 have unquestionably precluded themselves from bringing a suit of the character brought by the plaintiff, having accepted the gift made by the present life estate holder.

To concede to the plaintiff a right to bring a suit for a declaration that the deed of gift will be "null and void and not enforceable as against the future right of inheritance of the plaintiff" does not necessarily exclude the consideration of the further question, whether having regard to the particular circumstances of the case, the declaratory relief which is always in the discretion of the Court, should be granted. The deed of gift purports to have been executed by the widows of Sheo Ratan and Sarup in favour of the daughter of the last male holder and her son, and recites practically the whole of the family pedigree including the line in which the plaintiff's name occurs. The plaintiff is clearly admitted as the first cousin of Sarup, who has been found to be the last male holder of the property in dispute. The instrument evidences a gift in favour of such persons and made under such conditions that it cannot be considered to amount to a surrender of the estate by the widow of the last male holder. In these circumstances I am inclined to think that the declaration prayed for by the plaintiff is a declaration of what is palpably and uncontestably true. If the plaintiff's suit is dismissed his right to recover possession on the termination of the life estate, in case no nearer reversioner is alive, cannot be questioned. In cases of transfers for consideration in which questions of legal necessity may arise, the grant of a declaratory relief ordinarily serves the useful purpose of declaring rights which depend upon proof of circumstances as to which evidence may disappear by the time succession to the estate opens. But in a case where the transfer is a gift pure and simple made by a Hindu widow, no question of legal necessity or its validity as such can arise. It is in my opinion not desirable as a rule to grant a declaration which can serve no useful purpose now or hereafter. In view, however, of the fact that the defendants' written statement denies that the plaintiff belongs to the family of the last male holder, though the plea is in the teeth of what is stated in the deed of gift itself, I am not prepared to take a different view from that of my learned brother on this part of the case. Accordingly I concur in allowing the appeal in terms mentioned in his judgment.

By the Court.—We allow this appeal, set aside the decrees of the Courts below and decree the plaintiff's suit. As the parties came to Court on false allegations we direct that they should bear their own costs throughout.

G.P./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 737

DALAL, J.

Ghassoo—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 423 of 1929, Decided on 6th January 1930.

(a) Criminal P. C. S. 526—Ground for transfer is not to be decided in abstract—What is to be determined is whether Magistrate behaved so as to give legitimate ground for fear of impartial trial.

The matter is not to be decided in abstract whether a certain Magistrate would deal with a matter impartially or not. The question always is whether through some error or unfortunate accident the Magistrate has behaved in a way to give legitimate ground for fear to one party or the other. [P 737 C 2]

(b) Criminal P. C., Ss. 526 and 162—When copy of statement of witnesses before police is asked for, Court is bound to grant same insisting on a written application and refusal to grant them on misapprehension of law or flimsy pretext are enough circumstances to make accused believe that Magistrate had no desire to be fair to him.

When a copy of a written statement made by a witness before the police is asked for, it is the bounden duty of the Magistrate, and it does not depend upon his volition or good will that he should refer to the statement made before the police and furnish a copy or record a definite order that he did not think it expedient in the interests of justice to furnish the accused with the copy. Nor can he insist upon a written application for the same, an oral request being sufficient. Therefore, insistence on a written application and refusal to grant copies on misapprehension of law laid down under S. 162 or on other flimsy pretext are enough circumstances to give the accused person reasonable belief that the Magistrate had no desire to be fair to him : 36 *Cal.* 560, *Ref.* [P 738 C 1,2]

(c) Criminal P. C., S. 556, Expl.—Local inspection—Transfer is advisable but not necessary.

Explanation to S. 556 merely means that the local inquiry would not amount to a necessity for transfer, but there may be circumstances under which it would be advisable to direct a transfer from the Court of a Magistrate who has made a local inquiry. [P 733 C 2]

Zahur Ahmad—for Applicant.

U. S. Bajpai, A. P. Dube and *S. B. L. Gour*—for the Crown.

Judgment.—I have gone through the various affidavits and the explanation of the Magistrate who is trying the different cases. Unfortunately the cases have assumed a communal aspect as the dispute is between Hindus and Mahomedans. I well realize that in such a case the class to which the Magistrate belongs raises a suspicion in the opposite class, and, therefore, in cases of transfer where communal interests are involved a transfer should be granted with considerable hesitation. In the present case, however, I am afraid that the trying Magistrate has shown a certain amount of irritation and behaved in a way which would give legitimate cause to the Mahomedans to think that they would not receive justice in his Court. As I have often stated from this Bench, the matter is not to be decided in the abstract whether a certain Magistrate would deal with a matter impartially or not. The question always would be whether through some error or unfortunate accident the Magistrate has behaved in a way to give legitimate ground for fear to one party or the other. In this case such legitimate ground does exist. First of all certain Mahomedans were prosecuted by the police out of several against whom a complaint was made by the Hindus. When others were not prosecuted a complaint was made in Court and the Magistrate without holding any inquiry under S. 202, Criminal P. C., promptly ordered all the Mahomedans to be prosecuted at the same time. It is true that the complaint was made prior to the result of the police inquiry. Even so, when the favourable result of the police inquiry was available to some of the Mahomedans it would have been better if the Magistrate had waited until the completion of the inquiry in the case sent up by the police before ordering the prosecution of men whose prosecution was not desired by the police. A certain amount of confusion must arise and the defence must be prejudiced when the police case is mixed up with the case put forward by a partial complainant. It is rightly pointed out on behalf of those who are prosecuted by the police that by the complainant spreading wide his net to include all the Mahomedans, the persons prosecuted by the police have been deprived of defence witnesses because those who were prosecuted on the private complaint were the witnesses for those prosecuted by the police.

Secondly, the Magistrate has passed a most extraordinary order on the prayer of the Mahomedan accused for a copy of the statements of witnesses recorded by the police. Under S. 162,

Criminal P. C., a witness who was examined by the police and whose statement was recorded by the the police may be cross-examined if in Court he makes a statement in conflict with the statement made by him before the police. The Magistrate has a curious idea that the person to be contradicted is the police officer who recorded the statement and not the witness who made conflicting statements. He even goes to the length of informing the public that such is the law "as it exists" meaning thereby that the law was different previously. As is usual with Magistrates, I am certain that a copy of the Code of Criminal Procedure was not handy for this Magistrate to refer to, and he never read the provisions of that section before recording this most amazing order.

Another thing is that there was no necessity to insist on the Mahomedan accused putting in an application. An oral request ought to be entertained as the law does not prescribe any application. To ask for a reason is another amazing order when every Magistrate ought to know that when a statement is required under S. 162 it must be required for the purpose of contradicting a witness. Another noticeable matter is that the application was filed on 19th July, and no order thereon was passed till 30th September. It appears to me that the order was passed on 30th September, merely for the purposes of the record and that the Magistrate had no desire to carry out orders of the law under S. 162. The procedure is well laid down in *Salt* v. *Emperor* (1) by a Bench of two Judges of the Calcutta High Court. The rule laid down there was that when a copy of a statement made by a witness before the police is asked for it is the bounden duty of the Magistrate, and it does not depend upon his volition or good will, that he should refer to the statement made before the police and furnish a copy, or record a definite order that he did not think it expedient in the interests of justice to furnish the accused with such a copy. The irritation shown by the Magistrate in first of all insisting on an application from an accused person who in every case has to be given facility for his defence, secondly, in passing an order more than two months afterwards on the application, and, thirdly, in giving a most amazing reason for the refusal of the copy, would naturally give an accused person reasonable belief that the Magistrate had no desire to be fair to him.

In one case the prosecution was no doubt on behalf of the police, yet there was a Mahomedan complainant. When that complainant applied for stay so that he may request this Court to transfer the case, the Magistrate again took an exceedingly narrow view. He gave it out as his opinion that the Mahomedan was not the complainant and that he had no right to apply to this Court for transfer. In ordinary language the Mahomedan was certainly a complainant even though the prosecution was launched by the police. The refusal to grant a postponement which was absolutely compulsory under the law may have been an error of judgment but yet combined with the other actions of the Magistrate would create an impression of fear in the minds of the Mahomedans.

It appears that this Magistrate made a local inquiry. Mr. Dube on behalf of the opposite party was under the impression that the inquiry was made for some report to be submitted to Government. If so the inquiry was of a nature in which the Magistrate had to arrive at some conclusion, and I do not think that such a Magistrate would approach an inquiry in Court with an open mind. Reference was made on behalf of the opposite party to the explanation under S. 556, Criminal P. C., that the local inquiry did not deprive a Magistrate of jurisdiction. That merely means that the local inquiry would not amount to a necessity for transfer but there may be circumstances under which it would be advisable to direct a transfer from the Court of a Magistrate who has made a local inquiry.

I direct the transfer of all the cases to which these five applications for transfer relate from the Court of Mr. Chandra Mani to the Court of some other Magistrate having jurisdiction in the Etawah District. The District Magistrate is requested to fix upon such a Court. The trial shall proceed from the stage where it was left off. I have

(1) [1909] 36 Cal. 560=10 Cr. L. J. 88=2 I.C. 591.

informed Mr. Zahur Ahmad, counsel for the applicants, accordingly.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 739

BOYS, J.

Bhairo Prasad—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 154 of 1930, Decided on 26th May 1930, from order of Sess. Judge, Agra, D/- 29th October 1929.

U. P. Municipalities Act, S. 82—Interest in contract doubtful—Still permission of Commissioner is necessary.

A member of the Board acquiring share or interest in any contract must obtain permission in writing of the Commissioner. Where there is doubt as regards the interest, the Commissioner should be applied to for permission.

[P 740 C 1]

K. D. Malaviya—for Applicant.

Govt. Advocate—for the Crown.

Judgment.—The applicant has been convicted under S. 168, I. P. C., read with S. 82, Municipalities Act, in that while he was a public servant, i. e. a Municipal Commissioner, he had an interest in a contract made with the Board. This application is only before me on the revisional side of the Court, but the facts are of such importance to the public that it is desirable that they should have full publicity. The facts found are that the Board had some difficulty in arranging for the supply of gram to the conservancy bullocks. Whether these difficulties were genuine difficulties or manufactured in order to prepare the way for entering into an irregular arrangement with the applicant, there is no evidence. The applicant in 1926 was a member of the firm of Gobindram Chunni Lal, grain-dealers. He apparently began to supply gram for the conservancy bullocks to the Board through his firm, Gobindram Chunnilal, on 5th May 1926. He apparently had either some doubts himself as to the risk that he might be incurring by this course of action, or thought that someone who was hostile to him might make capital of it. He has been given the credit by the lower appellate Court of the most favourable view of his application to the Board (Ex. 121) of 3rd June 1926, to the effect that he and the man who was associated with him in the supply of gram felt that their position might be invidious.

Upon the application a resolution of the Board (Ex. 114), dated 30th June 1926, was passed to the effect that the applicant and the man associated with him should supervise the buying of gram at market rates. This gram then continued to be supplied by the applicant's firm, Gobindram Chunnilal, up to 21st September 1926, when the firm's name was changed to Bansidhar Rekhabdas, and apparently the object of this change was to conceal the fact that the same firm was really continuing to supply the gram. There is no reason to suppose that this suspicion is not well founded, and the applicant in any case has only himself to blame, for he has refused to produce his account books. The supply of gram continued in this way up to 3rd March 1928, when the matter was brought to the notice of the authorities and this prosecution was instituted. The learned Magistrate sentenced Bhairo Prasad to nine months' simple imprisonment and a fine of Rs. 500. The lower appellate Court substituted for the sentence of imprisonment a further fine of Rs. 300. Mr. K. D. Malaviya has urged every point that could be urged on behalf of the applicant, but I am quite satisfied that there is no force in any of them. He has urged that Cl. (f) of the proviso to S. 82, Municipalities Act, excepts from the prohibition in S. 82 "occasional" dealings. Apart altogether from the question whether Cl. (f) can be held to be in force at all seeing that, as I am told, the Government has not fixed any maximum, I have no hesitation in holding that though the supply of gram may have been irregular so far as dates and possibly even quantities were concerned, the term "occasional" is wholly inapplicable to a continuing arrangement for supply as needed. Nor is there any room for a suggestion that the applicant was under a mistake of fact which might enable him to plead S. 79, I. P. C.

It was suggested to me in the course of argument that the case was due to somebody having sent an anonymous letter and to hostility entertained towards the applicant by certain persons. This is, of course, wholly immaterial. All that we are concerned with is whether the applicant did or did not commit

an offence within S. 168, I. P. C., and in view of the great interest of the public in the probity of its representatives on the Board it is a matter for sincere congratulation when such a case is disclosed whether by an anonymous petition or otherwise. On the question of sentence I am asked to hold that the fine is too severe. I think that there is grave reason for suspecting the bona fides of Bhairo Prasad, the applicant, throughout this matter, and I find reasons for that opinion in two facts. According to the account that he himself gave, there was a discussion between him and others as to the propriety of his entering upon this transaction at all. That being so it is impossible to conceive that he did not consider the terms of S. 82, Municipalities Act, and from that section it is immediately apparent that where there is doubt the Commissioner should be applied to for his permission. Notwithstanding the discussion and doubt that arose in regard to the propriety of his action he refrained, and it is fair to say he deliberately refrained, from applying to the Commissioner. Further, he has refused to produce his accounts and has only himself to blame if conclusions unfavourable to him are drawn from that fact also. I think, therefore, that he was fortunate to have the sentence of imprisonment reduced to one of fine. The application is dismissed.

G.P./R.K. *Application dismissed.*

A. I. R. 1930 Allahabad 740

BOYS, J.

Paras Ram—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. 166 of 1930, Decided on 27th May 1930.

(a) Public Gambling Act (3 of 1867), S. 6—Warrant illegal—Presumption does not arise.

The presumption under S. 6 would not arise if it is found that the warrant was an illegal warrant. [P 740 C 2]

(b) Evidence Act, S. 114, Illus. (b)—Accomplice must be corroborated.

Evidence of accomplice requires corroboration. [P 740 C 2]

F. O. O'Neill—for Applicant.

M. Waliullah—for the Crown.

Judgment. — Paras Ram applies in revision from his conviction under S. 3 read with S. 15, Gambling Act (3 of 1867, and a sentence of nine months' rigorous imprisonment. It may be that Paras Ram, who is said to have previous convictions, had started anew to keep a common gaming house, and if that is so, it is unfortunate that the defect in the warrant should lead, as it must lead in the state of the evidence, in this case, to his acquittal.

The presumption under S. 6, Gambling Act, could not arise as it has been found that the warrant was an illegal warrant, and that position is not challenged. The presumption failing, it could be proved otherwise that the house was being used as a common gamlng house, and the prosecution has eudeavoured to prove this by the evidence of two witnesses Md. Yusuf and Mula. These are men who were actually among the alleged gamblers who were caught in the room. The Magistrate purported to examine them as witnesses under S. 10; it may be, I have not got to decide the point, that persons who are examined by virtue of the power given by S. 10 are not to be regardad as approvers or as accomplices in the sense that their evidence cannot be acted upon without corroboration. I have no need to consider this point because I am of opinion that S. 10 was inapplicable to the case. The house referred to in S. 10 must be one "entered under the provisions of this Act." The house was not entered under the provisions of this Act, in that there was neither a legal warrant, nor was there present in charge any officer of the rank specified in S. 5.

The fact, however, that S. 10 is not applicable to the case would not prevent the Magistrate from examining these two persons in the ordinary way as witnesses. So examined, however, they are clearly accomplices and as such their evidence requires corroboration. The Crown finds itself unable to point out any corroboration, and in fact there is on hint of any corroboration of the statement of these two witnesses, so far as they purport to show that it was a common gaming house. The presumption under S. 6 then failing, the Magistrate having no power to examine under S. 10 and therefore in any event there being no question of any special character attaching to the witnesses by virtue of examination under S. 10, and

there being no corroboration of the witnesses regarded as ordinary witnesses not examined under S. 10, there is not legal basis for the conviction. The application is allowed and the conviction and sentence set aside and the applicant will be released unless his lawful detention is required for any other purpose. His bail bond in this matter is discharged.

M.N./R.K. *Application allowed.*

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* A. I. R. 1930 Allahabad 741

BOYS, J.

Emperor

v.

Bashir—Accused.

Criminal Ref. No. 256 of 1930, Decided on 17th June 1930, made by Dist. Magistrate, Dehra Dun, on 9th April 1930.

*** Criminal P. C., Ss. 438 and 439 (5)—S. 439 (5) cannot constitute bar to District Magistrate's action under S. 438 in case of acquittal by a Magistrate since Local Government and District Magistrate are distinct and non-interchangeable terms.**

A District Magistrate and the Local Government are two distinct and non-interchangeable terms, and the District Magistrate not being the person entitled to appeal against the acquittal by a Magistrate, the mere fact that he may be able in his executive capacity to move the Local Government to appeal under S. 439 (5) cannot bar his taking action under S. 438: 24 *All.* 346, *Dist.* [P 741 C 2]

M. Waliullah—for the Crown.

Inahimudullah—for Accused.

Order.—This is a case of a reference by the District Magistrate asking that an acquittal should be set aside and the case sent back for retrial. The ground of the reference is that the accused was acquitted by the Magistrate of a charge of harbouring only because that person had not yet been convicted though proceedings were pending against him whom the present accused was charged with harbouring. The person alleged to have been harboured has been since convicted. The accused was not acquitted on the merits. If the Magistrate thought it necessary, I do not say it was necessary, but if he thought it necessary, to know the result of the trial of the person who was alleged to have been harboured for the offence which he was alleged to have committed, he should have adjourned the trial and awaited the result of the other trial. The only contention which could be raised here against the reference is that the powers vested in the District Magistrate under S. 438, Criminal P. C., are shut out by sub-S. 5, S. 439, because the Local Government should have appealed and has not done so. This is to confound the Local Government with the District Magistrate as if the two terms were interchangeable.

It is manifest that the Local Government could appeal, but it could so appeal even if the District Magistrate thought that it should not appeal. The two terms not being interchangeable I can see no reason whatever why sub-S. 5, S. 439, should be held to constitute any bar to the District Magistrate taking action under S. 438. For the accused my attention is drawn to the case *In the matter of Sheikh Aminuddin* (1). There two Judges of this Court refused to hold themselves barred from entertaining a reference under S. 438 by S. 439 (5). They did, however, go on to hold that as a matter of their discretion they declined to exercise their powers under S. 439 where the Local Government might have appealed, and where the Magistrate could have moved the Local Government if he so chose. It is possible that in that case the acquittal had been on what the Magistrate considered to be an acquittal. It has been based on a mistaken view of the course which the Magistrate ought to adopt. That may not be a material distinction, but the decision quoted is one where their Lordships acted in the exercise of a discretion, and I am certainly not bound by it. The District Magistrate not being the Local Government is not the person entitled to appeal, whether or not he may be able in his executive capacity to move the Local Government to appeal. I see no reason therefore why his judicial powers should be restricted.

Accepting the reference, I set aside the acquittal and direct the trial Court to take up the case again from the stage at which it had reached immediately before the order of acquittal was passed.

V.B./R.K. *Reference accepted.*

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(1) [1902] 24 All. 346=(1902) A.W.N. 89.

* A. I. R. 1930 Allahabad 742

SEN AND NIAMATULLAH, JJ.

Mohamed Sharif — Defendant — Appellant.

v.

Nasir Ali and *others* — Plaintiff and Defendants—Respondents.

Second Appeal No. 1958 of 1927, Decided on 18th June 1930, from decree of Sub-Judge, Bulandshahr, D/- 22nd August 1927.

(a) Police Act (5 of 1861), S. 42—Police Act provision of three months period for suits is repealed by Limitation Act (1871) —Suits are now subject to general law of limitation in Limitation Act.

On the passing of the Limitation Act (9 of 1871) the part of S. 42, Police Act (5 of 1861), which provides a period of three months for suits contemplated by it was repealed with the result that such suits became subject to the general law of limitation contained in the Limitation Act and the special provision of limitation contained in S. 42, Police Act (5 of 1861), ceased to be operative. [P 744 C 1]

*** (b) Limitation Act, S. 15—Claim against joint defendants—Notice necessary against only one defendant—Period of notice given is excluded in computing period of limitation for suit.**

If it is necessary for the plaintiff to bring a suit claiming relief against all the defendants jointly, and if notice under enactment was necessary against one defendant only and was in fact given, the period of notice is to be excluded in computing the period of limitation for the suit and not merely so far as the defendant to whom notice was given is concerned : *A. I. R.* 1922 *Pat.* 549, *Ref.* [P 745 C 1, 2]

(c) Civil P. C., S. 80 — Police Inspector acting in official capacity.

Police Inspector proceeded to the scene of offence on receipt of the report forwarded to him by the head muharrir. His subsequent report complaining of assault and obstruction by the plaintiff and his party was made by him in his capacity as police officer. One of the offences with which the plaintiff was charged was that under S. 332, I. P. C. Plaintiff was acquitted and suit was filed by him for damages for malicious prosecution.

Held : that the Police Inspector was acting in his official capacity and that it was imperative on the plaintiff to give notice to him of the suit for malicious prosecution : *A. I. R.* 1924 *All.* 851, *Foll.* ; 5 *I. C.* 467, *Dist.* [P 744 C 2]

(d) Police Act (5 of 1861), S. 42—Scope.

Section 42 refers to actions for "anything done or intended to be done under the provisions or under the general police powers."

Where a suit has been brought against police officer for damages for something done in the exercise of his powers under Criminal P. C., Police Act, S. 42, does not apply : 30 *I. C.* 173, *Foll.* [P 745 C 1]

(e) Malicious Prosecution—Finding as to conspiracy of three defendants, including police officer to prosecute plaintiff maliciously—Plaintiff held to be entitled to sue all three defendants for damages.

In a suit for damages for malicious prosecution the finding was that all the three defendants conspired to prosecute the plaintiff maliciously and without reasonable and probable cause and that in furtherance of their design one of the defendants figured as the complainant in a cognizable offence of which information was lodged by him to the police and the latter prosecuted the plaintiff on the faith of such information. Evidence, in the case, was given by all the three.

Held : that under these circumstances, all the three defendants, including the police officer were rightly considered by the trial Court to have prosecuted the plaintiff so as to entitle the latter to sue them for compensation for malicious prosecution : 30 *All.* 525 (*P.C.*); *A. I. R.* 1926 *P. C.* 46, *Rel. on.* [P 746 C 1]

K. N. Katju—for Appellant.

Judgment.—These two appeals arise out of a suit brought by the plaintiff-respondent Syed Nasir Ali for recovery of Rs. 1,000 as damages for malicious prosecution. Defendant 1, Sharif, was a Police Inspector stationed at Khurja at the time when the offences for which the plaintiff-respondent was prosecuted were alleged to have been committed. Syed Zafar Ali and Aftab Husain, defendants 2 and 3, who are brothers, are related to the plaintiff. On 11th January 1924 defendant 2 made a report at the Khurja Police Station that his house, which is contiguous to that of the plaintiff, had been raided by the plaintiff and his associates and that he (defendant 2) closed his doors to prevent the raiders getting into his house and made good his escape by jumping down the roof of his house. As the officer-in-charge of the police station was indisposed, the head muharrir forwarded the report to the Circle Inspector, defendant 1, who, accompanied by a few constables, proceeded to the scene of occurrence. Subsequently at about 12 p. m. the Circle Inspector made a report at the thana that, while he and the constables were proceeding to the scene of occurrence, the party were waylaid by the plaintiff and a few others and beaten. This was said to have occurred between 6 and 7 p. m. Defendant 1 was under orders of transfer to Saharanpur and left Khurja next day. The offences with which the plaintiff and his party were charged by defendant 1 in the report already mentioned were those under Ss. 332 and 147, I. P. C., i. e., voluntarily causing hurt to deter public servant from his duty and

rioting. The officer-in-charge of the police station made an investigation which resulted in the plaintiff's prosecution for those offences before the Joint Magistrate, who acquitted the plaintiff and his co-accused on 27th March 1924. The suit which has given rise to these appeals was instituted on 27th May 1925 on the allegation that defendant 1 and Syed Zafar Ali, defendant 2, who is an Honorary Magistrate, and defendant 3 conspired to bring a groundless charge against the plaintiff without reasonable and probable cause and maliciously. The Munsif, in whose Court the suit was brought, dismissed it on 22nd March 1926. On appeal the learned District Judge of Bulandshahr sent back the case to the Munsif on the ground that the latter had improperly refused to examine certain witnesses whom the plaintiff desired to produce and directed him to submit fresh findings after recording the evidence of such witnesses.

In the meantime the Munsif, who had dismissed the suit, was transferred and was succeeded by another officer, who recorded the evidence which the appellate Court had directed to be taken and found in favour of the plaintiff on all the material questions arising in the case. On receipt of the findings the learned District Judge decreed the plaintiff's claim to the extent of Rs. 700 against all the defendants. Second Appeal No. 1958 of 1927 has been preferred by defendant 1 and Second Appeal No. 2260 of 1927 has been preferred by defendants 2 and 3. To clear the ground for a consideration of the questions of law which have been argued before us we should state the findings of fact arrived at by the lower appellate Court which must be accepted as conclusive on second appeal. It has been found by the learned District Judge concurrently with the finding of the Court of first instance after remand that defendant 1 and defendant 2 were on friendly terms ; that there was ill-feeling between the plaintiff and defendants 2 and 3 in consequence of disputes about a certain zamindari ; that in June 1923 proceedings under S. 145, Criminal P. C., were taken by the Sub-Divisional Officer, Khurja, against the plaintiff and defendants 2 and 3 ; that a report of defendant 1 then made was unduly favourable to defendants 2 and 3 and that the evidence otherwise proved that defendant 1 had identified himself with defendants 2 and 3. It has also been found that the criminal case against the plaintiff and his party was absolutely false and that the plaintiff, who was a schoolmaster, was busy with the printing of examination papers in the school building at the time when the offences were said to have been committed. The lower appellate Court has gone so far as to hold that the report of defendant 2 made at the thana on 11th January 1924, which was forwarded to defendant 1, was without foundation and that the subsequent report of defendant 1, charging the plaintiff and his party with offences under Ss. 332 and 147 was equally without foundation. The learned District Judge has expressed himself thus :

"The plaintiff has thus proved that he could not be at the alleged row nor could he be at the tiraha to fight with the defendants. As the plaintiff was innocent and the whole story of the defendants from end to end was false, so not a single person of mohalla of defendants 2 and 3 nor any one of the tiraha appeared as a witness for them. I agree with Mr. Ratan Lal that the reports of defendants 2 and 3 to the police that there was a danger of breach of peace, as also the report of defendant 1 that the plaintiff beat him was all false so far as the plaintiff was concerned. As everything was false and imaginary it is fair to assume that the defendants were actuated by malice in so doing ..... It seems that all the three defendants acted in a sort of conspiracy to ruin the plaintiff. Defendant 1 was going, he was to hand over charge the next day and so it needed all efforts to concoct a case against the plaintiff and men of his party as early as possible. For want of better grounds the prosecution was launched on a flimsy story not supported by reliable evidence even."

It may be that this picture is somewhat overdrawn, but sitting in second appeal we are bound by the findings of fact supported as they are by evidence which we are precluded from examining ourselves. We must therefore hold that the plaintiff-respondent was prosecuted maliciously without reasonable and probable cause.

The learned advocate for the appellant has argued: (1) that the suit should have been brought within three months from the accrual of cause of action, as required by S. 42, Police Act 5 1861 ; (2) that even if a longer period of one year provided for by Art. 23 Sch. 2, Limitation Act, be applicable,

the plaintiff's suit is barred and (3) that defendant 1 cannot, under the circumstances of the case, be regarded as the prosecutor and no decree for damages can be passed against him.

The first point may be shortly disposed of. On the passing of the Limitation Act 9, 1871, that part of S. 42, Police Act 5, 1861 which provides a period of three months for suits contemplated by it was repealed, with the result that such suits became subject to the general law of limitation contained in the Limitation Act and the special provision of limitation contained in S. 42, Police Act 5, 1861 ceased to be operative.

Article 23, Sch. 2, Lim. Act, provides a period of one year for suits for compensation for a malicious prosecution, to be reckoned from the date the plaintiff is acquitted or the prosecution otherwise terminates. The plaintiff-respondent having been acquitted on 27th March 1924, his suit brought on 27th May 1925, is prima facie barred unless allowance is made for two months. The plaintiff claims a further period of two months under S. 15, Lim. Act, which provides inter alia that in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of notice shall be excluded. The plaintiff served defendant 1 with two months' notice under S. 80, Civil P. C., and brought the suit after the expiry of two months from the date of the notice. He, therefore, claimed benefit of S. 15 on the ground that such notice was imperative under S. 80, Civil P. C. If under the circumstances of the present case defendant 1 was entitled to a notice prescribed by S. 80, Civil P. C., there can be no doubt that the suit, so far, at any rate, as defendant 1 is concerned, was instituted within time. The question remains as to whether it was time barred against defendants 2 and 3 as to whom no question of notice can arise.

It was contended on behalf of defendant 1 that no notice under S. 80, Civil P. C., was necessary if the plaintiff's allegation be true that defendant 1 maliciously conspired with the other two defendants to launch a groundless prosecution against the plaintiff, because, in that case, he cannot be deemed to have acted in the discharge of his duty as a police officer. Reference was made in this connexion to *Mumtaz Hussain* v. *A. E. Lewis* (1) which is, however, not a case in point. An assistant engineer against whom damages were claimed in that case by his subordinate for assault and use of abusive language was held not to be entitled to a notice under S. 80, Civil P. C. It cannot be said that a public officer acts in his official capacity in maltreating his subordinate in relation to the discharge of his duties as a public officer. S. 80 will apply to a case in which damages are claimed against a public officer in respect of any act purporting to be done by him in his official capacity. An important test is whether the public officer professed to act in his official capacity. As was ruled in *Abdul Rahim* v. *Abdul Rahim* (2):

"If the act was such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term 'purport.' The motives with which the act was done do not enter into the question at all."

In the case before us defendant 1 proceeded to the scene of occurrence on receipt of the report previously made by defendant 2 and forwarded to him by the head muharrir. He purported to do so in his capacity as a Police Inspector. His subsequent report complaining of assault and obstruction by the plaintiff and his party was likewise made by him in his capacity as a police officer. Indeed one of the offences with which he charged the plaintiff in that report was that under S. 332, i. e., voluntarily causing hurt to deter public servant from his duty. We are clearly of opinion that on the authorities of this Court and the language of S. 80, Civil P. C., defendant 1 did purport to act in his official capacity and that it was imperative on the plaintiff to give notice to him of the suit for malicious prosecution. The learned advocate for the appellant argued that notice, if at all necessary, was required

(1) [1910] 5 I. C. 467.
(2) A. I. R. 1924 All. 851=80 I. C. 72=46 All. 884.

by S. 42, Police Act 5, 1861, which provides for one month's notice only. If this contention is sound the plaintiff's suit should be deemed to have been instituted beyond limitation by one month. We are unable to give effect to this argument. That section refers to actions for

"anything done or intended to be done under the provisions of this Act or under the general police powers hereby given."

It was not in the discharge of any duty imposed by the Police Act that defendant 1 was obstructed or made the subsequent complaint at the police station against the plaintiff. Defendant 2's report which had been forwarded to him by the head muharrir complained of a cognizable offence having been committed by the plaintiff. Defendant 1 proceeded to the scene of occurrence to investigate the case initiated by that report. It was therefore, in his capacity as an investigating police officer in the exercise of powers conferred upon him as such by the Criminal Procedure Code that he acted. His own report which led to the prosecution of the plaintiff-respondent was also made in the same capacity. It was held in *Bachha Singh* v. *Jajar Beg* (3), that :

"Where a suit has to be brought against a police officer for damages for something done in the exercise of his powers under the Criminal Procedure Code the provisions of S. 42, Police Act, do not apply and the plaintiff has to give two months notice as provided by S. 80, Civil P. C."

Accordingly we hold that S. 42, Police Act, does not apply and that the plaintiff was entitled to a period of two months being excluded in computing limitation. In this way the suit was rightly held by the lower appellate Court to be within time. The suit is in our opinion equally within time as against defendants 2 and 3. S. 15 (2), Limitation Act, provides that

"in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force the period of such notice shall be excluded."

If it is necessary or even permissible for a plaintiff to bring a suit claiming relief against all the defendants jointly, and if a notice under S. 80, Civil P. C., was necessary against one of the defendants and was in fact given, the period of notice is to be excluded in computing the period of limitation for the suit and not merely so far as the defendant to whom notice was given is concerned. Any other view will make the provision of S. 15 (2) nugatory in cases in which it is necessary to implead in one suit, private individuals and the public officer against whom there is but one cause of action. All that the section requires is that a notice should have been given in accordance with the requirements of any enactment for the time being in force and if this condition exists it declares without any qualification or reservation that the period of notice shall be excluded in computing limitation. The learned Judges of the Patna High Court have taken the same view in *B. & N. W. Railway Co.* v. *Ramsarup Lal Chowdhury* (4).

The only other question that remains is whether defendant 1 should be considered to have prosecuted the plaintiff. His report at the thana complaining that the plaintiff and his party had committed the offences under S. 332 and S. 147, I. P. C., and asking for action being taken against them, taken with his conduct previous to the report as found by the lower appellate Court, is sufficient, in our opinion, to establish that he was the prosecutor of the plaintiff. It is true he did not take any part in the proceedings which followed except by giving his own evidence, but that fact will not make him any the less a prosecutor if he can be otherwise considered to be such. In *Gaya Prasad* v. *Bhagat Singh* (5) their Lordships of the Privy Council held that :

"It is not a principle of universal application that if police or Magistrate act on information given by a private individual without a formal complaint or application for process the Crown and not the individual becomes the prosecutor. The answer to the question, Who is the "prosecutor," must depend upon the whole circumstances of the case. The mere setting the law in motion is not the criterion ; the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say the prosecution was instituted and conducted by the police ; that is again a question of fact. Theoretically all prosecutions are conducted in the name and in behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence who *pro hac vice* represents the Crown."

(3) [1915] 30 I. C. 178.

(4) A. I. R. 1922 Pat. 549=70 I. C. 109.

(5) [1908] 30 All. 525=35 I. A. 189=5 A.L.J. 665 (P.C.).

In a later case, *Balbhaddar Singh* v. *Badri Sah* (6), at 460 (*of* 24 *A.L.J.*) their Lordships observed :

"Of course there is nothing in the point which seems to have been taken in the Courts below but which was not urged before their Lordships, that here de facto the appellants were not prosecuted by the respondent. In any country where, as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused, an action will lie."

In the case before us the finding is that all the three defendants conspired to prosecute the plaintiff maliciously and without reasonable and probable cause and that in furtherance of their design defendant 1 figured as the complainant in a cognizable offence of which information was lodged by him to the police and the latter prosecuted the plaintiff on the faith of such information. In the proceedings which followed before the Joint Magistrate all the defendants gave evidence. Defendants 2 and 3 actively aided the police in prosecuting the plaintiff in other ways. Under these circumstances we entertain no doubt that all the three defendants were rightly considered by the learned District Judge to have prosecuted the plaintiff so as to entitle the latter to sue them for compensation for malicious prosecution. In view of our findings on all the questions argued in second appeal we uphold the decree appealed from and dismiss the appeals with costs including counsel's fee on the higher scale.

G.P./R.K. *Appeal dismissed.*

(6) A. I. R. 1926 P. C. 46=95 I. C. 329=1 Luck. 215 (P.C.).

A. I. R. 1930 Allahabad 746

BOYS AND YOUNG, JJ.

Abdul Jalil Khan and *others*— Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 949 of 1929, Decided on 25th March 1930, against order of Addl. Sess. Judge, Pilibhit, D/- 3rd September 1929.

(a) Criminal P. C., S. 288 — Previous statements of witnesses — Admissibility considered—Evidence Act, S. 157.

Previous statements of witnesses are only ordinarily admissible to corroborate or contradict the witnesses who have made statements at the trial, or by virtue of S. 288, Criminal P. C. The latter section should only be employed when there is reason to believe that a witness at the trial is deliberately departing from the evidence which he gave before the Magistrate and where it is considered by the trial Judge desirable to bring the whole statement made before the Magistrate on record as substantive evidence. As to corroborating a witness it is unnecessary for the prosecution to corroborate their witnesses by previous statements until the statement made at the trial has been, in one way or another, challenged. As to contradicting a witness, it is not in accordance with law to use his statement made on a previous occasion, until the particular statement, by means of which it is desired to contradict the witness is put to him and he is asked what explanation he can give. In neither of these two latter cases is the previous statement itself substantive evidence.

[P 747 C 1]

(b) Evidence Act, S. 30— Confession exculpating author from alleged offence is not confession and should not be relied upon for convicting co-accused.

A confession which does not exculpate the author thereof but is merely an explanation exculpating himself from his alleged share of the offence is not a confession at all and should not be relied upon in convicting the co-accused.

[P 747 C 2; P 748 C 1]

(c) Criminal Trial— Evidence — Accused identified by witness in jail but not identified in Court—Identification is not greatly reliable evidence.

Although an identification by a witness in jail who fails to point him out in the trial Court is not necessarily worthless, it is not evidence on which very great reliance can be placed.

[P 748 C 2]

(d) Criminal P. C., S. 164— Magistrate should not ask questions so as to reconcile statements with those of co-accused unless it is to make statement intelligible but should merely record such statement as accused desires to make.

In recording confessions under S. 164, the Magistrate should merely record such confessions or statement as the accused might desire to make. It is no part of his duty to ask questions in detail on matters already within the Magistrate's knowledge and endeavour to reconcile the statements of the accused with other co-accused. But if the statement contains any real ambiguity it is the duty of the Magistrate with great caution and exercising great discretion to question the accused in order to eliminate the ambiguity and give him a chance to make his statement intelligible.

[P 750 C 2]

M. A. Aziz—for Appellants.

U. S. Bajpai—for the Crown.

Boys, J.—This is an appeal of six men from convictions under S. 396, I. P. C., and in the case of Abdul Jalil Khan and Abdul Shakur alias Shakuri, sentences of death and, in the case of

Dilawar, Kundan, Chhida and Hemraj, sentences of 10 years' rigorous imprisonment, including three months' solitary confinement. The printed paperbook of the case runs to just over 300 pages. This is partly due to the fact that the learned Additional Judge has admitted on to the record the whole of previous statements made by witnesses. Previous statements of witnesses are only ordinarily admissible to corroborate or contradict the witnesses who have made statements at the trial, or by virtue of S. 288, Criminal P. C. The latter section should only be employed when there is reason to believe that a witness at the trial is deliberately departing from the evidence which he gave before the Magistrate and where it is considered by the trial Judge desirable to bring the whole statement made before the Magistrate on record as substantive evidence. As to corroborating a witness it is unnecessary, and this has been pointed out many times, for the prosecution to corroborate their witnesses by previous statements, until the statement made at the trial has been, in one way or another, challenged. As to contradicting a witness it is not in accordance with law to use his statement made on a previous occasion, until the particular statement, by means of which it is desired to contradict the witness, is put to him and he is asked what explanation he can give. In neither of these two latter cases is the previous statement itself substantive evidence. We recognize however that in the present case, in bringing the whole of previous statements on to the record, the learned Judge was only moved by a desire to give the accused every opportunity of making such criticisms against the witnesses' testimony in the Sessions Court as they could found on the earlier statements. The learned Judge's judgment extends to nearly 40 pages of the printed record, and he has dealt with the case ably and exhaustively. If as we think, he has dealt with it in greater detail than is necessary, we again recognize that that is an error on the right side and that he was only desirous of dealing with the case thoroughly. He has certainly succeeded.

We have listened to counsel for the appellants for several days and he again has given very commendable labour and time to the study of this brief. These facts, however, which we can and do record with approval make it the less necessary for us to enter into details ourselves. The evidence consists of that of an approver, Narain, and a number of men who were eyewitnesses to the dacoity. The learned Judge has further relied on what is described as the confession of one of the accused, Dilawar. Except in one very important feature, dealing with the arrival of the dacoits on the spot and the part actually taken by Dilawar, there is no serious discrepancy between the so-called confession of Dilawar and the statement of the approver. The approver Narain's statement is that some of the dacoits came to a spot on the road to the village where the dacoity was committed on a tonga driven by one of the witnesses for the prosecution, Hafizul Rahman. Hafizul Rahman minimises his own share in the dacoity and says that he was compelled to drive some of the dacoits there. This explanation of his own presence among the dacoits is apparently accepted by the Crown.

Dilawar, accused, in his so-called confession describes how he drove the same two dacoits who are alleged to have come with Hafizul Rahman on his own ekka and says that he was compelled to this course by threats. The Crown did not in the case of this man accept the explanation. The fact remains that we have in the so-called confession of Dilawar and in the statement of the approver, as supported by Hafizul Rahman, two irreconcilable stories, one of necessity deliberately false, as to the manner in which some of the dacoits came to the meeting place. It would be possible perhaps to offer an explanation of this conflict, but in view of the line that has been taken in this Court by the Crown, it is unnecessary to deal with it in detail. The learned trial Judge has given some weight to the alleged confession of Dilawar, but in this Court the Crown has thrown it out and does not ask us to rely upon it. We think that the learned Government Pleader was right in adopting this course. Whether or no Dilawar had told the truth in the rest of the story in the alleged confession and only endeavoured to protect himself by explaining that he was forced into the course that

be followed, the fact remains that the confession, as it stands, does not implicate him himself and is in fact not a confession at all, but an explanation exculpating himself from his alleged share in the dacoity. We need not therefore say anything further on the subject of Dilawar's confession more than this, that we had to examine very carefully the circumstances in which it was made to see whether any conclusion could be drawn from these circumstances from which the appellants were entitled to reap an advantage. We do not think, however, that any conclusion can be drawn from those circumstances in favour of the appellants.

We deal with the case, therefore, as depending upon the statement of the approver Narain, supported by the evidence of eyewitnesses.

We do not find it necessary to deal with the cases of any of the appellants, excepting that of Chidda, in any detail. In the case of Abdul Jalil the evidence is, in our opinion, fully satisfactory. In the case of Abdul Shakur we eliminate the evidence of Tara. He identified Abdul Shakur in the Bareilly jail and he made no mistakes. It is true that he picked out Abdul Shakur from a line including Shakuri and Abdul Jalil and 15 other men not suspected in the case, and it is true that he did not pick out in the Bareilly jail any unsuspected person, that is, any person admittedly not suspected in the dacoity. Had his efforts at identification stopped there, there might not have been much to be said against it, but we find that he was also invited to Pilibhit to pick out other accused whom he could identify 'from the long line of men put up before him, and he failed to identify any one of the suspected persons, while he did identify no less than three persons who admittedly were not suspected. Eliminating Tara we find more than sufficient evidence in the testimony of the remaining witnesses to support the conviction of Abdul Shakur. Similarly in the case of Dilawar, we strike out the evidence of Pitam who, while pointing out two of the suspected persons in the jail and making four mistakes, again failed in the Magistrate's Court and the Sessions Court to point out Dilawar. We do not suggest that an identification by a witness in jail who fails to point him out in the trial Court is necessarily worthless. His evidence that he did at the jail point out certain persons, though he cannot remember them, read with the evidence of other persons who can show who were the persons that were identified, may be of some value read with other evidence. But manifestly it is not evidence on which very great reliance can be placed. Striking out, however, Pitam from the list of witnesses against Dilawar we find there is sufficient remaining. The cases of the other accused, with the exception of Chidda, it is not necessary to deal with separately.

In the case of Chidda we find that Kandhai and Radhe, though they picked him out at the identification proceedings in the jail, did not identify him before the Magistrate or in the Sessions Court, and, as we have just said above, such an identification can ordinarily not carry much weight. Lochan, another witness, picked out Chidda in the Pilibhit jail, but he there also pointed out four persons who were not even suspected, while in the Bareilly jail he failed to pick out anybody rightly and did pick out one person wrongly. Lochan though he picked out Chidda in the Sessions Court failed to pick him out in the Magistrate's Court and picked out one Abdulla in his place. The evidence of Lochan is therefore unreliable. There remains against Chidda the statement of the approver supported only by the statement of Piare. We have, therefore, the more carefully examined the statement of Piare, for it does not follow that because there is only one witness, that witness' testimony is insufficient to corroborate the approver. We find, however, in Piare's statement before the trial Court that he constantly lays stress upon the fact that he knew Chidda because he saw him on the chabutra in front of the house where the dacoity was committed walking up and down with a sword. He was asked whether he had not in fact stated before the committing Magistrate that he saw no arms with any dacoit. He replied that he had told the Deputy Magistrate that he did see arms with the dacoits though the Deputy Magistrate may not have recorded the fact. The English record of the evidence in

the committing Magistrate's Court shows that Piare there said:

"I had not seen gun and weapon with any of the dacoits."

To further satisfy ourselves we checked the vernacular record and we found the same statement there. It is impossible then for us to believe Piare's statement that he stated the contrary and that he has been incorrectly recorded. It is difficult to suppose that both the Peshkar and the Magistrate, recording a statement in different languages, would have made the same mistake, and further it is certain that if he had said: "I did see arms in the hands of the dacoits," he would have been asked in whose hands he saw them, whatever his answer might have been. We do not think therefore that we can with confidence rely on the statement of Piare.

In our view then the appeals of all the appellants, except in the case of Chidda, must be dismissed.

A few further comments we must make. On p. 263 of the printed paper-book the learned trial Judge expresses the opinion that the statement of a woman to the police who was one of those residing in the house in which the dacoity was committed, could be treated as a first information report and that therefore such a statement was admissible against the accused, seeing that the woman in question was produced as a witness in the case and could be cross-examined on it. In this the trial Judge was in error. The first information report was clearly that which was made by the chowkidar. The statement made by the woman was nothing more than a statement made by a witness for the prosecution to the police, which could not be used by the Crown for any purpose and could only be used by the defence as a basis for cross-examination.

The next comment that we have to make is that in the course of the argument the learned Government Pleader, when dealing with the conflicting statements of Dilawar in his statement as an approver and Narain in his statement as an approver, drew our attention to the evidence of Babu Sri Krishana, Circle Inspector, which is to be found on p. 213 of the printed book. It is indeed astonishing that in the year 1929, when this evidence was given the Government Pleader of Pilibhit should have seen fit to lead it at all. There are no less than two printed pages at the very commencement of this police officer's evidence which are directed to one purpose and one purpose alone, namely, to show what a bad character the appellant Abdul Jalil was and how justified the Crown were in proceeding against him. We quote the following two examples of the evidence that the Government Pleader of Pilibhit permitted himself to lead. They are:

"In connexion with that dacoity (some other dacoity) the Sub-Inspector of Khatewa and the Circle Inspector of Naini Tal came to me at Pilibhit. They expressed their suspicion about this dacoity on Abdul Jalil, etc."

Again:

"the police of Pilibhit was very much afraid of Abdul Jalil Khan and was also in collusion with him. Nobody dared to see his house."

There are two pages of this sort of thing. It so happened that the Government Pleader of Pilibhit who represented the Crown at the trial was present in Court before us, and we asked him to explain how it came about that he led these two pages of evidence at the very commencement of the Circle Inspector's evidence without there having been any foundation to justify the evidence being led. He could only refer us to some wholly unsubstantiated suggestion that the police were intending originally to run a gang case and, therefore, wanting to put in all the evidence they could to connect various persons suspected in various dacoities or murders. It is manifestly immaterial what the police intended; the present case was a case directed, or at least should have been directed, solely to the proof of single dacoity. The only matter to which the Government Pleader of Pilibhit could direct our attention was a statement of the Magistrate who conducted the identification proceedings in the jail to the effect that he did not know for what case the accused were to be identified, but from the large number of accused put up before him he concluded that it was a gang case.

It is unnecessary to deal with this suggestion any further. The case before the Court, and the only case with which the Government Pleader of Pili-

bhit and the Court were concerned, was this single charge of a single dacoity, and it ought to have been most manifest to the Government Pleader of Pilibhit that he was not entitled to lead evidence to prejudice the Court against the accused or any particular accused and that he could only lead evidence of the bad character of the accused if that particular accused had previously led evidence of his good character (Evidence Act, S. 54). It is not suggested that Abdul Jalil Khan or any of the accused had, up to that period at any rate, led evidence of good character. We may note also that even if the Government Pleader of Pilibhit did endeavour to lead such evidence, it was the duty of the trial Court to have stopped him immediately. We recognize of course that the learned Judge had not had much experience on the date in question of Sessions work, and his failure to stop the Government Pleader in no way detracts from our great appreciation of the care and trouble that he expended on the case.

The next comment that we feel compelled to make is in reference to the Magistrate, Mr. Sri Kishen Kumar, who recorded the confession of Narain under S. 164, Criminal P. C. He had already apparently recorded the alleged confession of Dilawar, and we have already made mention of the serious conflict between Dilawar and Narain as to the manner in which the dacoits assembled at the spot, and also in regard to the acts of Dilawar subsequently and during the dacoity. Whether or no it was from Dilawar's previous statement that the Magistrate had got his knowledge, it is manifest that at the conclusion of Narain's statement he realized the serious discrepancy between the two statements and, as the record shows, apparently made a determined effort to get Narain's statement into harmony with that of Dilawar. Narain stated that Shakuri, Jalil and Dilawar went on a tonga while the remaining persons went on foot. Dilawar had stated that Shakuri and Jalil were driven by him to the meeting place on his own ekka. Narain completely finished his own statement, that is, the statement which he had come voluntarily to make, when the Magistrate proceeded to question him at great length manifestly on the basis of some information in his possession. It is only necessary to mention samples of the questions he asked. *Question*: "Did Shakuri and Jalil go in an ekka or in a tonga?" There was no ambiguity whatever in Narain's statement that they had come in a tonga, but it was in conflict with Dilawar's statement that he had taken two men on his own ekka. Narain relied definitely "in a tonga." The conflict remained. The next question asked was "Was Dilawar in the same tonga?" Manifestly this was with a view to giving Narain a chance of saying, "No Dilawar was in an ekka," but the witness replied definitely "yes." The witness was then asked "Who was driving the tonga?" and replied "The tonga belonged to some one else whom I do not recognize?" Now it was manifest from Narain's earlier statements that he knew Dilawar well, for he had given evidence mentioning Dilawar by name and the share that Dilawar took in the dacoity. Notwithstanding this the Magistrate asked him again "Was it driven by Dilawar?" and Narain again replied definitely "No." There are many other instances too numerous to detail showing that the Magistrate was questioning Narain in detail on matters already within the Magistrate's knowledge and endeavouring to reconcile the statement of Narain with that of Dilawar. This was no part of his duty at all. It was his duty merely to record such confession or statement as Narain might desire to make. It was also part of his duty with great caution and exercising the greatest discretion to question Narain in order to eliminate any real ambiguity that there might be in Narain's statement, or in other words to give Narain a chance of making his statement intelligible. But he had no right whatever to cross-examine the man who was making the statement or to endeavour to get particular statements out of him.

Before concluding we may discharge the more pleasant duty of expressing our approval of the very careful maps of the locality and the khasras accompanying, that were prepared by the responsible officers on behalf of the Crown. They have been of the very greatest assistance to us in appraising

the value of the evidence and the facts generally of the case. We have already expressed our appreciation of the careful judgment of the trial Judge, Mr. Ram Ugrah Lal Srivastava, which we have had to consider.

The result is that we set aside the conviction of Chidda and direct his immediate release, unless he is required in connexion with any other matter. The appeals of the remainig five are dismissed, and the sentences on Abdul Jalil and Abdul Shakur will be carried out according to law. A separate order will be passed expressing to Government our recommendation that it might consider the grant of an enhanced fee to the counsel, Mr. Abdul Aziz, who represented the appellants.

V.B./R.K. *Appeals dismissed.*

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* A. I. R. 1930 Allahabad 751

BOYS, J

Sallu Mal and *another*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 119 of 1930, Decided on 17th June 1930, made by Sess. Judge, Agra, on 17th February 1930.

*** Criminal P. C., S. 133—Chabutra in public way—Obstruction — Order for removal can be made.**

When there is a chabutra obstructing a public way the fact that in a particular case the public may have lot of room to go along the road, without needing to walk upon that particular site of the chabutra has nothing to do with the case and the public road authorities can secure its removal. [P 751 C 2]

Hazari Lal Kapoor—for Applicants.

M. Waliullah—for the Crown.

Judgment.—I see no reason whatever for interfering witn the Magistrate's order which is a most proper one, and a reference to the terms of S. 133 would make that absolutely clear. The person on whom notice was issued to show cause why the obstruction should not be removed set up at the outset what has been found to be a false case, that he has only re-constructed the chabutra on an old foundation. It is found in fact that there was no old chabutra on the site of the new construction. It is most manifest on the facts found that what has happened is this: There was a tiny little portion of chabutra, which the plan clearly indicates was itself an obstruction, which the proper authorities would have been entitled to have removed. Having kept that there for some time he has now extended it on either side along the whole length of the frontage wall. On the one side of the tiny portion of the chabutra previously existing the encroachment extends to no less a length than 174 ft. and on the other side 62 ft. and apparently the width of the chabutra is 8 ft. It would not make the smallest difference in principle if it was 8 inches or if the encroachment was only by the addition of a single brick. It is by adding brick to brick that these sorts of encroachments are habitually successfully carried, though S. 133 authorizes an order to remove

"any unlawful obstruction .from any way which is or may be lawfully used by the public or from any public place."

There can be no question on the findings that the site occupied by the present extension is a public way and is a public place and is ground which may be lawfully used by the public. The fact that in the particular case the public may have lot of room to go along the road without needing to walk upon that particular site has nothing whatever to do with the case. They are entitled to walk along that site if they wish. The opposite party here if allowed to maintain the chabutra would, of course, immediately set up that it was his chabutra and exclude the public. But even if he did not do so the public have a right to walk on that portion of the ground which the opposite party has covered with his chabutra. On this ground, and this ground alone, the Magistrate's order would be justified. He has in my view unnecessarily strengthened his order by pointing out that the P. W. D. are entitled to use the site for taking away material to repair the road. It is true that they are so entitled, but it would not make the least difference to the case if it were shown beyond doubt that they never would want to remove any soil from that site. The issue was perfectly simple and the facts show that the opposite party has deliberately encroached upon land which is public way, and his obstruction of it is unlawful, and the Magistrate's order directing its removal is a proper

order. It is not necessary for me to say anything in the present case whether as the plan suggests the so-called original portion of the chabutra is also an unlawful obstruction or not, but nothing that I have said in this judgment must be taken to suggest that that is an old chabutra and that the public road authorities cannot secure its removal. The reference is rejected. Let the record be returned.

V.B./R.K. *Reference rejected.*

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* A. I. R. 1930 Allahabad 752

SULAIMAN AND NIAMATULLAH, JJ.

Badri Prasad—Applicant.

v.

Emperor—Opposite Party.

Civil Revn. No. 75 of 1929, Decided on 25th April 1930, against order of Dist. Judge, Agra, D/- 19th January 1929.

*** Legal Practitioners Amendment Act (15 of 1926), S. 36, Expl.—Expression "majority of members present" is not same thing as "majority of members voting"—Out of 67 members present 26 voting in favour of resolution declaring person to be tout, 14 against and rest remaining neutral—There is no legal evidence on which person could be declared tout.**

The expression "majority of the members present" is not the same thing as the expression "majority of the members voting". If there are a large number of members who abstain from voting, it is quite clear that they are not prepared to state that there is a general repute against the person concerned. Where out of the 67 members of the Bar Association, only 26 voted in favour of the resolution declaring a person to be a tout and 14 against it, the rest remaining neutral, there is no legal evidence against the person on which he could be declared a tout. [P 752 C 2]

K. Verma—for Applicant.

U. S. Bajpai—for the Crown.

Sulaiman, J.—Lala Badri Prasad is one of the numerous persons who has been declared a tout by an order of the District and Sessions Judge of Agra. The only evidence against Badri Prasad is a resolution of the Bar Association passed at a meeting on 22nd November 1928 declaring him to be a tout. The report received from the Bar Association showed that there were in all 94 members of the Association, but only 67 out of these were actually present on 22nd November 1928 when the resolution was considered. The voting showed that 26 voted in favour of the resolution and 14 against it. The rest obviously remained neutral.

Ordinarily a mere resolution of an association of this kind cannot be legal evidence against a person when he is accused of any charge. But the explanation added to S. 36, by the Legal Practitioners Amendment Act(Act 15 of 1926), provides that the passing of a resolution declaring any person to be or not to be a tout by a majority of the members present at a meeting, specially convened for the purpose, of an association of persons entitled to practise as legal practitioners in any Court or revenue office shall be evidence of the general repute of such persons for the purposes of this subsection. The important words to consider are "by a majority of the members present at a meeting". There is no doubt that a majority of votes were cast in favour of the resolution if the neutral votes were to be excluded and therefore the resolution was duly passed by the Association. But the language of the explanation makes it quite clear that every resolution passed by the Association will not be legal evidence of general repute against an accused person. It becomes such evidence only if it has been passed by a majority of the members present at the meeting. The expression "majotity of the members present" is not the same thing as the expression "majority of the members voting". If there are a large number of members who abstain from voting it is quite clear that they are not prepared to state that there is a general repute against the person concerned. If it had been intended that a mere resolution passed by a majority of votes would be sufficient there would have been no necessity to add the words "by a majority of the members present at the meeting," as the word passing involves the idea of a majority of votes being cast in favour of the resolution.

We are therefore of opinion that there is no legal evidence against the applicant on which he could be declared a tout. We accordingly allow this revision and set aside the order of the District Judge and direct that the name of Badri Prasad be excluded from the list of touts. We make no order as to costs.

P.N./R.K. *Revision allowed.*

A. I. R. 1930 Allahabad 753

SULAIMAN AND SEN, JJ.

Naubahar Singh and *others*—Defendants—Appellants.

v.

Qadir Bux and *others*—Plaintiffs—Respondents.

Second Appeal No. 536 of 1927, Decided on 31st January 1930, from a decree of 1st Sub-Judge, Moradabad, D/-30th November 1926.

(a) Civil P. C., S. 9—Mahomedan's right to slaughter cows—When suit lies.

It is the legal right of every Mahomedan to slaughter cows as an article of food or for purposes of sacrifice, which right belongs to him in his individual capacity as also as a member of the Islamic faith and is independent of custom. The right is not lost by mere abstention or non-exercise for a number of years. The exercise of the right is subject to certain limitation. These limitations are the result of either a compulsory regard for the feelings of other people or upon the ground of public expediency so as to prevent a public nuisance or a breach of the peace. The exercise of the right is to be regulated by the common law principle embodied in the maxim *sic uteri tuo ut alienum non leadas* (every man is entitled to enjoy his own property according to his likes, provided that in doing so, he does not infringe the legal rights of his neighbour). If, in exercising his own rights he wantonly disregards the legal rights of his neighbour, this gives the latter a cause of action. Similarly, if in the exercise of his right, he is actuated by or creates animosities, his act may amount to an invasion of the public law and the State may intervene. Circumstances are conceivable where the slaughter of cows may amount to a public nuisance. [P 756 C 1, 2]

Where however the sacrifices are made within walled enclosures, so that no one could see the process from outside, or where the sacrifices are made with quiet and decency unattended with noisy or riotous demonstration, there can be no ground for objection. If cow sacrifices offend the Hindus individually or collectively, the act cannot be branded as a public nuisance, for the law makes no allowance for the susceptibilities of the hypersensitive : 30 *All.* 181 *at* 184 ; and 25 *I. C.* 104, *Ref.* [P 756 C 2]

(b) Specific Relief Act, S. 42—Suit for declaration of right when can be instituted.

The right may be infringed in a variety of ways and even by a denial of title. Where the declaration of title is necessary for the protection of interest, a cause of action may arise from the mere denial of title. Cases are conceivable, where title may be imperilled by the mere fact of denial and that fact may operate to produce serious effect on the quiet enjoyment of the right. But where the plaintiff, in a suit for a declaration of right, has all his rights uninvaded and intact ex-facie, there can be no foundation for an action, and suit for a declaration of right cannot be maintained. Where a right has been infringed by hostile demonstrations on the part of the defendants, coupled with a denial of the said right, a suit for declaration of the right is maintainable under S. 42, Specific Relief Act. A declaratory suit is also maintainable for the due enjoyment of the property belonging to the plaintiff which includes a cow. Where the plaintiffs' right is denied by the defendants, who, as Hindus are interested in denying it, and the right in controversy is with reference to property belonging to the plaintiffs, S. 42, Specific Relief Act, at once comes into play. Even the bare denial by a person who is interested to deny invests the plaintiff with a cause of action for a declaratory suit under S. 42, Specific Relief Act: 7 *I. C.* 318 ; *A. I. R.* 1928 *All.* 710; *A. I. R.* 1925 *P. C.* 36 ; and 30 *All.* 181. *Ref.* 17 *O. C.* 354 *Dist.* [P 756 C 2 ; P 757 C 1]

(c) Specific Relief Act, S. 42—No suit for declaration of abstract right lies.

No suit is maintainable for declaration of an abstract right. [P 756 C 2]

K. N. Katju and *S. C. Das*—for Appellants.

M. Waliullah—for Respondents.

Sen, J.—Rawana Shikarpur is a village in pargana Seohara in the district of Moradabad. It has a mixed population of Hindus and Mahomedans, the latter having the numerical superiority. The number of Hindus is about 250 and that of the Mahomedans about 1,500. The Mahomedans occupy a compact area in the village abadi and their residential quarters were apart from the portion inhabited by the Hindus.

Paucity in number does not however count as a factor indicating status, influence or prosperity. The village is owned by the Hindu proprietors Rani Phul Kumari, widow of Chowhdry Ranjit Singh. Phul Singh, Sagar Singh, Ram Kumar Singh and Munne Singh are some of the zamindars. No Mahomedan is a cosharer in the village. The zamindars realise houserent and bhet presents from the reyaya. They also receive manure. They also take begar or forced labour but do not realize any artisan's cess.

The relation between the Hindu and the Mahomedans appears to have been cordial till the close of 1923. About this time a certain amount of disquietude appears to have been caused in the minds of the Mahomedan inhabitants of the village by the inauguration of the Shudhi movement. The precise details of this phase of activity are not ascertainable from the record now before us, but the waves appear to have broken upon the Mahomedan popula-

tion and roused it from its dogmatic slumber. As a protest and as a measure of retaliation Nanhe, son of Kallu, who is plaintiff 3 in this action slaughtered a cow on the 30th May 1924 on the occasion of the Akika or tonsure ceremony of his son. This provoked angry feeling amongst the Hindus Five of them, viz., Sipahi Lal, Lalman, Sher Singh, Shankar Singh and Mohan lodged a report at the police station and finally made a complaint in the criminal Court under S. 298, I. P. C. The complaint was after a summary enquiry rejected under S. 203, Criminal P. C. The defeat of the Hindus, however did not depress them. They determined upon preventing the slaughter of cows at any cost and "showed their readiness to commit a breach of the peace." A report was made at the police station by Mohan Chowkidar, Mukhi Ram constable and Sipahi Lal village headman that breach of the peace was imminent between the Hindu and Mahomedans of this village. Proceedings were initiated on the report of the Sub-Inspector under S. 107, Criminal P. C. As a result, 54 Mahomadens and 15 or 16 Hindus were bound over to keep the peace.

The present action was commenced by five Mahomedan residents of Rawana Shikarpur who are all Jolahas by caste. The suit was instituted on the 2nd February 1925. It was originally directed against 10 Hindus of this village but 12 more defendants were added by order dated 14th April 1925. The plaintiffs allege in effect that they had a right to slaughter cows within their own premises in the village as being articles of their daily food as also for Qurbani or sacrifice on the occasions of marriages and deaths in their families and for celebration of festivals such as the Iduzzuha. They claim this as a right belonging to them in their personal capacity as also as being members of the Mahomedan community which is enjoined by its religious texts to sacrifice cows as a matter of religious merit. They complained that the said right had been invaded in consequence of the act of some of the Hindus of the village which has already been referred to. It was suggested that the act in question was prompted by the co-operation of the Hindus of the village, who were jointly and severally responsible for the slaughter of kine being prevented in the village. It was contended that the Hindus had not only denied their right to slaughter cows but had

"all along been offering obstruction and interference and showing threatening demeanours."

This compelled the Mahomedans to desist from slaughtering cows, as they were apprehensive that if they acted otherwise they were bound to be criminally prosecuted.

The plaintiffs allege that they with the rest of the Mahomedans of the village who did not join in the action had a common interest in the suit. They also aver that the cause of action alleged against the defendants was shared in common by the other Hindu residents of the village who had not been impleaded as defendants. They applied therefore for action being taken under O. 1, R. 8, Civil P. C.

The reliefs claimed in the suit were not very happily worded, but there can be no real difficulty as to their nature and scope. These reliefs are :

"(a) It may be declared that the Mahomedans of mouza Rawana Shikarpur, pargana Seohara, Tahsil Dhampur, have a permanent right to make all sorts of slaughters including the slaughter of cows inside their houses and the places and the lands in their possession within the abadi of mouza Rawana Shikarpur on the basis of old custom and that if the custom is not proved then according to religion, statute and Mahomedan law, they have a permanent right to do so for their daily use and on the occasions of marriages, deaths and Iduzzuha and that the Hindu residents of mouza Rawana Shikarpur along with the defendants have no right to interfere with this right."

"(b) A perpetual injunction may be issued to all the Hindu residents of mouza Rawana Shikarpur along with the defendants restraining them from ever offering obstruction to the slaughter of animals of every kind including cow by any of the Mahomedan residents of mouza Rawana Shikarpur now or in future."

The suit was contested upon grounds which were common to all the defendants. It was contended that the plaintiffs had no cause of action for the suit, that the slaughter of cows in this village was in the nature of an innovation and was not supported by custom, that the entire village belonged to Hindu zamindars, that the plaintiffs and the other Mahomedan residents of the village were mere licensees of the lands, that they had no right to perform cow slaughter within the zamindari of the

Hindus, against their religion and against their "conscience" and that the reliefs sought by the plaintiffs were "against law" and "not fit to be granted."

The suit appears to have stirred to their depths certain sections of the Hindus and Mahomedans alike in the District of Moradabad. This must have been abundantly manifest to the learned Munsif who prefaces his judgment with the following remarks :

"This suit has created a lot of zeal and narrow communal feeling between the Hindus and Mahomedans of the village. The outside atmosphere is also surcharged for both to allow them a dispassionate thought on the subject, apart from religious bias. The Hindus have worked themselves up to such a high pitch that they regard cows as sacred and would prefer to shed human blood to save it from slaughter. Dabblers in politics of the country regard cows as an emblem of unity under which they hope to unite the fissiparous Hindus. On the other hand the Mohamedans are conscious of the hypersensibility of the Hindus on this point and take advantage of it. Thus the question is not allowed to receive a calm consideration from a purely economic point of view, which is a safe and satisfactory criterion in the present day civilization."

We are in general accord with the aforesaid observation though we may not be ready to subscribe to the language in which the same has found expression. In *Shahbaz Khan* v. *Umraopuri* (1) at p. 184 it was observed by a Bench of this Court that it was in the highest degree desirable that the members of the different religious persuasions who are to be found in this country should, in the observance of their religious ceremony as well as in the exercise of their lawful rights, show respect for the feelings and sentiments of those belonging to different persuasion, and avoid anything calculated to irritate the religious susceptibility of any class of the community. In *Mohammad Yakub* v. *Mangru Rai* (2), another Bench of this Court sounded a note of regret that more tolerance did not prevail. The principle which ought to animate the action of two communities placed side by side and whose destiny is intertwined in many respects by objects and ends is to live and let live. Reasonableness, tolerance and forbearance cannot be expected to thrive in an atmosphere of communal bickering and strife.

The arguments in this second appeal were closed on 3rd January. We did not proceed to judgment at once as we thought it desirable to give some time to the contestants to make up their differences upon reasonable lines. Attempts, if any, for a reasonable compromise appear to have failed. The differences continue just as they were at the inception of the action.

The Court of first instance found that it was satisfactorily proved from the evidence on the record that

"animals including cows were never slaughtered in Rawana as a custom either for food or for sacrifice,"

and that "there was rather a negative custom of abstention." It found however that the plaintiffs apart from custom had as Mahomedans a valid and legal right to slaughter cows and other animals for food and sacrifice. It repelled the contention of the defendants that the plaintiffs had no right to slaughter cows because they were mere licensees and not the owners of the house-sites which belonged exclusively to the Hindu zamindars:

"License to live for generations must be presumed to permit all enjoyments of life by the licensee without restriction. Eating meat or beef is such a reasonable enjoyment of life and it does not per se injure the rights of others. If a man has a right to eat what he likes, it follows he has a right to procure it in a legitimate way."

We are of opinion that the law on this point has been correctly stated by the learned Munsif. And although his finding on the crucial issue to be noted presently has been reversed by the lower appellate Court, the judgment of Babu Brij Behari Lal merits our approbation as being on the whole and except on one point clear, consecutive and closely reasoned. He clearly erred in dismissing the plaintiff's suit upon the ground that on the facts alleged and proved, no cause of action was disclosed for a declaration of right within the purview of S. 42, Specific Relief Act. His judgment proceeds upon the ground that the defendants did not individually or collectively deny the right asserted by the plaintiffs, that even if they did, a bare denial of right was not actionable, that the slaughter of cows prohibited by an act of the executive and not by the act of the defendants and that the plain-

(1) [1908] 30 All. 181=5 A. L. J. 147=(1908) A. W. N. 64.
(2) [1910] 7 I.C. 318=11 Cr.L.J. 448.

tiffs, through fear of the executive had desisted from slaughtering cows, and for this, the defendants could not be held responsible.

The lower appellate Court has reversed the decree and granted the declaration and injunction asked for in the suit.

Some of the defendants have appealed to this Court and it has been contended on their behalf that the claim for declaration of right as put forward in the plaint is not maintainable and is not warranted by S. 42, Specific Relief Act.

It may be noticed that this plea was not specifically raised in the written statement, nor was any issue framed with regard to this. The learned Munsif in dealing with the issue relating to the cause of action, incidentally discusses the applicability of S. 42, Specific Relief Act. The point was not raised before the lower appellate Court and has not been referred to in the judgment. As the point however was one of law, we did not like to be too technical and we allowed the defendants to argue it before us.

A number of authorities has been cited, but most of the decisions have no direct bearing upon this question.

The right which is sought to be declared by means of this suit has been the subject of judicial decisions in this Court and in the High Court of Calcutta. It may be taken to be settled law that : (1) it is the legal right of every Mahomedan to slaughter cows as an article of food or for purposes of sacrifice. (2) This right belongs to every Mahomedan in his individual capacity as also as a member of the Islamic faith. (3) This right is independent of custom : *Shahbaz Khan* v. *Umrao Puri* (1) at p. 184. (4) This right is not lost by mere abstention or non-exercise for a number of years : *Chowdhri Mahadeo Prasad* v. *Nabi Bux* (3). (5) The exercise of the right is subject to certain limitations. These limitations are the result of either a compulsory regard for the feelings of other people or upon the ground of public expediency so as to prevent a public nuisance or a breach of the peace. The exercise of the right is to be regulated by the common law principle embodied in the maxim, *sic uteri tuo ut alienum non laedas* (every man is entitled to enjoy his own property according to his likes, provided that in doing so, he does not infringe the legal rights of his neighbour). If, in exercising his own rights, he wantonly disregards the legal right of his neighbour, this gives the latter a cause of action. Similarly, if in the exercise of his right, he is actuated by or creates, animosities, his act may amount to an invasion of the public law and the State may intervene. Circumstances are conceivable where the slaughter of cows may amount to a public nuisance. Where, however, the sacrifices are made within walled enclosures, so that no one could see the process from outside, or where the sacrifices are made with quiet and decency unattended with noisy or riotous demonstration, there can be no grounds for objection. If cow sacrifices offend the Hindus individually or collectively, the act cannot be branded as a public nuisance for the law makes no allowance for the susceptibilities of the hypersensitive. (6) The right may be infringed in a variety of ways and even by a denial of title. Where the declaration of title is necessary for the protection of interest, a cause of action may arise from the mere denial of title. Cases are conceivable, where title may be imperilled by the mere fact of denial and that fact may operate to produce serious effect on the quiet enjoyment of the right. But where the plaintiff, in a suit for a declaration of right, has all his rights uninvaded and intact ex facie there has been no foundation for an action, and a suit for a declaration of right cannot be maintained. (7) No suit is maintainable for declaration of an abstract right.

It is abundantly clear that the present suit is not one for declaration of an abstract right. The right of the plaintiff was jeopardized by determined opposition on the part of the Hindus before the date of the action. It is certain that they denied the plaintiffs' right. But they did something more. The finding of the lower appellate Court is clear on this point :

> "But the evidence on the record abundantly shows that the Hindus of the village have not only serious objections to the killing of the cows in the village but thereaten to interfere with the exercise of the plaintiffs' right."

The present suit is not for obtaining a declaratory relief simpliciter. The

(3) [1914] 25 I. C. 104.

plaintiffs claimed an injunction. The object of the declaratory decree is to obtain a judicial recognition of the plaintiffs' right. Its enjoyment is to be protected by an injunction, restraining the defendants from interfering with its exercise. The interference of the defendants in the past and the threats used by them constituted a substantial cause of action. It is therefore not a suit for declaration of an abstract right but for the protection of the right, which has already been infringed. Where a right has been infringed by hostile demonstrations on the part of the defendants, coupled with a denial of the said right, a suit for declaration of the right is maintainable under S. 42, Specific Relief Act. A declaratory suit is also maintainable for the due enjoyment of the "property" belonging to the plaintiff which includes a cow. Where the plaintiffs' right is denied by the defendants, who, as Hindus, are interested in denying it, and the right in controversy is with reference to property belonging to the plaintiffs, S. 42, Specific Relief Act, at once comes into play. Even the bare denial by a person who is interested to deny invests the plaintiff with a cause of action for a declaratory suit under S. 42, Specific Relief Act.

Reliance has been placed by the defendants on *Ori Lal* v. *Mohammad Yakub* (4). In this case the plaintiffs, who were Mahomedans had sued for a declaration that they were entitled to slaughter cows inside their houses. The defendants (Hindus) had never interfered with the exercise of the alleged right. The plaintiffs had applied to the Deputy Commissioner for permission to sacrifice. In the course of the enquiry the defendants filed a petition in which they denied that the Mussalmans had any right to sacrifice cows in Bilgram. The defendant had offered no active opposition, but had put in a petition in the course of the magisterial enquiry. It was doubtful therefore if any cause of action had accrued against the defendants. No injunction was prayed for in that case. The case appears to have been decided upon facts peculiar to it and the learned Judge was justified in holding that the granting of a declaratory relief, being discretionary, the discretion ought not to be exercised in favour of the plaintiffs. This case cannot be held to be an authority for the proposition that no declaratory suit is maintainable upon a bare denial of right. Denial of right and denial of an abstract right are two different things. It is noteworthy that the learned Judge was referred to the case of *Shahbaz Khan* case (1), in which upon similar facts a declaration of right to slaughter cows, coupled with an injunction, was prayed for and decreed. The learned Judge did not dissent from this decision but distinguished it.

Declaratory relief, as prayed for in this case, was granted by this Court in *Shahbaz Khan's* case (1). In this case, the applicability of S. 42, Specific Relief Act, was not argued or discussed. In *Sheik Mohamad Yakub* v. *Mungru Rai* (2) it was held that S. 42, Specific Relief Act, enables a person who is entitled to a right to any property to institute a suit against a person denying or interested to deny his title to such right, and as the defendants in that case were not interested in denying the plaintiffs' title in the sense in which the word "interested" is used in the section, it lay upon the plaintiff to prove that they did deny his title before the suit was instituted. According to this decision therefore the denial of a right may constitute a cause of action for a declaratory suit. A similar view was taken by another Bench of this Court in *Mohammad Salim* v. *Ram Kumar Singh* (5). The current of authorities is therefore in support of the plaintiffs' claim. The principle underlying the aforesaid decision is further fortified by the pronouncement of the Judicial Committee in *in re Manzur Hasan* v. *Mohamad Zama* (6). The parties to the suit were Shias on one side and Sunnis on the other. There was no dispute about slaughter of cows. A declaratory right was claimed about the right of the Shias to take out their religious procession through the public street on which stood a Sunni mosque. S. 42, Specific Relief Act, has not been dealt with or applied by their Lordships, but they upheld the decree of the

(4) [1914] 17 O. C. 354=25 I. C. 908.

(5) A. I. R. 1928 All. 710=110 I. C. 657.

(6) A. I. R. 1925 P. C. 86=86 I. C. 236=52 I. A. 61 (P.C.).

trial Court which had passed a declaratory decree. This decision is only helpful by way of analogy.

In view of our findings this appeal must substantially fail, but we are of opinion that the plaintiffs were not entitled to an unconditional decree. In modification of the decree passed by the lower appellate Court we give the plaintiffs a decree declaring that they have a right to slaughter cows within their houses and in any place within their exclusive possession which is not exposed to public view for purposes of daily consumption and for religious sacrifices on the occasion of Iduzzuha and other festivals, provided that they make no noisy or riotous demonstrations, and provided also that in the exercise of such right they do not commit a nuisance or infringe any rule of law or direction issued or promulgated by the lawfully constituted authorities relating to the said right. We grant an injunction restraining the defendants from interfering with the rights of the plaintiffs as above declared. The defendants-appellants may pay the costs of the plaintiffs-respondents.

V.B./R.K. *Order accordingly.*

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* A. I. R. 1930 Allahabad 758

SULAIMAN AND NIAMATULLAH, JJ.

Sumatra Devi, Mt.—Plaintiff—Applicant.

v.

Hazari Lal and *another*—Defendants—Opposite Parties.

Civil Revn. No. 43 of 1929, Decided on 23rd April 1930, from an order of Sub-Judge, Allahabad, D/- 8th September 1928.

(a) Civil P. C., O. 33, Rr. 5 and 6—Application to sue as pauper refused as case was weak on merits without enquiry into pauperism — There is refusal to exercise jurisdiction—Civil P. C., S. 115.

Court not inquiring into an application to sue as pauper on merits, but fixing a day under O. 33, R. 6, for receiving evidence as regards pauperism, but merely considering the case to be weak on merits, although time for production of evidence had not arrived can be said to have refused to exercise jurisdiction. The Court cannot reject an application merely because the Government pleader was prepared to contest it. [P 758 C 1, P 759 C 1]

(b) Civil P. C., O. 33, R. 5— Order dismissing application to sue as pauper is not interlocutory—Revision lies.

When the matter is altogether at an end and the plaintiff is entirely out of Court because his application has been rejected the order though not a decree cannot be, strictly speaking, treated as a mere interlocutory order in the course of the trial of a pending suit. A definite case should be deemed to have ended with an order of the Court rejecting an application to sue as pauper, because if the court-fee is not paid subsequently the claim of the pauper cannot be proceeded with : *A. I. R.* 1926 *All.* 446 and *A. I. R.* 1921 *All.* 1 (*F.B.*) *Dist.*; 32 *All.* 623, *Ref.*; *A. I. R.* 1923 *All.* 577 and *A. I. R.* 1925 *All.* 275, *Foll.*

[P 760 C 1,2]

(c) Civil P. C., S. 115—All "cases" are not "suits"—Case is "case decided."

The word "case" is more comprehensive expression than the word "suit." Whereas all cases are not suits, every suit is at least a case. Case referred to in S. 115, must be considered to be case which has been decided.

[P 761 C 1]

*** (d) Civil P. C., O. 33, R. 5—Decision on application to sue as pauper is not a decision of a preliminary issue within meaning in Civil P. C.**

Decision of the question as to whether an applicant is entitled to sue as a pauper is not the decision of a preliminary issue arising in any suit which would come into existence only if the application is granted and registered as plaint. If the word "issue" is to be taken in the sense in which it has been used in the Code it would arise only when a material fact affirmed by one party is denied by the other, a stage which would be reached long after permission is granted or the application is otherwise registered as a plaint. The question as to whether an applicant is entitled to sue as a pauper is not a question arising in the suit at all. It is a question anterior to the commencement of the suit : 32 *All.* 623, *Ref.*

[P 761 C 2]

S. B. Johari—for Applicant.

Shiva Prasad Sinha—for Opposite Parties.

Sulaiman, J.—This is an application for revision by the plaintiff from an order of the Subordinate Judge dismissing her application for leave to sue in forma pauperis. The learned Judge has dismissed the application on two grounds:

(1) That the case is "apparently founded on weak grounds" i. e., "the case is weak on merits"; and

(2) that the Government pleader intimated his intention to dispute the allegations of the applicant's pauperism.

The Court did not proceed to enquire as to whether the plaintiff was in reality a pauper or not, but merely considered her case to be weak on the merits, although the time for the production of her evidence had not yet arrived. The ground for the dismissal of the application is not that the application was not properly framed and presented or that the applicant was not a pauper

or that she had acted in any way fraudulently, or that her allegations showed no cause of action or that she had entered into an agreement with another person who has obtained an interest in the subject-matter of the suit. His opinion that the case was weak on the merits is not tantamount to holding that the plaint itself discloses no cause of action. Thus the learned Judge has proceeded entirely outside the scope of O. 33, R. 5, which gave him jurisdiction to dismiss the application. When the case was not covered by that rule it was the duty of the Court, under R. 6, to fix a day for receiving evidence as regards her pauperism. The Court could not reject the application merely because the Government pleader was prepared to contest it. It is therefore perfectly clear that the Court has refused to exercise jurisdiction by not enquiring into the application on the merits, has also acted without jurisdiction in dismissing it on a ground not covered by R. 5 and has acted with material irregularity in the exercise of its jurisdiction because the plaintiff has been given no opportunity to show that she was a pauper or that she had really a good case. The order of the Court below therefore cannot be justified in any way.

A preliminary objection however is taken on behalf of the respondent that this Court has no jurisdiction to interfere in revision. It is contended that the order passed by the Judge is an interlocutory order and therefore it is not a case decided within the meaning of S. 115, Civil Procedure Code and that therefore no revision at all lies to this Court. The learned advocate concedes that prior to the decision in *Budhu Lal* v. *Mewa Ram* (1) there were various cases of this Court in which the High Court had interfered in revision when an application for leave to sue in forma pauperis had been rejected and there were proper grounds for interference. I may in this connexion refer to the case of *Malik Muhammad Ayab* v. *Muhammed Mahmud* (2) where Karamat Husain and Chamier, JJ., drew a distinction between the case where the application for leave to sue in forma pauperis was dismissed and the case in which it was granted. The contention however is that, as a result of the pronouncement by the Full Bench no revision now lies. Reliance is strongly placed on the case of *Shanker Ban* v. *Ram Deo* (3), which is cited as an authority for the proposition. It is possible that the learned Judges in that case considered that there was not a good ground for interference in revision. Bnt if they intended to lay down that the High Court has no jurisdiction to interfere in revision if an application for leave to sue as a pauper has been dismissed, no matter however illegal or without jurisdiction the order may be, that opinion is certainly contrary to other cases of this Court which were decided subsequent to the same Full Bench. In *Shauran Bibi* v. *Abdus Samad* (4), the High Court did interfere in revision and set aside an order dismissing an application for leave to sue as a pauper. In a case somewhat similar on facts to the case before us, a single Judge of this Court also interfered in revision: see *Lachmi* v. *Ram Bahadur* (5).

It seems to me that the case of *Budhu Lal* v. *Mewa Ram*(1) is no authority for the broad proposition that no revision lies from any order which may be called an interlocutory order, much less for the proposition, that, even if an application for leave to sue in forma pauperis has been dismissed and so far as the plaintiff is concerned his case is at an end, no revision lies. Rafique and Walsh, JJ., were of opinion that a revision lay from even an interlocutory order, which would include even the decision on one issue in the case. Piggot, J., with whom Gokal Prasad, J., agreed, held that no revision would lie from an interlocutory order when the case was still pending. He distinguished some of the cases cited before the Full Bench on the ground that they dealt with the record of cases which had beyond question been decided, having been finally disposed of and struck off the pending file of the subordinate Court concerned; and finally concluded that:

(1) A. I. R. 1921 All. 1=63 I. C. 15=43 All. 564 (F.B.).
(2) [1910] 32 All. 623=6 I. C. 881.
(3) A. I. R. 1926 All. 446=94 I. C. 484=48 All. 493.
(4) A. I. R. 1923 All. 577=73 I. C. 538=45 All. 548.
(5) A. I. R. 1925 All. 275=86 I. C. 781.

"the order against which this application in revision has been filed is merely a finding by the trial Court on one out of several issues arising in a suit which is still pending . . . . . the record before us is that of a pending suit and not the record of any case which has been decided."

Ryves, J., confined his judgment within very narrow limits. To quote his own words:

"the only question which I propose to answer in this case is whether the decision of a single issue by a subordinate Court in a suit which *is still pending in that Court* (the italics are by the learned Judge himself) is a case decided . . . . . My answer is confined strictly to the precise point we have to decide. The referring order I think is perhaps framed too widely, though I myself was chiefly responsible for its wording."

Having put before him this narrow question, his conclusion was that there was no revision from a mere finding. It is noteworthy that in that case the Court had merely expressed an opinion on one of the several issues which arose in the case; and the finding on the issue of jurisdiction being in favour of the plaintiff, the Court was still seized of the case and proposed to proceed with the trial of the remaining issues. Thus a revision had been preferred merely from a finding on an isolated issue in the suit. In that view, no case had really been decided but an opinion had been expressed containing a finding on that issue. As the opinion of Ryves, J., alone turned the scale, the Full Bench is only authority for the proposition that no revision lies from a mere finding, even though that finding may relate to the question of jurisdiction. That case is no authority for the broader proposition that no revision will ever lie from an order which is merely an interlocutory one. In *Mahadeo Sahai* v. *Secy. of State* (20 *A. L. J.* 55), Piggot, J., himself did not consider that such a result necessarily followed from his judgment in the Full Bench case.

It may further be pointed out that when the matter is altogether at an end and the plaintiff is entirely out of Court because her application has been dismissed, the order, although not a decree cannot be, strictly speaking, treated as a mere interlocutory order in the course of the trial of a pending suit. So far as the plaintiff is concerned her case has been completely disposed of, and if the Court has acted without jurisdiction or with material irregularity in the exercise of it, the plaintiff would be without any remedy unless the High Court can interfere and help her. I have, therefore, no hesitation in saying that the Full Bench case is no bar to our interfering in revision in this case.

Niamatullah, J.—The facts out of which the present revision has arisen have been fully stated by my learned brother. I need not recapitulate them. I entirely agree with his conclusions and the reasons on which they proceed. I desire to make a few observations to emphasize his view that the revision is maintainable.

The case of *Shanker Ban* v. *Ram Deo* (3) has been pressed on our attention in support of the argument that no revision can, under any circumstances, lie from an order dismissing an application for leave to sue as a pauper under O. 33, Civil P. C. The proposition contended for is so widely put that it is necessary to examine the provisions of O. 33, Civil P. C., and the Full Bench case of *Budhu Lal* v. *Mewa Ram* (1) on which the case quoted above proceeds. An application for leave to sue as a pauper is to be either rejected or granted. If any of the grounds specified in R. 5 of that order exists the application for leave to sue as a pauper must be rejected. The proceedings, so far as they relate to that application, terminate, and if court-fee is paid, the proceedings in the suit will begin. Similarly, if the application for leave to sue as a pauper is granted under R. 8 it is to be registered as a plaint, and the proceedings in the suit will commence. I do not express any opinion as regards the question whether if an application for leave to sue as a pauper is granted, a definite proceeding should be considered to terminate with the order granting such application so as to amount to a "case" having been decided: but if the application for leave to sue as a pauper is rejected, I entertain no doubt that a definite "case" should be deemed to have ended with the order of the Court rejecting the application to sue as a pauper, because if court-fee is not paid subsequently, the claim of the pauper cannot be proceeded with, and if a revision is otherwise entertainable it cannot be contended that a "case" has not been decided.

In *Budhu Lal* v. *Mewa Ram* (1) Piggott, J., whose conclusions were

adopted by two other learned Judges, has attempted to define the word "case" as it occurs in S. 115, Civil P. C. He observes at p. 572 of the report :

"The word 'case' is therefore the more comprehensive expression of the two; but while in O. 14, R. 2, it is used as if practically synonymous with 'suit,' I am confident that instances can be quoted of its use where it would not at least include a suit. If this view is correct it follows that, whereas all 'cases' are not 'suits,' every 'suit' is at least a 'case.' From this I would go on to conclude that, where the 'case' in which the revisional jurisdiction of the High Court is invoked happens to be also a 'suit' then this suit is itself the 'case' referred to in S. 115, Civil P. C., which requires to be decided before the record is called for. To put the point in another way: holding that the word "case" in the Civil Procedure Code always includes a "suit", I read the relevant portion of S. 115 just as if it ran, "may call for the record of any suit or other description of cases which has been decided."

A dismissal of an application for leave to sue as a pauper is obviously not the decision of the suit which did not begin till then. There can be no doubt that the proceedings started by the application did come to an end. According to the definition of the word "case" given in the passage quoted above it must be considered to be a "case" which has been decided.

According to the view taken by the learned Judges forming the minority of of the Full Bench (Rafique and Walsh, JJ.) there can be no question that a proceeding of the kind we are concerned with comes within the meaning of S. 115, Civil P. C. The learned Judges who decided the case of *Shanker Ban* v. *Ram Dei* (3) have held that the rejection of an application for leave to sue as a pauper is not a decision of a "case" within the meaning of S. 115, Civil P. C. The facts of the case which the learned Judges were called upon to consider are not given in the report. It is not known whether the application had been dismissed by the Court of first instance on the ground that the applicant had failed to establish that he was a pauper within the meaning of the explanation to R. 2, O. 33, Civil P.C., or whether it had been dismissed on any other ground referred in R. 5. The learned Judges assumed that the Full Bench case, to which reference has already been made, was applicable to the particular case before them. They observed that

"the refusal to sue as a pauper does not determine anything in the suit. It is merely the decision of a preliminary issue arising in or anterior to the suit. It determines nothing except that the plaintiff cannot sue as a pauper. He can sue in the ordinary way like anybody else and to my mind the case is indistinguishable from the case of *Budhu Lal* v. *Mewa Ram* (1), in which a Full Bench of this Court finally endeavoured to set at rest a point upon which there had been considerable controversy. The question there was whether a preliminary issue on a question of jurisdiction was a case decided within the meaning of S. 115. That issue, if decided in the negative, determined the proceedings in that Court. But it is after all only a preliminary issue arising in a suit. Although the plaintiff cannot, after the determination of that issue, sue in that Court, he can still sue in the proper Court which has jurisdiction. If the decision of an issue that the Court has no jurisdiction is not a case decided, I am unable for my part to see how it is possible to hold that the decision of a preliminary issue that the plaintiff is or is not a pauper is a case decided."

With the utmost respect I would point out that the decision of the question as to whether an applicant is entitled to sue as a pauper is not the decision of a preliminary issue arising in any suit which, as pointed out above, would come into existence only if the application to sue as a pauper is granted and registered as a plaint. If the word "issue" used by the learned Judge is to be taken in the sense in which it has been used in the Civil Procedure Code it would arise only when a material fact affirmed by the plaintiff is denied by the defendant—a stage which would be reached long after the permission is granted or the application is otherwise registered as a plaint. The question as to whether an applicant is entitled to sue as a pauper is not a question arising in the suit at all. It is a question anterior to the commencement of the suit. The decision of that question merely determines the right of the plaintiff to be exempted from the payment of court-fee. The law in this respect has, in my opinion, been correctly laid down by Chamier and Karamat Husain, JJ., in *Muhammad Ayab* v. *Muhammad Mahmud* (2). Chamier, J., expressed himself as follows:

"It seems to be quite clear that the "case" must have been decided before the High Court can interfere in revision. . . . . But giving the word "case" the widest meaning, ... I am unable to hold that the order against which this application for revision is presented decided any "case." It appears to me that there is a clear distinction between the case of an application for permission to sue or ap-

peal in forma pauperis being dismissed or rejected and the case in which a similar application is allowed. In the former it may be said that the case had been decided, while in the latter the order appears to be merely interlocutory."

The learned Judges had to deal with a case in which leave had been granted. In revision the order granting such leave was questioned. The suit instituted by the pauper plaintiff was pending. There is some justification for the view that no "case" under those circumstances could be said to have been decided; but the learned Judges took care to point out that if the application for leave to sue as a pauper had been dismissed the same considerations could not be applicable. In commenting upon the observations quoted above the learned Judges who decided the case of *Shanker Ban* v. *Ram Deo* (3) says that the distinction drawn is "subtle." It is submitted with very great respect that the distinction is obvious and real and has been clearly set forth by those learned Judges. If the application to sue as a pauper is dismissed, no further proceedings can continue; and if the application to sue as a pauper was the foundation of a "case" it must be deemed to have terminated with the order of dismissal; whereas, if the application had been granted, the proceedings may be taken to continue. In the latter case according to the learned Judges who decided the case of *Muhammad Ayab* v. *Muhammad Mahmud* (2), proceedings in the case continue and no case can be deemed to have been decided.

Our difficulty in fully appreciating the reasons which prompted the decision in *Shanker Ban* v. *Ram Deo* (3) mainly lies in the total absence of facts of the particular case which the learned Judges had to decide. The view taken by them might have been perfectly justifiable with reference to the peculiar circumstances of that case; but the observations occurring in the judgment reported, which are founded on in the arguments before us, are general and, apart from the facts of the peculiar case may be open to criticism. Were it not for a number of cases in which a contrary view has been taken and which have been referred to by my learned brother this would have been a fit case for reference to a Full Bench; but in view of those cases in which the question we have to decide was directly raised and considered this procedure is unnecessary. We are at liberty to follow the view taken by one Division Bench in preference to that taken by another Division Bench.

For these reasons I have no hesitation in agreeing with the conclusions arrived at by my learned colleague, and concur in the order which he proposes to pass.

By the Court.—We allow this revision, set aside the order of the Court below and send the case back to that Court with directions to proceed with it according to law as provided under O. 33.

G.P./R.K. *Revision allowed.*

A. I. R. 1930 Allahabad 762

SEN AND NIAMATULLAH, JJ.

Ram Dei Misrain, Mt.—Plaintiff—Appellant.

v.

Jurawan Misir and *others* — Defendants—Respondents.

Second Appeal No. 1406 of 1927, Decided on 17th April 1930, from decree of Second Addl. Sub-Judge, Gorakhpur, D/- 19th April 1927.

Civil P. C., O. 22, R. 3 — Effect of non-joinder of legal representative of deceased defendant within time allowed by law is that suit abates as against that defendant only.

There is no legislative authority for the proposition that where one out of the several defendants dies and the legal representative is not brought on the record within the time allowed by law, the suit abates as a whole. The effect of the non-joinder is that the suit abates as against that defendant only. How far the absence of his heirs from the array of the parties will affect the rights of the plaintiff to obtain relief against the surviving defendant will depend upon the circumstances of the case and the relief claimed : *A. I. R.* 1926 *All.* 234; *A. I. R.* 1925 *All.* 108; *A. I. R.* 1929 *P. C.* 58; *A. I. R.* 1925 *All.* 141; *A. I. R.* 1927 *All.* 331; *A.I.R.* 1927 *All.* 543; *A.I.R.* 1928 *All.* 345 (*F.B.*); *A. I. R.* 1923 *All.* 211; *A. I. R.* 1928 *All.* 172 (*F.B.*); 52 *I. C.* 18 and 9 *A. L. J.* 86, *Reviewed.*

[P 764 C 1; P 767 C 1]

A. Sanyal—for Appellant.

P. L. Banerji and *A. P. Panday*—for Respondents.

Sen, J.—This is a plaintiff's appeal arising out of a suit for possession and mesne profits. Three kinds of property were embraced in the claim; (a) zamindari share to the extent of 3 pies $6\frac{3}{4}$ chhataks each in mauzas Reoli and Bhita; (b) mortgagee rights in 2 pies

2 chhataks of Reoli and (c) certain cultivatory holdings set out at the foot of the plaint. The last-named item, by an oversight, has been omitted in the translation of the plaint as contained in the paper book.

Mt. Ram Dei Misrain executed a zari-peshgi lease of these properties in favour of Ram Lochan Misra, defendant 7, on 25th June 1919, for five years. Under the terms of this instrument, she reserved to herself the right to cancel the lease by giving a month's notice to the lessee. Surju Misra defendant 1, pre-empted the lease, on 28th June 1920. Mt. Ram Dei gave a notice to Ram Lochan Misra, the original lessee, and Surju Misra, the pre-emptor, intimating thereby that she had put an end to the lease and asking for possession. Surju Misra did not surrender possession. Ram Lochan Misra gave up possession of the cultivatory holdings but the defendants second party, namely Jurawan Misra, Dwarka Misra, Birna Misra, Bholi Misra and Ram Sarup Misra took forcible possession of the cultivatory holding; hence the suit for possession and damages.

Plaintiff's claim for possession and mesne profits relating to the zamindari shares in Reoli and Bhitha and the mortgagee rights in Reoli have been decreed. The defendants have submitted to the decree. This part of the claim therefore need not be canvassed any further.

As to the cultivatory holdings, the defendants second party put in a joint written statement and contended that they had been in possession of the plots in controversy in their own rights for a long time: vide para. 2 of the additional pleas in the written statement, and that the plaintiff neither had nor has any cultivatory holding nor were these defendants in possession of any cultivatory holding of the plaintiff. They also repudiated the claim as to damages which they described as "a mountain of falsehoods."

During the progress of the suit, Jurawan Misra, defendant 2, was examined and he supplemented his pleadings by a statement that he and his associates were the sub-tenants of the plaintiff. As a result of this statement, the Court directed the defendants second party under S. 202, Agra Tenancy Act 2, 1901, Local, to institute a suit in the revenue Court to have the question of the alleged tenancy determined by the said Court. Out of the five defendants, defendants 2 to 4 namely Jurawan Misra, Dwarka Misra and Birna Misra instituted a suit in the revenue Court. The other two defendants, Bholi Misra and Ram Sarup Misra did not join in the suit. The trial of the suit in the revenue Court lasted for an unconscionably long time. During the progress of the trial Bholi Misra and Ram Sarup Misra, defendants 5 and 6 died. The exact time of their death is not known. In the statement of Mt. Ram Dei recorded under O. 10, R. 1, Civil P.C., on 12th April 1927, she stated that Bholi Misra and Ram Sarup Misra fell ill during the Holi season and died in Chait two or three years ago. She further stated that they died three years after the suit had been filed and that they lived together and cultivated jointly.

The legal representatives of Ram Sarup Misra and Bholi Misra were not brought on the record within the statutory period of limitation.

The revenue Court held that defendants 2 to 6 were not tenants or subtenants of the plaintiff, but that they were trespassers.

No distinct issue was framed by the trial Court as to how far the plaintiff's claim relating to the cultivatory holding was affected by the death of Bholi Misra and Ram Sarup Misra, their legal representatives not having been brought on the record. Certain portions of the judgment are vague and very far from being satisfactory:

"Defendants 5 and 6 are said to be dead and no legal representative has been brought on the record, the names of 5 and 6 shall be struck off from the plaint and as regards them the suit must be considered to have abated; defendant 7 is also dead and his name too shall be struck off. It should however be remembered that defendants 5 and 6 had not filed the suit in the revenue Court. The revenue Court suit had been filed only by defendants 2 to 4 and hence the striking off the names of defendants 5 and 6 does not harm to (*sic*) the plaintiff."

Nothing turns upon the death of defendant 7 who was only a pro forma defendant.

The Court of first instance gave the plaintiff a decree for possession and for Rs. 1,083-10-0 which was the amount of mesne profits claimed.

Of the defendants second party, Jurawan Misra, defendant 2, appealed. He impleaded Dwarka Misra and Bholi Misra as pro forma respondents, under O. 41, R. 4, Civil P. C.

The point principally urged in the lower appellate Court was that during the pendency of the suit Bholi Misra and Ram Sarup Misra having died, and that no proceedings relating to substitution of names having been taken in time, the claim of the plaintiff-respondent had abated against all the defendants-appellants. The appeal was heard by Muhammed Junaid, 2nd Additional Subordinate Judge of Gorakhpur. He gave effect to that contention and held that the plaintiff's suit abated as a whole by reason of the non-substitution of the heirs of Bholi Misra and Ram Sarup Misra within the time allowed by law.

Plaintiffs impugn the correctness of the aforesaid decision.

There is no legislative authority for the proposition that where one out of several defendants dies and his legal representative is not brought on the record within the time allowed by law the suit abates as a whole.

Section 368, Act 14, 1882 had given rise to a number of conflicting decisions. That section was worded as follows:

"Where the plaintiff fails to make such an application within the period prescribed therefor the suit shall abate."

Ex facie the language of this section was very wide and was open to the construction that under given circumstances the suit abated as a whole. It is significant that S. 368 has been remoulded and recast in Act 5, 1908, and the phraseology of the corresponding section (O. 22, R. 4, sub-R. 3) is very different."

"Where within the time limited by law no application is made under sub-R. 1 the suit shall abate as against the deceased defendant."

Order 22, Civil P. C., is the only enactment of law which contains any provisions as to abatement of suits by reason of the death of the plaintiff or the defendant during the pendency of the suit where his legal representative has not been substituted within the time allowed by law. Under O. 22, R. 3, sub-R. 2 "the suit under similar circumstances 'shall abate so far as the deceased plaintiff is concerned." Under O. 22, R. 11, the rules of this chapter are applicable to appeals. The word "plaintiff" and the word "defendant" include an appellant and a respondent and the word "suit" an appeal. To hold that the whole suit or the entire appeal abates is not only unsupported by statute but is in the teeth of the clear provisions of O. 22.

Order 1, R. 9, Civil P. C., would also point to the conclusion that a suit is not to be defeated merely by reason of non-joinder of parties. It follows that the Court has in every suit to deal with the matter in controversy as regards the rights and interests of the parties actually before it. There may be cases where the joinder of a party is a matter of expediency. There are other cases where the presence of a party is essential for the progress of the suit. The dismissal of a suit for non-joinder of a party whose presence is imperative and essential for the trial of the suit and for the determination of rights and interests of all persons concerned is a very different thing from an abatement within the purview of O. 22, Civil P. C. O. 22 expressly provides for an abatement of the suit against a deceased plaintiff or a deceased defendant or against a deceased appellant or a deceased respondent. It does not provide for the abatement of the suit against all the other parties who are present before the Court. The rights and interests of such parties should be and have to be adjudicated upon the merits. It is possible, however, to conceive cases where, by reason of the absence of necessary parties, there cannot be a proper adjudication or trial of the suit or of the appeal. The absence of such parties is calculated to prejudice the trial. Where the suit is instituted at the instance of trustees, executors or co-owners or the suit is of the nature of partition, of rendition of account, or of dissolution of partnership or where the suit is directed against joint tenants or joint tortfeasors, the absence of a particular person from the original suit or failure to substitute the names during the pendency of the suit or of the appeal may be fatal. By reason of his absence from the array of parties such person cannot be bound by the decision passed in the suit. In his absence, the rights and interests of the persons who

are actually before the Court cannot be properly and finally determined. In such cases the suit is liable to dismissal not because the suit has abated under O. 22, Civil P. C., but because the suit cannot be properly heard or disposed of without prejudicing the rights of necessary parties. There can be no rule exhaustive enough to cover all possible cases. Much would depend upon the frame of the suit, the nature of the cause of action and the relief claimed.

Where, upon the death of a defendant the right to sue does not survive, the claim abates as a whole, *actio personalis moritur cum persona.*

Where a suit has been instituted by the plaintiffs jointly or is directed against several defendants cases may occur in which the several plaintiffs or defendants have defined and distinct rights. Where the right of the plaintiff and the defendants is ascertained or ascertainable the death of one or more of them cannot cause the abatement of the entire suit. The suit can only abate with reference to such of the plaintiffs or defendants whose legal representatives have not been substituted on the record. This cannot lead to any anomaly. There can be no conflicting or contradictory decrees by reason of the adjudication of the claims for or against parties who are actually before the Court. The adjudication relates to property which is distinct and there is no community of interest in such cases between the parties who are actually before the Court and those who are not, namely the legal representatives of the deceased.

In cases falling under this category it could not be said that the decree passed by the Court is incapable of execution.

It should be borne in mind that where a plaintiff or a defendant dies during the pendency of the original suit in the trial Court there cannot be any possibility of two conflicting decrees.

The learned counsel for the respondents has taken this Court through a long string of decisions in *Narain Das* v. *Sheo Din* (*A. I. R.* 1926 *All.* 234) and *Wajid Ali Khan* v. *Puran Singh* (*A. I. R.* 1925 *All.* 108). This case went on appeal before their Lordships of the Privy Council (*A. I. R.* 1929 *P. C.* 58) who modified the decision of Daniels and Neave, JJ. Their Lordships substantially accepted the view taken by the Subordinate Judge and observed that "they preferred this view to that taken by the majority of the learned Judges in the High Court ; that in the suit the abatement against the deceased plaintiff made it impossible to proceed effectively with the hearing of the appeal as against the surviving plaintiffs and rendered the judgment and decree of the appellate Court passed in the absence of the representatives of the deceased plaintiff a complete nullity so that the surviving plaintiffs were entitled to be restored to possession in accordance with the decree of the first Court along with the representatives of the deceased plaintiff. With this view their Lordships were unable to agree."

Bikramjit Rai v. *Darshan Das* (*A. I. R.* 1925 *All.* 141). There was a Letters Patent appeal from this decision and the decree passed by Neave, J., was modified upon the ground that where the defendants were in possession of distinct parcels of land the death of one did not cause an abatement of the entire suit : *Sheo Chand Misra* v. *Sita Ram* (*A. I. R.* 1927 *All.* 331) and *Matbar Singh* v. *Abhai Nandan Prasad* (*A. I. R.* 1927 *All.* 543), per Walsh and Banerji, JJ. This decision was overruled by Lindsey, Mukerji and Iqbal Ahmad, JJ. : *Mahadeo Singh* v. *Talib Ali* (1), *Ambika Prasad* v. *Jhinak Singh* (*A. I. R.* 1923 *All.* 211) and *Faqira* v. *Hardewa* (2).

Suits by or against members of a coparcenary body governed by the Mitakshara school of Hindu law rest upon a different principle. So also do suits relating to pre-emption.

It will serve no useful purpose to analyze or comment upon in detail either the authority referred to above or other decisions of the High Courts. Some of these decisions are conflicting. There are others which may be taken to have been decided with reference to the facts peculiar to them.

It may be incidentally mentioned that in para. 5 of the memorandum of appeal in the lower appellate Court Jurawan Misra pleaded as follows :

"If the Court does not consider the claim of the plaintiff to have abated against all the defendants-appellants, still it has abated against Bholi Misra, defendant 5, Ram Sarup Misra, defendant 6 and Ram Lochan Misra, defendant 7. The appellants are not liable to pay damages in respect of the lands in the possession of the aforesaid persons, that is the appellants are not liable for more than their share of the damages."

(1) A. I. R. 1928 All. 345=50 All. 792 (F.B.).
(2) A. I. R. 1928 All. 172=50 All. 559 (F.B.).

The above would suggest that defendants 2 to 6 were in possession of specific portions of the cultivatory holding.

Mt. Ram Dei claimed a joint decree against defendants 2 to 6. The complaint against them was that they had joined in a trespass. It is not clear from either the plaint or the written statement as to whether defendants 2 to 6 were jointly in possession of the entire cultivatory holding or whether they were in possession of specific plots or specific areas. It is also not clear from the pleadings whether Bholi Misra and Ram Sarup Misra, deceased, were properly represented by the other defendants, namely Jurawan Misra, Dwarka Misra and Birna Misra. It is not necessary at this stage to express any opinion as to how far the claim of the plaintiff for possession and damages relating to the cultivatory holding will be affected if defendants 2 to 6 are found to be in possession of the holding jointly or if defendants 2 to 4 do not represent the deceased defendants Bholi Misra and Ram Sarup Misra. For the proper determination of the appeal I think it necessary to remit the following issues :

(1) Were defendants 2 to 6 in possession as plaintiffs' subtenants or trespassers ?

(2) Were defendants 2 to 6 in joint possession of the cultivatory holding or were they in possession of specific areas or specific plots ?

(3) Were defendants Bholi Misra and Ram Sarup Misra properly represented in the action by the remaining defendants, namely Jurawan Misra, Dwarka Misra and Birna Misra ?

Parties may be permitted to adduce fresh evidence.

Niamatullah, J.— I am in entire agreement with my learned colleague in his conclusion and in the reasons on which it is based. I desire only to emphasize one of those reasons as it appears to me to conclude all arguments to the contrary.

Before the passing of the Code of Civil Procedure of 1908 failure to implead the legal representatives of a deceased defendant entailed, in many cases, the abatement of the whole suit, as S. 368, Act 14 of 1882 expressly laid down that "the suit shall abate." Indeed a literal construction of that section made it arguable that in every case the suit should abate in its entirety. This view did not find favour for obvious reasons and it was made to depend on the circumstances of each case whether the suit should be deemed to have abated partially or as a whole.

The Code of 1908 introduced a material change in so far as abatement of a suit as a whole is concerned. O. 22, R. 4, provides in express terms that "the suit shall abate as against the deceased defendant" only. No suit can therefore abate in its entirety in cases where there are more than one defendant, not being pro forma, and one of them dies and the plaintiff fails within the period of limitation to make his legal representatives parties to the action. It may be that substantially the same result follows by operation of another rule of law, viz. that a suit must be dismissed if, having regard to the nature of it, the relief claimed therein cannot be granted in the absence of parties whose rights are to be inevitably affected by such relief being granted. The aid of O. 1, R. 9, cannot be invoked under those circumstances. The rule that

"no suit shall be defeated by reason of non-joinder of parties, and the Court may in every case deal with the matter in controversy so far as regards the rights and interests of the parties actually before it"

is confined to cases where the Court can deal with the matter in controversy with regard to the rights and interests of the parties before it. *Madho Ram* v. *Jagat Singh* (3) and *Gendan Lal* v. *Babu Ram* (4) are instances in which the suits had to be dismissed for want of necessary parties in spite of O. 1, R. 9. In the second of these cases some members of a joint Hindu family were not made parties to a suit on mortgage sought to be enforced against the family and when the objection as to non-joinder was taken the suit as against them was barred. It was held that the Court could not proceed under O. 1, R. 9, because the interests of the members were not separate and distinct and that the whole suit should be dismissed. The conjoint effect of O. 22, R. 4, O. 1, R. 9 and of the rule that a suit must be dismissed in the absence of parties whose rights are necessarily and inevitably to be affected by the relief by the plaintiff being granted is that the suit cannot abate as a whole in consequence of the death of one of

(3) [1919] 52 I. C. 18.
(4) [1912] 13 I. C. 197.

several defendants and of his legal representatives not being impleaded in time, that it abates only against the deceased defendant and the position is virtually one of non-joinder of such defendant. If the Court can deal with the matter in controversy between the parties before it and can grant to the plaintiff a relief as against the surviving defendants without prejudicing the rights of the legal representatives of the deceased defendants it shall do so. If it is not possible to do so the suit has to be dismissed. It is a misnomer to characterize the dismissal under such circumstances as an abatement of the suit in its entirety. It is not a different way of expressing the same idea. Cases are conceivable in which the difference is one of substance. Abatement under O. 22, Civil P. C., completely bars a suit on the same cause of action (O. 22, R. 9). Dismissal for want of necessary parties may not bar another suit on the same cause of action if differently framed and brought for a relief which can be granted against the surviving defendants without prejudicing the rights of the legal representatives of the deceased defendant. It is not necessary for the purposes of the present appeal to pursue this aspect of the case any further. The effect of non-joinder of the legal representatives of the deceased defendants is therefore an abatement of the suit as against them only. How far the absence of their heirs from the array of parties will affect the right of the plaintiff to obtain relief against the surviving defendants will depend on the circumstances of the case. The issues which my learned colleague proposes to remit relate to such circumstances. I therefore concur in his order remitting those issues for trial and findings.

By the Court—The case is remanded under O. 41, R. 25, to the lower appellate Court for findings on the following issues:

(1) Were defendants 2 to 6 in possession as plaintiff's sub-tenants or trespassers?

(2) Were defendants 2 to 6 in joint possession of the cultivatory holding, or were they in possession of specific areas or specific plots?

(3) Were defendants Bholi Misra and Ram Sarup Misra properly represented in the action by the remaining defendants, namely Jurawan Misra, Dwarka Misra and Birna Misra?

The parties shall be at liberty to adduce such evidence as they may be advised to produce. The findings should be returned within three months, after which the usual ten days shall be allowed for objections, if any.

V.B./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 767

MUKERJI AND BENNET, JJ.

Gobindji and *others* — Defendants—Appellants.

v.

Lallamul Hardeo Das and *others* — Defendants—Respondents.

First Appeal No. 312 of 1928, Decided on 20th May 1930, against a decree of Sub-Judge, Muttra, D/- 27th April 1928.

Hindu Law— Joint family — Manager— Powers of.

The criterion to be applied to a transaction such as a mortgage by manager is not whether it ultimately turned out to be for the benefit of the family, but whether it was a transaction which at the time it was entered into was such that a prudent man would have entered into it in the expectation that it would be for the benefit of the joint Hindu family.

Where a mortgage deed was proved to have been executed by adult members of a joint Hindu family on their own behalf and as guardians of minor members, and where the minors challenged the mortgage on the ground that it was not for legal necessity or for the benefit of the family estate and where it was proved that the consideration of the mortgage was borrowed for purchasing a house in which the joint family had been carrying on jajmani business and it was established by evidence that if the adult members had failed to purchase the house which was offered to them at a concession, there would have been a loss to the family in the jajmani business.

Held : that as the danger to be averted was the loss of the possession of the house which had been in the possession of the family for 40 years, and which had been of material assistance to the family in conducting its business of jajmani, the adult members were justified in executing the mortgage in question and that the transaction was a transaction for the benefit of the family : 6 *M. I. A.* 393 *Foll.*; and *A. I. R.* 1924 *P. C.* 50, *Ref.* [P 770 C 1, 2]

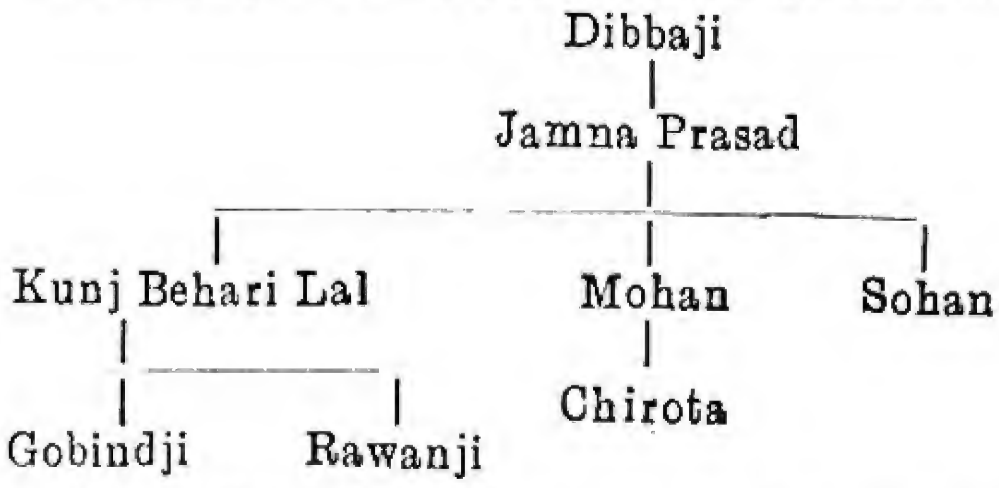
N. P. Asthana and *B. N. Sahai*—for Appellants.

K. N. Katju, Panna Lal and *K. C. S. Bhatia*—for Respondents.

Bennet, J.—These are two connected First Appeals No. 312 of 1928, by the minor defendants Gobindji and Rawanji and No. 476 of 1928, by the plaintiffs the firm of Lallamul Hardeo Das against a decree of the learned Subordinate Judge of Muttra in which the suit of the plaintiff has been decreed in

full but certain of the mortgaged properties have been partly exempted. There were originally three minor defendants-appellants, but the minor Chirota died after the filing of the appeal, and his name has been expunged as his father Mohan is a party to the appeal.

The plaintiff firm sued on a simple mortgage deed of 6th December 1921. Execution of this mortgage deed was denied, but it has been proved that it was executed by defendant 1 Jamna Prasad on his own behalf and as guardian of his minor son defendant 4 Sohan, and also executed by defendant 2 Kunj Behari Lal on his own behalf and as the guardian of his minor sons Gobindji and Rawanji the present defendants-appellants, and by Mohan, defendant 3. These defendants are related as follows:



The amount of the mortgage money was Rs. 24,000 and the rate of interest was 10 annas per cent per mensem compoundable half-yearly. There were four properties mortgaged, No. 1 being a haveli called 'Bara' or 'Nohra' and bearing the number 1543; No. 2, a dwelling house; No. 3, an enclosure containing kachcha and pucca houses; and No. 4, the mortgagee rights in three pucca shops. The written statement of the present appellants denied the execution of the mortgage or that it was for consideration and alleged that in any case:

"There was no pressing legal necessity .... nor was any benefit or gain of the family considered, nor was it obtained."

It is also alleged:

"Jamna Prasad is not the karta of the family and Kunj Behari is bent on wasting the entire property."

The learned Subordinate Judge came to the conclusion that the mortgage was not for legal necessity and accordingly he held that although the total amount of the mortgage money could be recovered by the sale of properties Nos. 1 and 4, which were not ancestral, properties 2 and 3 were ancestral, and he held that the decree could only be executed against properties 2 and 3 so far as the half-share in these properties belonging to the adult executants of the mortgage deed was concerned.

In the appeal of the minor defendants the point is taken that on the finding that the mortgage was not for valid family necessity nor for the benefit of the estate the entire ancestral property should have been exempted. That argument is undoubtedly correct, but we have first of all to consider whether the finding of the learned Subordinate Judge that this mortgage deed was not for valid family necessity, nor for the benefit of the estate, is a correct finding on the facts which were pleaded and proved in this case. With the plaint a copy of the mortgage deed in question was filed, and para. 6 of the written statement of the present defendants-appellants printed on p. 11 states that that copy of the mortgage deed was perused by the person who drafted the written statement for these defendants. That mortgage deed sets forth in its recitals:

"For the benefit of the members of our family, we, the executants, intend to purchase a haveli known as Nohra together with the shops, situate in Muttra, Holi Darwaza. We have continually been in possession of the said property for about 40 years, have been deriving benefit therefrom in every respect and have been giving convenience and comfort to the pilgrims from the outstations by letting them stay therein. At present the Hon'ble Raja Brijnath Singh, the Ruler of the Mahiyar Estate, who is now the owner of the said property, wants to sell it. We are getting the said property at favourable price. We and also the minors and the other members of our family have hope to be benefited in every way by purchasing the property."

Now it is true that the plaint does not repeat the recitals in this mortgage deed, but nevertheless the written statement in para. 7, additional pleas sets up the following allegation:

"The transfer alleged by the plaintiff is a transfer of an ancestral property which is legally invalid."

Further in the second ground of appeal to this Court the defendants-appellants alleged:

"Because the Court below has erred in holding that properties Nos. 1 and 4 were not ancestral."

Naturally in view of this case set up by the defendants-appellants the plaintiffs would be led to consider that there was no denial of the allegations in the mortgage deed to the effect that the family of the defendants had been in continuous possession of the haveli known as Nohra for about 40 years and

had been using it for their business of conducting pilgrims. There is no clear allegation in the written statement that this was not the joint business of the family of defendants. On behalf of the plaintiff there was evidence given as follows : Lallamul on p. 13 stated that he had negotiated the loan of Rs. 24,000 on this mortgage from the plaintiff firm which is a firm of cotton spinners in Hathras; and Lallamul states that the profession of the defendants is jajmani, and that he has seen them in occupation of the Nohra so far back as he could remember, and his age is 46.

It is true, as pointed out by the learned counsel for the appellants-defendants, that this witness adds that Kunj Behari Lal and Jamna Prasad represented to him that other persons wished to purchase the Nohra, and if the mill advanced the money the defendants would have a permanent means of livelihood for their children as the house was of particular value for their profession. But we do not consider that this sentence should be taken to indicate that the witness considered that this profession was only to be begun in the future in that house. On the other hand the meaning apparently is that up to the time of the purchase of this house, which was on the same date as the sale deed, the defendants were not secure in their occupation of the house, because being purohits of the Raja who was the owner of the house the defendants merely kept it during his pleasure. When the Raja of Maihar determined to sell this house, the adult defendants naturally consider it a prudent move to purchase this house in which they had been so many years living and carrying on their business and accordingly as they were unable to raise the purchase price of Rs. 26,000 they borrowed Rs. 24,000 from the plaintiff firm and put up Rs. 2,000 of their own money, and on 6th December 1921 they bought the house by the sale deed printed at p. 52 of the paper book. On the same date they pledged the house by the mortgage in suit for the security of Rs. 24,000 to the plaintiff firm. The question therefore, before us is whether the defendant mortgagors were acting with prudence and discretion in their management of the family affairs in purchasing this house and thereby enabling the family of the defendants to continue their business of jajmani in that house. Further evidence is given for the plaintiff by Banwari Lal on p. 15, who states that he has seen Jamna Prasad and Kunj Behari, Lal in the bara or haveli for many years, and that it was in their management on behalf of the Raja of Maihar and that the house was decidedly a help to them in their profession of jajmani. This witness also states that the house was called Dibbaji ka bara after the grandfather of the defendant Kunj Behari, that is the father of Jamna Prasad. The same statement is made by the plaintiff's witness Sohan Lal, who states that he had seen the Nohra in the possession of Dibbaji for a long time and that other people were prepared to pay Rs. 33,000 or Rs. 34,000 for the property, but Jamna Prasad and the other defendants were given the property because they were the purohits of the Raja of Maihar. This witness also states that he had seen Jamna Prasad and Kunj Behari scores of times at the railway station with pilgrims, and that he had seen them guiding the pilgrims to the temples.

On behalf of the defendants evidence was given by Siji at p. 20, who is a Chaube, and he states that he never saw the defendants exercising the profession of jajmani. He also alleges that there is no room in the bara to put up pilgrims. From the recitals in the sale deed and the mortgage deed of the extent of the bara we see that this statement must be absolutely untrue. Not a single defendant comes forward to give evidence in denial of the recitals in their mortgage deed. This witness Siji alleges that Kunj Behari defendant keeps ekkas and tongas for hire for about 20 years, and that he lives at the bara. In this connexion we may point out that the sale deed shows that in this bara there are two sections called stables. It is apparently in these stables that Kunj Behari keeps his ekkas and tongas, and these ekkas and tongas are also apparently used in the business of conveying pilgrims from the station of Muttra to the temples which are at a considerable distance from the station. The evidence of the defence witness Shamji is similar to that of Siji. Further evidence is given for the defence by one Pearey Lal at p. 23, who says that he is a munib of a firm which

rented a portion of this bara for Rs. 90 between dates 23rd June 1924 and 28th February 1926. There were also two shops in the bara at the entrance which were not included in the lease and which the witness thinks could be let at Rs. 15 per mensem. This evidence is intended to show that the purchase of the bara was a purchase which was not for the benefit of the family because the interest at 10 annas per cent per mensem on Rs. 24,000 would be Rs. 150 per mensem. But in the first place the evidence omits to notice that besides the income of Rs. 90 and possibly Rs. 15 for the two shops there was also a use of the bara at the time by the defendants for their business of jajmani and also a use for providing stables for the numerous ekkas and tongas belonging to Kunj Behari.

Moreover the criterion which we are to apply to a transaction such as the mortgage deed in question is not whether it ultimately turned out to be for the benefit of the family, but whether it was a transaction which at the time it was entered into was such that a prudent man would have entered into it in the expectation that it would be for the benefit of the joint Hindu family. Further in the present circumstances the prospect before the adult members of the defendant's family was this. If they had failed to purchase this house which was offered to them by the owner at a concession, then the business of the family in jajmani could not have been any longer conducted in this building. There would, therefore, have been a loss to the defendants unless they had been able to establish their business of jajmani elsewhere.

We may observe that the method adopted by persons plying this trade in Muttra and elsewhere is to meet pilgrims at the railway station and to take them round the temples in the city and to put them up at suitable lodging houses under the control of the persons conducting the business. Without lodging accommodation it is not, we consider, possible to conduct this business on any large scale. Now in the present case the plaint sets out that the defendants were able to pay only instalments amounting in all to Rs. 3,000 of the interests, and eventually the defendants had been sued for Rs. 32,318. But the question arises as to whether the present situation of the family was due to any inherent imprudence in the execution of the mortgage deed in question or whether it was due to bad management on the part of the adult members of the family subsequent to that transaction. Up to the date of the sale the family of the defendants had been in possession, that is to say they held this large property without paying rent whatsoever to the Raja. When the sale took place and they became liable for interest on the mortgage deed of Rs. 150 a month it became of course necessary for the defendants to meet this charge either by enlarging their business or by improving their income in other directions. There was no doubt that there was between 1924 and 1926 a certain amount of income from letting a portion of the haveli, but like many other people the defendants did not appear to have been sufficiently capable to conduct their business or to economise sufficiently so as to meet the interest charges on this mortgage; but is want of capacity in their subsequent management, a matter which we should take into account in considering whether the transaction entered into in 1921 was or was not for the benefit of the family? We may refer for the law on the subject to *Hanoomanpersaud Pandey* v. *Mt. Babooee Munraj Koonweree* (1), (at p. 423) which states as follows:

"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

Now in the present case the danger to be averted was the loss of the possession of this house which had been in the possession of this family for 40 years and which had been of material assistance to the family in conducting its business of jajmani. We consider, therefore, that in the present case, following the principle laid down by their Lordships of the Privy Council,

(1) [1854] 6 M. I. A. 393=18 W. R. 81=2 Suther. 29=1 Sar. 552 (P.C.).

the adult defendants were justified in executing the mortgage in question and that the transaction was a transaction for the benefit of the family. In the later ruling of *Brij Narain* v. *Mangla Prasad* (2) (at p. 104 *of* 46 *All.*) their Lordships of the Privy Council laid down five propositions the first of which is that the managing coparcener of a joint undivided estate cannot alienate or burden the estate qua manager except for charges of necessity. We consider that the present case falls within this proposition and that the transaction was for legal necessity.

Accordingly the transaction was for legal necessity and the four properties in the mortgage deed are equally bound. We therefore allow the appeal of the plaintiff and decree the suit of the plaintiff in full with costs in both Courts and the decree will be amended so that the decree will be against all the four properties in the plaint. A fresh decree will accordingly be prepared. Six months from the date of this order will be allowed for payment of the amount decreed by the defendants. We dismiss the appeal of the defendants with costs and decree the appeal of the plaintiff with costs. The order of the lower Court for proportionate costs will be set aside and the plaintiff will receive his costs in both Courts in full.

K.N./R.K. *Order accordingly.*

(2) A. I. R. 1924 P. C. 50=77 I. C. 689=51 I. A. 129=46 All. 95 (P.C.).

A. I. R. 1930 Allahabad 771

SULAIMAN AND KENDALL, JJ.

Muhammad Siddiq and *others*—Defendants—Appellants.

v.

Muhammad Nuh—Plaintiff—Respondent.

First Appeal No. 424 of 1926, Decided on 27th January 1930, from a decree of Sub-Judge, Allahabad, D/- 29th May 1926.

(a) Pardanashin Lady—Burden of proof—Transferee relying for title merely on covenant in document must prove that it was read, explained and understood—In other cases there is presumption under Transfer of Property Act, S. 55.

Where a document purporting to transfer property is executed by a pardanashin lady, if the transferee depends upon a specific covenant entered in it to establish his title to it, the burden of proof lies heavily on him to prove that the document was read over and explained to her and that she understood it. But in other cases the presumption under S. 55 overrides this burden: 34 *All.* 455 (*P. C.*). *Ref.* [P 773 C 2]

(b) Transfer of Property Act, S. 55 (2)—Presumption.

The presumption under S. 55 (2) is absolute and irrebuttable. [P 773 C 2]

(c) Contract Act, S. 73—Suit for damages for breach of contract by dispossessed vendee and not for return of original price—Measure of damages is loss sustained by vendee.

In a suit for damages for breach of contract by the dispossessed vendee against the vendor, and not for recovery of original price on the ground of failure of consideration, the measure of damages is the loss suffered by the vendee. [P 777 C 1]

(d) Limitation Act, Art. 116 — Implied covenant in registered document—Art. 116 applies—Transfer of Property Act, S. 55.

If a statute says that a certain covenant should necessarily be implied in a certain contract and that contract itself is in writing and registered, Art. 116 applies, and if the contract is under S. 55, T. P. Act, and the vendee is put in possession and dispossessed the time begins to run from the date of dispossession: *A. I. R.* 1928 *All.* 293, *Rel. on.*; (*Cases discussed*). [P 775 C 1]

B. E. O'Conor, *L. Banerji* and *S. Majid Ali*—for Appellants.

K. N. Katju, *U. S. Bajpai* and *Shiva Prasad Sinha*—for Respondent.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for damages on the ground for breach of a covenant for title and quiet enjoyment. It is now an admitted fact that four annas share was in the possession of Mt. Badam Kunwar which had been originally acquired by her deceased husband, Ajodhia Prasad. On 17th February 1877 she along with her husband's brother and nephew and her own daughters executed a sale deed of this share in favour of Abdul Majid in the name of his wife, Mt. Wahidunnisa (p. 23). She asserted in the deed that she was the absolute owner of the property and had full power to transfer it, and this assertion was accepted by the other executants. There was also a recital in this document that a sum of Rs. 5,000, which was the sale consideration, had been required by her for various necessities. It is an admitted fact that Abdul Majid had owned the remaining twelve annas share in the three villages in dispute. Thus after 1877 Abdul Majid became the sole owner of the entire villages. On his death some dispute arose between his heirs which resulted in a compromise decree dated

31st January 1890 (p. 29). Under this decree the property was divided among his various heirs in this way : that the whole estate was split up into 80 sihams out of which 40 sihams went to Wahidunnisa, 12 sihams to his daughter Hamidunnisa, and the remaining 28 sihams to four ladies, Hikmatunnisa, Niamat Bibi, Anisunnisa and Azmatunnisa. The widow appears to have got more than her legal share, presumably on account of her dower debt remaining outstanding. It is noteworthy that in this compromise decree there was no reference to the previous sale of 1877, nor to the fact that Abdul Majid had acquired four annas share from a Hindu widow, Mt. Badam Kunwar.

On 6th March 1891 a sale deed was executed by the four ladies mentioned above of their 28 sihams in favour of a stranger, Bishun Dat, for Rs. 15,000. This covered the entire interest which the four ladies had in three villages. The deed as it stands contained a clear covenant for title as well as quiet enjoyment, and provided that if any part of the whole of the property sold was claimed and found to be the property of anyone else, or if the vendee had to pay anything as costs or damages on account of any suit by anyone else, then in any and every case the vendors, their heirs and representatives and executors, jointly and severally, as well as their moveable and immovable properties, would be liable for the costs, damages and loss. So far as this deed went it did not refer to the sale of 1877 and merely referred to the compromise decree of 1890, which in itself had contained no reference to that sale of 1877. The sale to Bishun Dat was pre-empted by Mt. Wahidunnisa, and her suit resulted in a decree for pre-emption on 30th November 1892.

Mt. Badam Kunwar appears to have remained alive for a very long time, and some years after her death a suit was instituted by Brij Behari Lal and others claiming to be her daughter's sons. This suit was decreed on the 29th September 1921 by the first Court on a finding that Mt. Badam Kunwar had a Hindu widow's interest in the property and had no authority to transfer it without legal necessity. Mt. Wahidunnisa's representative appealed to the High Court, but the decree of the first Court was affirmed on 16th April 1924. The possession of the property was finally delivered on 23rd August 1924. There is the dakhalnama printed on p. 101 which shows the delivery of possession with regard to a grove.

The plaintiff, who is the son and sole heir of Mt. Wahidunnisa, claims damages on account of the loss of this property in consequence of the suit brought by the daughter's son of Mt. Badam Kunwar.

Various defences were raised to this claim including the plea that the executants, the four ladies, were pardanashin ladies, and they had not executed the document after the same had been read over, explained to and understood by them. It was also urged that the claim was barred by limitation. The amount claimed as damages was also disputed and so was the claim as regards interest.

The learned Subordinate Judge has decreed the claim in part and has allowed interest up to the time of the suit but not thereafter. He has given the plaintiff half of the full costs. The defendants have preferred an appeal from his decree, and the plaintiff has filed cross-objections.

The four issues which were considered by the Court below were: (1) as to limitation; (2) as to Badam Kunwar being the absolute owner of the property, (3) as regards the vendors having understood and agreed to the deed and (4) as to the amount of damages. On behalf of the appellants the question of Badam Kunwar's absolute interest has not been raised in appeal. The main question of fact which has been argued is whether the ladies understood the covenant for title and quiet enjoyment and whether the same was binding upon them.

There was a clear plea raised in the written statement that the deed had not been read over, explained to or understood by the ladies, on which the Court framed a specific issue in the following words:

"Did the vendors understand and agree to the indemnity clause as it stands and what would be the vendors' liability under S. 55 sub-Cl. (2)?"

But the plaintiff did not offer any evidence on this point. He relied mainly on the admission by the defendants that the sale transaction had been agreed to

by the ladies. But when one of the defendants, Mt. Niamat Bibi, who was also one of the original executants, was being examined on commission, the cross-examination was directed to eliciting from her her knowledge of the transaction. Muhammad Siddiq, who was her relation and the scribe of the sale deed of 1891, was also cross-examined on those lines. Although their evidence does lend support to the argument that Muhammad Siddiq was looking after the completion of the transaction, and it was he himself who had got the document registered, it is difficult to infer from this evidence that Muhammad Siddiq had been authorized by all the four ladies to settle not only the terms of the contract but all the conditions and covenants that were to be embodied in the sale deed, and that he had been appointed an authorized agent on behalf of all these ladies to bind them by his agreement, even though they themselves might not be made fully aware of all those conditions.

In the next place this question of authority was not suggested in the plaint and was certainly not the subject-matter of any issue that was framed for trial by the Court below. In the absence of the point being in issue it would be unjust and unfair to the other defendants in the case that they should be bound by statements made either by one of the defendants or a witness for them. The learned Subordinate Judge seems inclined to go a step further than even the learned advocate for the plaintiff, and has enunciated what he calls :

"a new principle for dealing with a transfer purporting to have been made by "parda" ladies, namely that the Court should see to it that their relations who were looking after their interests in a particular transaction were satisfied of the propriety of the terms purporting to have been agreed to by the parda ladies."

This is a novel proposition which in face of the case law as it stands cannot possibly be accepted. Nor can we consider the case that Muhammad Siddiq was an agent authorized on behalf of all the ladies to enter into all the terms which were to be entered into the sale-deed so as to bind them, even though the deed was never read over to the ladies and never understood by them.

The learned advocate for the plaintiff has to concede that there is no positive evidence to show that the sale-deed was actually read over to the ladies and explained to them. On the other hand, there is definite evidence of Muhammad Siddiq and Niamat Bibi, even though it may possibly be untrue, to the effect that the deed was never read over to the ladies. In the present case there is this additional fact : that the deed was not presented for registration by the executants themselves so that there is not even an endorsement by the Sub-Registrar that the document was read over or explained to them. In the absence of such evidence we are bound to hold that the plaintiff has failed to discharge the initial burden which lay upon him to show that the deed was read over, explained to and understood by the ladies so as to bind them.

On this point there are numerous cases decided by their Lordships of the Privy Council which are binding upon us. We may only refer to the case of *Sajjad Husain* v. *Ahid Husain Khan* (1) where previous cases decided by their Lordships were referred to. The same principle has been reaffirmed in subsequent cases, although it has been made clear that it is not always absolutely necessary to prove that there was also independent advice given.

If therefore the plaintiff had merely to depend on the specific covenant entered in the sale deed in order to establish his claim there would have been considerable difficulty in allowing it. But under S. 55, T. P. Act, sub-Cl. (2), the seller is deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. This presumption is absolute, and in the absence of a contract to the contrary is irrebuttable. S. 55, sub-Cl. (g), also enjoins upon the seller the duty to give on being so required by the buyer or such person as he directs, such possession of the property as its nature admits. The defendants admit that the ladies understood that they were selling the property to Bishun Dat. The law presumes that in the absence of any contract to the contrary they did give warranty of title.

(1) [1912] 34 All. 455=15 O. C. 271=16 I. C. 197=39 I. A. 156 (P. C.).

and it was their duty to put the vendee in possession of the property. In spite of what Muhammad Siddiq has stated-and he is an interested person, we hold that there is no satisfactory proof that the ladies or any agent on their behalf entered into any contract contrary to this presumption. As a matter of fact such an oral agreement would not be admissible in evidence, unless it were embodied in the deed itself: S. 92, Evidence Act.

The claim for recovery of damages is therefore undoubtedly maintainable, and the only question that remains for consideration is one of limitation and that of the amount of damages.

It has not been disputed before us that when Mt. Wahidunnisa pre-empted the sale to Bishun Dat she stepped into the shoes of the vendees and assumed all this liabilities and became entitled to all the benefit which he was entitled to; and that therefore the present plaintiff can enforce a covenant for indemnity in the same way as Bishun Dat himself would have done. Indeed, S. 55, sub-Cl. (2), in itself provides that the benefit of such contract shall be annexed to and shall go with the interest of the transferee, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

The learned Subordinate Judge has thought that the liability imposed by S. 55, sub-Cl. (2), can be enforced only within three years being governed by Art. 62 or Art. 97, Lim. Act, and that in that event the suit would probably have been time barred. We are unable to agree with the view that Art. 116 is inapplicable.

There has been some conflict of opinion on this point, and the learned Judges who have held Art. 116 to be inapplicable have relied on the cases of *Hanuman Kamat* v. *Hanuman Mandur* (2) and *Juscurn Boid* v. *Pirthi Chand Lal* (3). But in none of these cases decided by their Lordships of the Privy Council did this point arise. *Hanuman Kamat's* case was one in which the sale deed containing the clause was of the year 1879 before the Transfer of Property Act came into force. Their Lordships therefore had not before them the consideration of the effect of S. 55, sub-Cl. (2), T. P. Act, and that case cannot be treated as an authority on the legal effect of that statutory provision. In the same way *Hukum Chand's* case was one in which the sale had not taken place under a private transfer, but it was an involuntary sale for arrears of rent under the Bengal regulations. The suit was one for recovery of the sale price and not for damages for breach of contract. There being no registered document in the case their Lordships had not to consider the applicability of Art. 116 at all. Thus both these cases are clearly distinguishable.

The learned advocate for the defendants has relied on the case of *Janak Singh* v. *Walidad Khan*(4), but there too the effect of S. 55 (2) was not discussed in the judgment and does not appear to have been pressed before the Bench. The question which we have to consider is whether by virtue of this statutory provision a covenant for title cannot be read into the conveyance itself. *Janak Singh's* case (4) was followed by this High Court in *Kundan Lal* v. *Bisheshar Dayal* (5). The learned Judges thought that the question for their consideration was concluded by *Janak Singh's* case (4) as well as by *Hanuman Kamat's* case (2) decided by the Lordships of the Privy Council. We have already pointed out the distinction. The last-mentioned case, namely, *Kundan Lal* v. *Bisheshar Dayal* (5), was expressly dissented from by a Bench of this High Court in the case of *Hanumant Rai* v. *Chandi Prasad* (6). The learned Judges thought that they were at liberty to accept the ruling in the case of *Mul Kunwar* v. *Chattar Singh* (7) in preference to that of *Kundan Lal's* case. (5) Although the case of *Mul Kunwar* (7) was not directly in point inasmuch as there was an express covenant there, and not an implied covenant, there can be no doubt that the learned Judges in *Hanumant Rai's* case (6) held that even in the case

(2) [1892] 19 Cal. 123=18 I. A 158=6 Sar. 91 (P. C.).
(3) A. I. R. 1918 P. C. 151=50 I. C. 444=46 I. A. 52=46 Cal. 670 (P. C.).
(4) [1915] 30 I. C. 410.
(5) A. I. R. 1927 All. 734=103 I. C. 165.
(6) A. I. R. 1929 All. 293=119 I. C. 243=51 All. 651.
(7) [1908] 30 All. 402=5 A. L. J. 480=(1908) A. W. N. 185.

of an implied covenant, if the contract is under a registered document, Art. 116 applies. We are in perfect agreement with their view.

As pointed out by them, S. 9, Contract Act, implies the existence of a contract where its completion by acceptance is implied. It may further be pointed out that Art. 114 which is somewhat similar to Art. 116 and relates to unregistered contracts, refers to a contract whether it be express or impliad. There is no reason to suppose that the contract mentioned in Art. 116 may not be implied and must always be in express words. It therefore follows that if a statute lays down that a certain covenant should necessarily be implied in a certain contract and that contract itself is in writing registered, Art. 116 would be applicable and the time begins to run from the date of dispossession. The observations of their Lordships of the Privy Council in the case of *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (8) at p. 767 (of 44 *Cal.*) go to suggest that Art. 116 is not a mere residuary article, but is a special provision for registered instruments. It seems to us that when such a covenant is implied by law it is to be presumed to be a necessary accompaniment of the conditions of the sale and is therefore, deemed to be embodied in the deed of conveyance. The statute law has, so to say, added such a covenant to a registered conveyance unless there is an express contract to the contrary. It would be incorrect to hold that the covenant is presumed only with regard to the contract of sale and not to the deed of sale. There is abundant authority in support of the view taken in the latest case of this Court and of the other High Courts in India. We may in this connexion briefly refer to the case of *Arunachala Ayyar* v. *T. Ramasami Aiyar* (9) and the case of *Municipal Council, Cochin* v. *Baru Devussi, A. I. R.* 1926 *Mad.* 235: and also to the *Calcutta* case of *Injad Ali* v. *Mohini Chandra Adhikari, A.I.R.* 1924, p. 148, and the *Bombay* cases of *Multanmal Jayaram* v. *Budhumal Kevalchand* (10) and *Ganappa Putta Hegde* v. *Hammad Saiba* (11). We may also point out that there is an analogous case of the Patna High Court in *Nabin Chandra Ganguli* v. *Munshi Mander, A. I. R.* 1927 *Pat.* p. 248, where the presumption arising under S. 108, T. P. Act, was given a similar effect. Thus there is a considerable preponderance of authority in favour of the view that even in cases of implied covenants if the contract itself is registered, Art. 116 is applicable. We see no good ground for making a departure from this abundance of authority.

In the case of void documents, particularly where the deed is not registered, it has been held that a suit to recover the amount paid is governed by Art. 62. On the other hand, if the transfer was not void ab initio but was voidable and the consideration fails subsequently, then in the absence of a registered document Art. 97 would cover a suit for recovery of the money for which the consideration failed. In the present case we have a registered document and have applied Art. 116. Even if Art. 116 were not applicable, the suit not being one for refund of the price paid, but for damages for the loss suffered, it may be a point worth considering whether the claim would be outside Art. 97, and therefore, within the residuary Art. 120. In either case we are clearly of opinion that the six years' rule of limitation applies and not the three years' rule. In this view of the matter the present suit was within six years of even the decrees of the first Court, under which the transfer was avoided.

But even if Art. 97, Limitation Act, were applicable, the next question that would arise for consideration would be as to the starting point of limitation. Under that article three years run from the date of the failure of the consideration.

The learned advocate for the plaintiff relies strongly on the case of *Juscurn Boid* v. *Pirthichand Lal Choudhury* (3), *Hukum Chand Boid* v. *Pirthichand Lal Choudhury* (4) and has urged that the starting point of limitation must be the date of the first Court's decree. The case before their Lordships of the Privy Council was a peculiar case. Cl. 14, Reg. 8, 1819, itself pro-

(8) A. I. R. 1916 P. C. 182=39 I. C. 156=44 I. A. 65=44 Cal. 759 (P.C.).
(9) [1914] 38 Mad. 1171=25 I. C. 618.
(10) A. I. R. 1921 Bom. 252=61 I. C. 70=45 Bom. 955.
(11) A. I. R. 1925 Bom. 440=89 I. C. 59=49 Bom. 596.

vided that an action would lie for the reversal of the sale on account of arrears of rent payable by a patni talukdar, and laid down that the purchaser should be made a party to such a suit and upon a decree passing for reversal of the sale, the Court should be careful to indemnify him against all loss, at the charge of the zamindar or person at whose suit the sale might have been made. Such a suit was not a suit for recovery of actual possession, but for reversal of the sale, and a decree to indemnify the aggrieved party had to be passed in the same suit. In their judgment their Lordships indicated:

"There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which limitation begins to run, but that is not the case here."

Their Lordships pointed out that the quality of possession acquired by the purchaser in that case excluded the idea that the starting point was to be sought in a disturbance of possession. This leading case has been considered by the Madras High Court in several cases. We may refer to the cases of *Subbaroya Reddiar* v. *Rajagopala Reddiar* (12) and *H. C. K. V. Sankara Variar* v. *R. K. Ummer* (13) and also *Mahomed Ali Sheriff* v. *Badharaju Venkatapathi Raju* (14). The learned Judges of that High Court have come to the conclusion that the starting point of limitation would be the date of dispossession where possession has been delivered. We may point out that this was the view expressed in an earlier case of this High Court: *Ram Chandar Singh* v. *Tohfah Bharti* (15). In the case of an express covenant for quiet enjoyment there can be no doubt that the covenant is broken when possession is disturbed. But even under S. 55 there is not only a covenant for good title but also an obligation to put the vendee in possession of the property. So long as the vendee actually remains in possession and is in receipt of the profits he is getting some consideration for his money, and it is difficult to say that the consideration has already totally failed merely because a suit has been decreed against him. In England a distinction is drawn between a mere covenant for title and a covenant for enjoyment. In India the rights and liabilities of the parties are governed by the Contract Act and the Transfer of Property Act. Under S. 73, Contract Act, the party who suffers by breach of of contract is entitled to receive compensation for the loss or damage which has been caused to him. A mere apprehended breach of covenant of title may not entitle him to a claim for damages when no loss has actually occurred; unless of course he could avoid the whole contract itself on the ground of fraud, misrepresentation or mutual mistake. It would also be inconvenient to hold that the breach was committed from the very start when the sale deed was executed in 1891. The English cases referred to by the learned counsel for the appellants are mostly cases where there was an absolute defect of title ab initio. In the present case the transfer was only voidable and not void and if acquiesced in by the reversioner or not challenged by him it would hold good. It is also clear that so long as the option to avoid was not exercised by the reversioner the transfer stood though it was liable to be defeated. The failure of consideration was only discovered when the claim was put forward on behalf of the reversioner. In the peculiar circumstances surrounding a transfer by a Hindu lady who has a restricted power of alienation, it would be inadvisible to import the considerations which affect the English law of immovable property. Following the cases referred to above, we should hold that the total failure of consideration took place on 23rd August 1924 when the plaintiff was actually dispossessed by the reversionary heir. In the view of the matter also the claim would be within time.

The question that arises for consideration is the measure of damages. It is urged on behalf of the appellants that the plaintiff is only entitled to a refund of the proportionate amount of the original consideration, and not the present market value of the property. On behalf of the plaintiff-respondent reliance is placed on the case of *Jai Kishen Das* v. *Arya Priti Nidhi Sabha* (16) in which certain earlier cases have been re-

(12) [1915] 38 Mad. 887=23 I. C. 570.
(13) A. I. R. 1923 Mad. 46=70 I. C. 787=46 Mad. 40.
(14) [1920] 60 I.C. 235.
(15) [1904] 26 All. 519=(1904) A.W. N. 92=1 A. L. J. 231.
(16). [1920] 1 Lah. 380=58 I. C. 757.

ferred to, which lay down that the measure of damages is the price of the land at the date of eviction.

As the suit is really not a suit for recovery of the original price, because the consideration did not fail from the very beginning, but is for damages for the loss suffered by the plaintiff on account of the breach of the contract, the measure of damages should be the exent of the loss suffered by the plaintiff. The real loss to him is the loss of the property, that is to say, its going out of his possession in 1924. In order to compensate him fully and put him in a position, as if he had suffered no loss whatever, one would have to deliver to him another property of the same value as that which he has lost. It therefore, follows that the measure of the loss to him is the market value of the property at the time when it goes out of his possession. It would be both inequitable and unjust to base the amount of damages on the price paid in 1891, for since that year the situation has considerably changed. On the one hand the plaintiff's predecessor parted with her money and has not been receiving any interest. On the other hand, the plaintiff has been in possession of the property and receiving its profits; but he might also have improved the lands by further investments as well as by his labour, and the price of the land has undoubtedly increased in consequence of the general rise in prices all round. If the plaintiff's predecessor had been given some other land, to which the title was not defective, that property also would have risen in value to the same extent as the property which he has now lost. In view of all these circumstances, we are of opinion that the equitable method would be to uphold the decree of the Court below, under which damages have been assessed at the present market value.

No serious objection can be taken to the estimate of the valuation. The learned Judge has taken three per cent as the rate for capitalizing the amount of profits, and in our opinion that rate is not unfair.

We may point out that there was at first a misapprehension in the mind of the learned advocate for the appellants when it was urged before us that the Court below has given the plaintiff the full value of four annas share in the three villages, and not only the proportionate interest of the four ladies in those four annas, that is to say, 23/80 of four annas. On an examination of the share mentioned in the schedule attached to the plaint and the value of the property in the decree of suit No. 885, 1920, it is now made clear that there is no such mistake.

The cross-objections raised three points. The first is that the Court below should have given to the plaintiff a decree for the costs incurred in the appellate Court also. The learned Subordinate Judge has thought that after the adjudication by the first Court the position was made perfectly clear to the plaintiff, and when he took the matter up in appeal, he took it there at his own risk. He has accordingly disallowed the costs of the appellate Court, and we do not think that he was wrong in this respect.

The second ground is that the plaintiff was entitled to his full costs. The learned Subordinate Judge has given the plaintiff half of his full costs. We think that it would be fair to both parties to direct that they should receive and pay costs in proportion to success and failure in both Courts.

The learned Subordinate Judge has not given any pendente lite of future interest. As the claim was one for damages, and the amount of the loss suffered by the plaintiff was adjudged at the time of the judgment by the Court, we think that no further interest pendente lite should be allowed. But at the same time there seems to be no reason why the plaintiff should not have his ordinary interest at the Court rate of six per cent per annum on the amount of the decree till payment. We accordingly dismiss the appeal and allow the cross-objection to this extent: that we modify the decree for the amount of damage decreed by the Courts below and direct that the same should carry future interest at the rate of six per cent per annum.

The parties would receive and pay costs in proportion to their success and failure.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 778

MUKERJI AND BENNET, JJ.

Jhandu Mal and *Sons*—Applicants.

v.

Official Liquidators of the Dehra Dun Mussoori Electric Tramway Co. Ltd.—Opposite Party.

Letters Patent Appeal No. 175 of 1928, Decided on 27th March 1930, from judgment of Ashworth, J., D/- 15th November 1928.

Negotiable Instruments Act, S. 27—Company not liable for promissory note executed by and in name of agent unless agent so authorized—Companies Act, S. 89.

Unless a person is so specifically authorized to do, either as a managing agent or otherwise, he cannot execute or make a promissory note in his own name so as to bind the Company : *Chapman* v. *Smethurst*, (1909) 1 *K.B.* 927, *Dist.*; *A. I. R.* 1925 *Cal.* 1062, *Ref.* [P 778 C 2]

Iqbal Ahmad, *P. L. Banerji* and *Hazari Lal Kapoor*—for Applicants.

K. N. Katju and *Bhagwati Shankar*—for Opposite Party.

Bennet, J.—This is a Letters Patent appeal from a judgment of the learned Company Judge, dismissing the claim of the appellant applicant Messrs. Jhandoo Mal and Sons through Lala Bool Chand. The appellant put in a petition on 3rd August 1928 to the learned Company Judge containing certain items of Claim Nos. 1 to 9 amounting in all to Rs. 6,490-7-0. Of these items the order of the Company Judge deals with items 1 to 4, which are claims by the appellant on two promissory notes of 7th November 1924 and 21st November 1924. These promissory notes are signed by Mr. T.B. Gilani, and below his signature there appear on one promissory note the words :

"Managing Agent, Dehra Dun Electric Tramway Company Limited."

On the other promissory note below the signature of Mr. Gilani the words written are :

"Agent, Dehra Dun Mussoorie Electric Tramway Company Limited."

The learned Company Judge has held that the Dehra Dun Mussoorie Electric Tramway Company Limited, now in liquidation, are not rendered liable by these promissory notes. It is contended on behalf of the appellant that this decision is incorrect. Under S. 27, Negotiable Instruments Act :

"Every person capable of binding himself or of being bound, as mentioned in S. 26, may so bind himself or be bound by a duly authorized agent acting in his name."

Under S. 89, Companies Act :

"a promissory note shall be deemed to have been made on behalf of a company if made . . . in the name, or by, or on behalf or on account of, the Company by any person acting under its authority, express or implied."

The first thing therefore which the appellant has to show is that Mr. Gilani was the authorized agent of the Company for the purpose of making promissory notes within the language of S. 27, Negotiable Instruments Act, or that he was acting under the authority of the Company, express or implied, as laid down in S. 89, Companies Act. The appellant has been unable to satisfy us on these points. He has referred to the Memorandum of Association of the Company Cl. (t), which merely states that one of the objects of the Company is to make promissory notes. It is not stated that the managing agents are to make these promissory notes. In the Articles of Association, paras. 120 and 121 power is given to the managing agent to make contracts and sign receipts on behalf of the Company ; but there is no power given to the managing agent to make promissory notes on behalf of the Company. It accordingly follows that Mr. Gilani is not shown to be the duly authorized agent of the company for the purpose of making promissory notes. Accordingly therefore, even if Mr. Gilani had acted in the proper form which would have bound the Company, the Company is not bound because Mr. Gilani was not the authorized agent of the Company for this purpose. The next point in this connexion is whether the form employed in the promissory note would bind the Company if Mr. Gilani had been duly authorized to bind it. Reference has been made to several cases and the appellant relied on *Chapman* v. *Smethurst* (1). In that case the promissory note was signed by :

"J. H. Smethurst's Laundry and Dye Works, Limited, J.H. Smethurst, Managing Director."

It was held that the Company was bound by this promissory note. But that promissory note is easily distinguished from the two promissory notes in the present case, because in *Chapman* v. *Smethurst* (1) the name appearing as the maker of the promissory note was the name of the company, and J. H.

(1) [1909] 1 K. B. 927=78 L. J. K. B. 654=16 Manson 171=14 Com. Cas 94=25 T.L. R. 383=100 L. T. 465=53 S. J. 340.

Smethurst, Managing Director, merely signed below the name of the Company to show which official signed the name of the Company. On the contrary in the present case the name of the maker of the promissory note is Gilani, and the words appended after his name are mere description of Gilani. In *Sree Lal Mangtu Lal* v. *Lister Antiseptic Dressing Co. Ltd.* (2) a hundi was drawn in favour of a firm "M. and Sons" and was endorsed twice by them "M. and Sons" and "M. and Sons", Managing Agents "L. A. and Co." It was held that the Company "L.A. and Co." were not bound by this promissory note, and that the words "Managing Agent, L. A. and Co." were merely description of M. and Sons. That case is practically the same as the present case, and following that ruling we hold that the form in which the two promissory notes were drawn up precludes the appellant from making the Company liable on these two promissory notes.

The next point in regard to which we have been addressed is about that portion of the order of the learned Company Judge which states :

"Accordingly I direct that the costs in the *Calcutta* case incurred or that will properly be incurred by the Company in liquidation shall be borne by Messrs Jhandoo Mal and Sons according to the compromise."

This compromise between the parties in Calcutta dated 5th July 1928, stated in para. 9 (f) as follows :

"That the costs incurred by the parties in the Calcutta High Court will be decided as payable to and by the parties according to the order of this Hon'ble Court."

It is admitted that "this Hon'ble Court" refers to the Allahabad High Court in which this application was made. Objection is taken on behalf of the appellant that the Official Liquidator claims a large sum as his travelling expenses to Calcutta. It is denied on behalf of the Official Liquidator that any such claim has been made, and we consider that when the application for costs is actually made to the learned Company Judge it will be a matter for him to decide. The order of the Company Judge before us is, in our opinion, in accordance with the term 9 (f) in the compromise between the parties.

The order of the learned Company Judge before us deals with items 1 to 4 only in the application of 3rd August 1928, and does not deal with items 5 to 9 in that application. On those items we express no opinion, and it will be for the learned Company Judge to decide those items if application is further made to him on the subject. Accordingly we dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

(2) A. I. R. 1925 Cal. 1062=52 Cal. 802.

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* A. I. R. 1930 Allahabad 779

SULAIMAN AND KING, JJ.

Anmol Singh and *others*—Plaintiffs—Appellants.

v.

Hari Shankar Lal and *others*—Defendants—Respondents.

Appeal No. 16 of 1929, Decided on 11th April 1930, from an order of Sub-Judge, Azamgarh, D/- 13th September 1928.

***(a) Civil C. P., O. 22, R. 4, and O. 34—Death of defendant after preliminary decree but before final decree—Legal representatives not brought on record within limitation—Suit abates as against deceased defendant.**

Under the Civil P. C., now in force suit does not terminate by the passing of the preliminary decree, but continues till it is finally and completely disposed of by the passing of the final decree. Consequently where one out of the several defendants dies after the preliminary decree but before the final decree and his legal representative is not brought on record within the time allowed by law, the suit abates as regards that defendant: *A. I. R.* 1922 *All.* 396 ; *A. I. R.* 1927 *All.* 272 ; 50 *I. C.* 529 (*F.B.*) ; *A.I.R.* 1921 *Cal.* 551, *Foll.*; 33 *All.* 154 ; 39 *All.* 551 ; 39 *All.* 641 ; 40 *All.* 203 ; 40 *All.* 235 and 21 *All.* 314, *Ref.* ; *A. I. R.* 1928 *Mad.* 914 (*F.B.*) ; *A. I. R.* 1929 *Cal.* 430; *A. I. R.* 1927 *Oudh* 156, *Diss. from.* ; *A. I. R.* 1924 *P.C.* 198, *Dist.* and *Expl.*

[P 782 C 1, 2 ; P 783 C 1]

(b) Civil P.C., O. 22, R. 4—Application for substitution made after limitation—Unless knowledge of death within three months of application is proved abatement cannot be set aside—Limitation Act, Art. 177.

Where no application for substitution of legal representative is made within the period of limitation unless the plaintiff can satisfy the Court that he had no knowledge of the death of the defendant till within three months of the date on which he applies for substitution of the legal representative of the deceased defendant, the application is beyond time and there can be no ground for setting aside the abatement. [P 783 C 2]

N. P. Asthana and *Kedar Nath Sinha* —for Appellants.

K. N. Katju and *A. P. Pandey* — for Respondents.

Judgment.—This is an appeal by the plaintiffs from an order of the Court below actually dismissing the suit,

which has been treated as an order refusing to set aside an abatement against the contesting defendants only, from which an appeal lies under O. 43, R. 1 (k).

While a mortgage suit was pending against the numerous defendants Mahadeo, defendant 4, died on 3rd July 1922, but an application to bring his son and heir, Chandar Deo, was filed on 30th January 1923, without informing the Court of the lapse of time which had intervened. Notice was issued to the proposed heir and there was substituted service by means of affixation of notice and publication in a newspaper. On 27th March 1924 a preliminary decree in the mortgage suit was passed ex parte. After this decree two of the other defendants, namely, Gobardhan Das, defendant 2 and Shyam Sunder Das, defendant 3, also died on 9th February 1926, and 23rd March 1926, respectively. An application was filed by Chandar Deo, the heir of Mahadeo Pande, for setting aside the ex parte decree on the ground that he had no information of the suit. Another application appears to have been filed by the heirs of Gobardhan Das and Shyam Sunder Das, alleging that they also had no information about the suit. The application however is not to be found on this record, but both these applications were disposed of by a joint order of the Court dated 13th January 1928 on a finding that the applicants had no information of the suit. The ex parte decree was accordingly set aside as against the applicants and the suit was restored so far as they were concerned.

The position, strictly speaking, was that Mahadeo Pande had died and an application for substitution of the name of his heir had been made though beyond time; and that Gobardhan Das and Shyam Sunder Das died after the preliminary decree and no formal application to bring the heirs upon the record was made up to that time. On 9th February 1928, the heirs of Gobardhan Das and Shyam Sunder, by their application pointed out that their names had not been formally brought on the record and that the suit could not continue as against them. The plaintiffs promptly applied on the same date to bring their names on the record as the legal representatives of the two deceased defendants. The Court made an order accordingly and allowed time to the heirs of the deceased defendants to file a written statement. These defendants filed a written statement on 13th February 1923, in which they took the plea that the suit had in fact abated as against them because no application for substitution of names had been filed within the time allowed by law. The learned Subordinate Judge acceded to this contention, and holding that the suit had abated dismissed the suit as against these contesting defendants, that is to say, against the heirs of Mahadeo Pande, Gobardhan Das and Shyam Sunder Das. It is from this order that the principal appeal has been preferred.

The first point urged on behalf of the appellants is that after a preliminary decree had once been passed there was no question of abatement at all. Strong reliance is placed on the pronouncement of a Full Bench of the Madras High Court in the case of *Perumal Pillay* v. v. *Perumal Chetty* (1), which has been followed by the Calcutta High Court and the Lucknow Chief Court.

The learned Chief Justice of Madras in delivering the judgment of the Court relied mainly on the principle laid down in *Chapman* v. *Day* (2), as well as the pronouncement of their Lordships of the Privy Council in *Lachmi Narain Marwari* v. *Balmakund Marwari* (3). The learned Chief Justice considered that this was a case of a casus omissus from the Code of Civil Procedure and there was no express provision to meet the case of a party dying after the passing of the preliminary decree and before the final decree is passed. He therefore considered that it was open to the High Court to lay down a rule of practice which would be the most logical rule to follow. The specific provisions of the Code, apart from those contained in Rr. 3 and 4, do not apear to have been examined.

The Calcutta High Court in the case of *Nazir Ahammad* v. *Tamijaddi Ahammad* (4) has accepted this view. In the course of the judgment it was

(1) A. I. R. 1928 Mad. 914=112 I. C. 116=51 Mad. 701 (F. B.).
(2) [1883] 48 L. T. 907.
(3) A. I. R. 1924 P. C. 198=81 I. C. 747=51 I. A. 321=4 Pat. 61.
(4) A. I. R. 1929 Cal. 430=57 Cal. 235.

also remarked that the Allahabad High Court in *Ali Bahadur Beg* v. *Rafiullah* (5) had taken the same view. We shall point out hereafter that this assumption was incorrect.

The Lucknow Chief Court in *Mt. Lakhpati Kuar* v. *Daulat Singh* (6) has undoubtedly accepted the same view. Stress has also been laid by the learned Judges on the language of O. 2, R. 6 in support of their view which we shall consider presently.

Now if their Lordships of the Privy Council have laid down any principle which ought to apply to the case before us we are of course in duty bound to follow that ruling. *Lachmi Narain Marwari* v. *Balmakund Marwari* (3) was a case in an appeal arising from a partition suit; the parties compromised their suit before the High Court and a consent decree was passed by the High Court in the terms quoted on p. 63. Although certain proceedings still remained after that decree the form of the decree does not suggest that the parties clearly expressed their intention that the consent decree should be in the nature of a preliminary decree to be followed by a further final decree. So far as the parties were concerned they finally settled their disputes and their compromise was embodied in the decree. The judgment of their Lordships of the Privy Council also suggests that all that had remained after the decree was certain supplementary proceeding with a view to carry out the decree. When the case was remitted to the Subordinate Judge in order that necessary steps for effecting the partition be taken he fixed a date for hearing the parties and gave them notice. On the day fixed although he waited the whole day the plaintiffs and their pleaders did not turn up and he then dismissed the suit for want of further prosecution. He had thought that the proceeding was governed by the provisions of O. 17, R. 2 and the date was the day to which the hearing of the suit had been adjourned. The Patna High Court was of opinion that it was never intended that there should be a hearing of the suit in the ordinary sense of the word but merely some interlocutory matter decided between the parties as to the future conduct of the suit. Their Lordships of the Privy Council, in dismissing the appeal, observed :

"After a decree has once been made in a suit the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of a decree, acquired rights or incurred liabilities which are fixed, unless and until the decree is varied or set aside. After a decree any party can (as already stated) apply to have it enforced."

The passage quoted above with reference to the facts of that case fully applied to a compromise decree passed between the parties.

We may point out that under O. 20, R. 18, it is not obligatory on a Court to pass a preliminary decree in a suit for partition, but the Court may pass such a decree if the partition or separation cannot be conveniently made without further enquiry. Much less therefore is it obligatory on the parties to a suit who are compromising their dispute that there should be a preliminary decree in a partition suit in the first instance. On the other hand O. 34 requires that there should be a preliminary decree followed by a subsequent final decree. But even in the case of a mortgage suit, it is possible to have a compromise decree which is the final decree itself there being no intention that there should be another decree after it. We may in this connexion refer to the case decided by a Full Bench of this High Court, *Askari Hasan* v. *Jahangiri Mal* (7).

It may further be pointed out that although if a partition suit is to become infructuous no fresh suit can be instituted on the same cause of action, nevertheless if the property remains joint and undivided there is nothing to prevent a cosharer, subsequently on a fresh cause of action, from again suing for division of the joint property and for the separation of his share. To hold that his right to get a partition is extinguished would be tantamount to holding that the property has become impartible.

It is therefore clear to us that the case before their Lordships of the Privy Council was a case of a totally different character and their Lordships had not to consider the specific language of the

(5) A. I. R. 1927 All. 272=101 I. C. 288=49 All. 310.

(6) A I. R. 1927 Oudh 156=101 I. C. 174=2 Luck. 464.

(7) A.I.R. 1927 All. 167=100 I.C. 59=49 All. 297 (F.B.).

various rules in O. 22 and we see no reason to extend the principle underlying that decision to cases of abatement in a country where the law is to be found in a codified form.

On the same ground we think that the principle underlying the decision in *Chapman* v. *Day* (2) cannot be strictly applied to cases arising under the Code of Civil Procedure if we can find speeific provision in the Code which ought to govern our decision.

With great respect to the learned Judges of the Madras High Court we are unable to hold that this is a case of a casus omissus from the Code of Civil Procedure. Before the new Code was passed there was a difference of opinion between the various High Courts as to whether the proceedings following upon a decree under S. 87, T. P. Act, were proceedings in execution or proceedings in a suit. That controversy has now been set at rest by the explanation added to S. 2 of the Act. A decree in a suit may be either preliminary or final. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of ; it is final when such an adjudication completely disposes of a suit. There cannot therefore be the least doubt that under the Code of Civil Procedure now in force the suit does not terminate by the passing of the preliminary decree but continues till it is finally and completely disposed of by the passing of the final decree. This point has arisen in numerous cases in connexion with the period of limitation which should be applicable to applications for the framing of a final decree and it has been unanimously held by all the High Courts that the proceedings are not by way of execution but in the suit itself. We need only refer to a few cases of our own High Coutt on this point: *Abdul Majid* v. *Jawahir Lal* (8) ; *Moti Lal* v. *Ram Narain* (9); *Gajadhar Singh* v. *Kishan Jiwan Lal* (10); *Nizamuddin Shah* v. *Bohra Bhim Sen* (11); *Ahmad Khan* v. *Mt. Gaura* (12).

Now when the suit is still continuing even after the passing of the preliminary decree, it is difficult to see how O. 22, R. 4, cannot be applicable to it. It expressly states that the Court "shall proceed with the suit." There seems to be no reason to restrict the meaning of the word "suit" in this particular rule and say that there "suit" means the stage in the suit up to the passing of the preliminary decree only 'and not thereafter.

It has been held by the learned Judges who have taken the contrary view that the case might fall under R. 10 and not R. 4, but R. 10 applies to "other cases", which obviously mean cases other than those of death, marriage and insolvency, which have been dealt with in the rules which precede it. It may also be noted that for a case under R. 10 it is not obligatory on the Court to substitute the name of the person on whom the property has devolved during the pendency of the suit, but there is a discretion to allow the suit to be so continued if the Court thinks fit to grant leave. Obviously such a discretion could not have been contemplated in the case of the death of a party to the suit. It may further be pointed out that R. 12 of that order expressly excludes the operation of R. 4, from proceedings in execution of a decree or order and does not exclude its operation in the case of proceedings between the preliminary decree and the final decree. Had the legislature intended to exclude such proceedings the position would have been made clear in R. 12. Stress has been laid by the Lucknow Chief Court on the language of R. 6, where "cause of action" is mentioned and not the "right of suit." But R. 6, which is a new addition to the Code, embodies an altogether different principle of law. It was pointed out by this High Court in *Chetan Charan Das* v. *Balbhadar* (13) that if death occurs some time after the hearing of the suit and before the delivery of the judgment, the judgment would date from the date of the hearing and the decree would be a valid decree in spite of the fact that the death of the plaintiff was not known to the Court at the time that the judgment was pronounced. That rule was the application of a larger general principle *actus curiae nemini facit injuriam*. R. 6 would be applicable even if the cause

(8) [1911] 33 All. 154=7 I. C. 926 (F.B).
(9) [1917] 39 All. 551=40 I. C. 1006.
(10) [1917] 39 All. 641=42 I.C. 93.
(11) [1918] 40 All. 203=43 I. C. 870.
(12) [1918] 40 All. 235=43 I. C. 518.
(13) [1899] 21 All 314=(1899) A.W.N. 86.

of action does not survive. It therefore deals with different principle altogether and cannot be availed of in interpreting R. 4 of that order.

So far as this High Court is concerned the view has been consistently held that the death of a party after the passing of the preliminary decree may cause an abatement of the suit and no case expressing a contrary opinion has been brought to our notice. We may refer to the case of *Jagar Nath Umar* v. *Ram Karan Singh* (1) in which the judgment was delivered by the learned Chief Judge of the Lucknow Chief Court when he was a Judge of this Court, and also to the case of *Ali Bahadur Beg* v. *Rafiullah* (5), which was decided after the pronouncement of their Lordships of the Privy Council in the case of *Lachmi Narain Marwari* v. *Balmakund Marwari* (3). The effect of this decision has been misunderstood by the learned Judges of the Calcutta High Court because of the misleading head-note. In that case the party died after the passing of the preliminary decree and an application to set aside the abatement was filed after the expiry of the period of limitation. The District Judge held that the application was time barred and that the suit had abated. This order was affirmed by the High Court. In the course of the judgment the learned Judges clearly stated: "Here every condition required by R. 4 is present." They obviously held that R. 4 applied, that there was an abatement of the suit and that the application for setting aside the abatement not having been made in time had been rightly held by the District Judge to have been barred by time. This case therefore, far from being an authority for the opposite view, is an authority for the view which we have taken in this case.

We may further mention that before the pronouncement of the decision in *Lachmi Narain Marwari* v. *Balmakund Marwari* (3) the opinion expressed in several cases by the Madras High Court was the same though it has now been overruled by the Full Bench so far as that High Court is concerned. Similarly a Full Bench of the Patna High Court, in the case of *Jangli Lall* v. *Laddu Ram Marwari* (15), held that there can be abatement in such circumstances. The same view was held by the Calcutta High Court in *Bhuthnath Jana* v. *Tara Chand Jana* (16).

We are accordingly of opinion that there is nothing in the case of *Lachmi Narain* v. *Balmkaund Marwari* (3) which can be taken to overrule these previous decisions. We must therefore adhere to the view which has so far been strongly expressed by the High Court as we are not bound by the opinions expressed by the other High Courts.

Coming to the merits of this case: there has unfortunately been some confusion in the Court below, but as the matter has come up in appeal before us, and we are seised of the whole case, we can certainly put things right.

Strictly speaking, on the death of Mahadeo Pande the plaintiff got the name of Chander Deo substituted. The Court had jurisdiction to set aside an abatement if it were satisfied that there was good cause for the delay. When Chander Deo got the exparte decree set aside it was open to him to satisfy the Court that the abatement also had been set aside without sufficient cause and without notice to him. The Court did find that Chander Deo had no information of the suit. It therefore obviously held that not only the ex parte decree which was passed behind his back should be set aside but that the substitution of his name which had been made on an application filed beyond time was also not binding upon him. We think that unless the plaintiffs can satisfy the Court that they were not aware of the death of Mahadeo till within three months of 30th January 1923, when they applied for the substitution of the name of Chandra Deo the suit must be deemed to have abated, and there is no good ground for setting aside that abatement.

As regards the heirs of Gobardhan Das and Shyam Sunder Das their fathers were alive when the preliminary decree was passed but that decree also has been set aside as against them on the ground that they had no notice of the suit. So far as they are concerned it must be assumed that the suit has been restored and their fathers were in the array of the defendants and are dead. The plaintiffs applied on 9th

(14) A. I.R. 1922 All. 396=68 I. C. 251.
(15) [1919] 50 I. C. 529 (F. B.).
(16) A. I. R. 1921 Cal. 551—59 I. C. 177.

February 1928 to bring these objectors on the record as the legal representatives of Gobardhan Das and Shyam Sundar Das. The same rule applies and unless the plaintiffs can satisfy the Court that they had no knowledge of the death of these two defendants till within three months prior to 9th February 1928 their application would be beyond time and there would be no ground for setting aside the abatement. It is certainly open to the heirs of Gobardhan Das and Shyam Sunder Das to plead that the suit has abated. The technical objection that a formal order directing the substitution of their names was passed forthwith on the very day of the application, namely 9th February 1928, cannot stand in their way as no proper opportunity had been given to them to object to it. It was assumed in the Court below that they would have a right to contest the suit on this ground when they filed their written statement. In spite of these irregularities therefore we must hold that they are entitled to rely upon the abatement of the suit. The Court below has also found in their favour that they had no information of the suit. In view of certain previous proceedings the learned advocate for the plaintiffs is not in a position to suggest that they were not aware of the death of these persons till within three months of the date when they filed the application. In these circumstances the suit must be deemed to have abated as against defendants 2, 3 and 4, namely Gobardhan Das, Shyam Sunder Das and Mahadeo Pande. We accordingly dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 784

MUKERJI AND BENNET, JJ.

Ajodhia and *others*—Defendants—Appellants.

v.

Bishambhar Nath and *others*—Plaintiffs—Respondents.

Appeal No. 105 of 1929, Decided on 4th June 1930, from judgment of King, J., D/- 10th December 1928, in Second Appeal No. 141 of 1927.

Landlord and Tenant — Person without title to land planting grove — Zamindar's consent is presumed.

A grove is constituted by a person without any title to the land only on obtaining the permission of the zamindar to plant trees on the zamindar's land. A grove, therefore, which is owned not by the zamindar but by a person other than the zamindar, can come into existence only when it is planted with the zamindar's consent. [P 785 C 1]

K. C. Mital—for Appellants.

S. N. Seth—for Respondents.

Mukerji, J.—This is a short appeal against the judgment of a learned single Judge of this Court.

The plaintiffs who have recently purchased the entire village brought a suit out of which this appeal has arisen, for recovery of damages and an injunction on the ground that on a piece of banjar land there stood a large number of trees, namely mahua, mango, nim etc., and the defendants without any right have cut down a nim tree and have misappropriated the produce of the mahua trees. The claim was for recovery of Rs. 10 as the price of the nim tree and Rs. 50 as the price of mahua flowers.

The defence was that the trees constituted a grove of the defendants which was planted by their ancestors about 100 years ago, and that the defendants had been in enjoyment of the grove for 100 years. They denied that they had cut the nim tree.

The Court of first instance decreed the suit, but the lower appellate Court Judge modified the decree. He held that the defendants did cut a nim tree which was a wild one. He valued the damages at Rs. 3 and decreed the claim to that extent only. As regards the other trees the learned Judge held that they had been planted by the defendants' ancestors, and that they had been in enjoyment of these trees and were the owners of these trees. In the result the learned Judge dismissed the suit so far as it was for the value of the mahua flowers and for injunction.

The learned single Judge of this Court accepted the argument of the appellants, that granting that the trees had been planted by the defendants, they had not proved that they had planted them with the consent of the zamindar, and that therefore the title to the trees had not passed to the defendants.

In Letters Patent appeal it is argued on behalf of the defendants that their plea of planting the trees with the consent of the zamindar was involved in their plea that the trees constituted

their grove. We consider that this argument is sound. As has been laid down more than once by this Court, a grove is constituted by a person without any title to the land obtaining the permission of the zamindar to plant trees on the zamindar's land. A grove therefore which is owned not by the zamindar, but by a person other than the zamindar, can come into existence only when it is planted with the zamindar's consent. This plea therefore that the trees were the grove of the defendants, involved in it a plea that the trees had been planted with the zamindar's consent.

In the result we allow the appeal, set aside the judgment of this Court, and restore the decree of the lower appellate Court.

The appellants will have their costs at both the hearings of this Court.

B.V./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 785 (1)

DALAL, J.

Bageswar Tewari—Plaintiff—Applicant.

v.

Bikramajit Singh and *others*—Defendants—Opposite Parties.

Civil Revn. No. 397 of 1929, Decided on 21st March 1930, against order of Small Cause Court Judge, Jaunpur, D/- 30th August 1929.

Limitation Act, Arts. 116, 62, or 97—If there is covenant express or implied indemnifying party suffering against loss caused by defect in title of executant of document Art. 116 applies, otherwise Art. 62 or Art. 97.

The provisions of Art. 116 will apply where there is a breach of covenant to idemnify the party suffering against loss caused to him by a defect in the title of the executant of the document. The covenant need not be express. It may be implied as in the case of a sale under S. 52 (2), T. P. Act, for the refund of purchase money. If there is no such covenant Art. 62 or 97, Lim. Act will apply. 30 *All.* 402; 13 *A. L. J.* 669 and *A. I. R.* 1929 *All.* 293, *Ref.* [P 785 C 2]

Janki Prasad—for Applicant.

Haribans Sahai—for Opposite Parties.

Judgment.—Mr. Janki Prasad has placed all the rulings before me. They are *Mul Kunwar* v. *Chattar Singh* (1), *Janak Singh* v. *Walidad Khan* (2), and *Hanwant Rai* v. *Chandi Prasad* (3). The question : is Which article will apply : Art. 116 or Art. 62 when a suit is brought for the recovery of money on failure of consideration? In the present case the plaintiff paid Rs. 50 to the defendants for the consideration of the defendants' relinquishing certain rights. The deed of relinquishment subsequently failed because the defendant's sons brought a suit for declaration that the deed was invalid, and succeeded. According to the rulings the provisions of Art. 116 will apply where there is a breach of covenant to indemnify the party suffering against loss caused to him by a defect in the title of the executant of the document. The covenant need not be express. It may be implied as in the case of a sale under S. 52 (2), T. P. Act for the refund of purchase money. If there is no such covenant Art. 62 or Art. 97, Lim. Act, will apply. There is no law that on the failure of the defendants' title to relinquish the rights of the family the consideration for the relinquishment would be refunded. The trial Court was therefore correct in applying Art. 62 or 97, and this application is dismissed with costs.

V.B./R.K. *Application dismissed.*

(1) [1908] 30 All. 402=5 A. L. J. 480=(1908) A. W. N. 185.

(2) [1915] 13 A. L. J. 669=30 I. C. 410.

(3) A. I. R. 1929 All. 293=51 All. 651.

A. I. R. 1930 Allahabad 785 (2)

MUKERJI AND BANERJI, JJ.

Bansidhar—Defendant—Applicant.

v.

Ratan Lal — Plaintiff — Opposite Party.

First Appeal No. 71 of 1929, Decided on 13th June 1930, from order of Addl. Dist. Judge, Aligarh, D/- 21st January 1929.

Civil P. C., O. 47, R. 5—Transfer of application for review by District Judge to Additional District Judge is not permissible—If District Judge be transferred his successor-in-office can hear applications for review.

An application for review to a District Judge was transferred by him to the Additional District Judge. This is not permissible under O. 47, R. 5, Civil P. C., the language of the rule being imperative. If the District Judge be transferred to some other place his successor-in-office can hear the application for review. [P 786 C 1]

N. P. Asthana and *Baij Nath Sahai*—for Applicant.

Panna Lal—for Opposite Party.

Mukerji, J. — This is an appeal against the decree passed by the learned Additional District Judge of Aligarh on review of judgment.

Two points have been urged before us:

1. that the learned Additional District Judge had no jurisdiction to hear the application for review of judgment; and 2. that the learned Additional District Judge failed to consider the question of limitation that had been raised on behalf of the appellant.

We need not go into the merits of the case. It appears that Mr. Allsop, as the District Judge of Aligarh, decided a certain appeal on 2nd January 1925. An application for review of the judgment was presented to the same gentleman on 24th July 1928 when he was still the District Judge of Aligarh. The learned District Judge rightly took cognizance of the application, but subsequently he transferred the case for decision to the Additional District Judge. It appears to us that this was not permissible to the learned District Judge under the provisions of O. 47, R. 5, Sch. 1, Civil P. C. The language of that rule is imperative and it says:

"Where a Judge ..... who passed the decree ..... a review of which is applied for, continues ..... attached to the Court at the time when the application for a review is presented ..... such Judge ..... shall hear the application, and no other Judge .... shall hear the same."

Having regard to the provisions of the law quoted above it was the duty of Mr. Allsop to hear the application. We hold therefore that the order transferring the case to Mr. Ali Ausat, the then Additional District Judge was not correct. The question of limitation has not been decided by either Mr. Allsop or by Mr. Ali Ausat. The matter will have to be decided by the successor-in-office of Mr. Allsop.

It appears that Mr. Allsop having taken cognizance of the application ordered notice to issue to the opposite party. That being the case his successor-in-office is entitled to hear the application for review if it should happen that Mr. Allsop is no longer there.

We accordingly set aside the decree of the Court below and remand the case to the District Judge of Aligarh with the direction that the application for review shall be re-admitted on its original number in the register and shall be heard and disposed of according to law. Costs here and hitherto will abide the result. This will include counsel's fees in this Court on the higher scale.

There was a cross-objection on behalf of the respondent. Obviously it cannot be entertained because of the preliminary point on which we have decided the case.

B.V./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 786

SULAIMAN AND KENDALL, JJ.

Gopi Nath and *anothers*—Defendants—Appellants.

v.

Rup Ram and *other*—Plaintiffs and Defendants—Respondents.

First Appeal No. 12 of 1927, Decided on 21st March 1930.

(a) Civil P. C., S. 107 (2), O. 1, R. 10, and O. 41, Rr. 4, and 33—Appellate Court has power to transfer respondent to be appellant and pass decree in his favour if just and equitable.

Reading O. 1, R. 10 along with S. 107 (2) there is no doubt that the appellate Court has power to transfer a respondent to the array of appellants aud pass a decree in his favour under O. 41, Rr. 4 and 33, in case it is just and equitable. [P 787 C 2]

(b) Transfer of Property Act, S. 43—Erroneous representation on question of fact and inference to be drawn on documents of title—If transferee sure that transferor was entitled to property under document of title and believing acts upon it, he is protected.

There may be erroneous representation both on question of fact and on inference to be drawn from documents of title, but if the transferee were quite sure that his transferor was fully entitled to the estate as absolute owner under the aforesaid documents, and he believes it to be true and acts upon it, he is entitled to protection even though if he had been more careful he might have found out that that was not a true representation; *A. I. R.* 1926 *All*, 102, *Ref.* [P 790 C 1, 2]

(c) Evidence Act, S. 92—S. 92 applies only to transactions inter partes and then too does not bar enquiry establishing fraud or illegality of transaction.

Though S. 92 contemplates that no party to an instrument or his representative should be allowed to uphold the written contract and yet try to establish a contemporaneous oral agreement so as to vary the terms of it, it does not prevent even a party to such an instrument from establishing any fact which would make the document itself invalid, or establish any fraud or show the transaction to be illegal for the effect of such a plea is not to vary the terms of the document, but to nullify it: (*Case law referred*). [P 791 C 2, P 792 C 1]

(d) Registration Act, S. 28 — Fruad on registration.

That a fictitious inclusion of an item of property never intended to be sold can amount to

fraud no registration admits of on doubt, If the parties never intended that a certain item should be sold at all and transferred under the deed, the deed does not relate to it, and by concealing the fact from the Sub-Registrar they commit a fraud on the registration law.

[P 792 C 1]

B. Malik and *N. P. Asthana*—for Appellants.

Igbal Ahmad, *S. K. Dar* and *Baleshwari Prasad*—for Respondents.

Sulaiman, J.—A preliminary objection to the hearing of the appeal has been raised on behalf of the plaintiffs-respondents. It is necessary to give the facts briefly in order to consider that objection.

The appeal arises out of a suit for sale on the basis of a mortgage deed of 1913 against the representatives of the mortgagors and subsequent mortgagees and transferees. The defendants were Kanhaiya Lal, a mortgagee of 1924, and Dr. Gopi Nath, who had purchased part of the property in execution of a simple money decree. Kanhaiya Lal and Gopi Nath both contested the suit in the Court below but the other defendants did not. The suit was decreed. An appeal was filed by Dr. Gopi Nath alone in this High Court against the whole decree, impleading Kanhaiya Lal and the other persons as pro forma respondents.

During the pendency of the appeal Kanhaiya Lal executed his .decree obtained on the basis of his own mortgage, to which however neither the present plaintiffs-respondents nor Gopi Nath was a party, and Kanhaiya Lal himself purchased the property on the 20th April 1927. Subsequently he applied to the High Court for the transference of his name from the array of the respondents to that of the appellants. Notices were issued, and after hearing the parties a learned Judge of this Court passed an order dated the 12th June 1928 transferring the name of Kanhaiya Lal from the array of the respondents and made him a co-appellant. In the meantime the second mortgagee Mathura Prasad obtained a decree on the basis of his deed of 1921 against all the subsequent transferees and put the property to sale, and it was purchased by Roshan Lal on the 20th July 1929. Roshan Lal has been made a respondent to this appeal.

Gopi Nath has not pressed his appeal and his appeal has already been dismissed by us under a separate order.

The learned advocate for the plaintiffs-respondents first takes an objection that the order making Kanhaiya Lal a co-appellant was without jurisdiction and is not binding on them. This contention in our opinion cannot prevail. Under O. 1, R. 10 (2) the Court has ample jurisdiction to transfer a defendant to the array of the plaintiff. Reading that rule along with S. 107 (2) there would be no doubt that the appellate Court would have a similar power. It is also quite clear under O. 41 R. 4 as well as R. 33 that the appellate Court would have power to pass a decree in favour of Kanhaiya Lal, who is a party to this appeal, in case he thinks it just and equitable.

There is also no force in the suggestion that a single Judge had no jurisdiction to make that order. Chap. 1, R. 8 (vii) brings such an application expressly within his jurisdiction. In any case the residuary section S. 14 (b), would be applicable. The order was made after notice to the parties and has become final. We accordingly overrule this objection.

It is further suggested that the ground on which Kanhaiya Lal's name was transferred was the devolution of interest on him pendente lite by virtue of his purchase, and that inasmuch as in a subsequent suit Gopi Nath has been held not to be bound by that decree the basis of Kanhaiya Lal's application has been destroyed. This contention also has no force, because the sale in favour of Kanhaiya Lal still stands, and only a right of redemption could have been allowed to Gopi Nath as a result of the decree in his favour.

The next objection taken is that Kanhaiya Lal has no longer any locus standi to continue this appeal. This contention is based on the ground that the property has been purchased by Roshan Lal in execution of a mortgage decree which had priority over Kanhaiya Lal's mortgage and which the latter did not redeem. The learned advocate for Kanhaiya Lal tries to meet this objection on three grounds. It would be convenient to dispose of the last two grounds urged by him in the first instance. He suggests that it is open to his client to bring a separate

suit for setting aside the sale on the ground of fraud committed in the conduct of it, or in the proclamation of the sale. The decree was transferred to the Collector for execution and the rule framed by the Board of Revenue applies to the proceedings. That rule is similar to O. 21, R. 92 (3), and prohibits a separate suit on the ground of fraud in the proclamation or conduct of the sale. We therefore do not see any force in this suggestion. The second suggestion is that the confirmation of the sale by the revenue Court has not yet become final. Although the Commissioner on 17th January 1930 confirmed the sale, it is suggested that a revision would be filed before the Board of Revenue, and if necessary the matter would be taken up to their Lordships of the Privy Council. This is wholly problematic. In the next place it appears that Kanhaiya Lal himself never applied for the setting aside of the sale, and it was not he who appealed to the Commissioner. We therefore do not consider this a sufficient ground to meet the objection.

The third ground is that the whole of the property has not been sold by the revenue Court. The mortgage deed of 1913 is printed on p. 43 of the paper book and shows that it covered certain zamindari properties as well as a pucca chabutra (platform, masonry work.) At the trial when the plaintiffs' pleader Pandit Sital Prasad was questioned he made a statement (p. 14) that the two storeyed deorhi (antechamber) mentioned in the document was the chabutra, and that it was the same property which had been hypothecated. Sita Ram, one of the plaintiffs, in his cross-examination (p. 19, line 45) also admitted that "the chabutra of the house" had been hypothecated. We do not find that the statement of Pt. Parbhu Dayal (p. 17), pleader for the defendant, relied upon by the learned counsel for the respondents, contains any admission that this chabutra was not included in the mortgage deed of 1924 in favour of Kanhaiya Lal. In reply to the affidavit filed on behalf of the plaintiffs, Kanhaiya Lal's counsel has tendered before us a certified copy of the mortgage deed dated 14th June 1924, which clearly states that the property hypothecated was the mortgagor's right and interest in the zamindari property, as well as one three-storeyed residential house No. 4669 together with the site and rights appurtenant thereto. The boundaries of the house and the locality leave no doubt that it is the same house which was mortgaged in 1913. This house had been allotted to Shambhu Nath exclusively under a deed of partition dated 24th March 1898 and was mortgaged by him. The antechamber or the platform of his house must therefore be assumed to be a part of the property hypothecated, and some interest in it therefore must be deemed to have passed to Kanhaiya Lal. This question admittedly has not been decided by the revenue Court, nor can this property be sold by that Court. In this view of the matter Kanhaiya Lal has a locus standi to continue the appeal. We accordingly overrule the objections.

We now proceed to consider the appeal on its merits. Three main pleas have been urged before us on behalf of Kanhaiya Lal. The first is that the mortgage deed of 5th December 1913 in favour of the plaintiffs-respondents was invalid for want of a proper attestation; the second is that it hypothecated a mere chance of succession, which was illegal, and the third is that the deed is invalid on account of a fraud on registration.

The plea as to want of proper attestation cannot at all be sustained. The document purports to have been attested by more than one witness, and one of the attesting witnesses, viz. Gopi Chand, has been produced by the mortgagees, and states that the execution took place in the presence of the attesting witnesses. Jagat Narain the scribe also corroborates his statement. We therefore see no defect in the attestation.

The plea of a transfer of a mere spec successionis is based on the fact that the property hypothecated originally belonged to Bal Kishen who died leaving a widow Mt. Muthra Dei and two daughters. These daughters had one son each, one of whom was Sambhu Nath, the mortgagor. Under a registered deed of partition dated 24th March 1898 the estate of Bal Kishen was divided among these people, and the zamindari property and the residential house were allotted to Shambhu Nath. It is

to be noted that in the preamble to this document Shambhu Nath was described not only as Bal Kishan's daughter's son but also as his adopted son, and although it was admitted that the property had been purchased and acquired by Bal Kishen and had come into the possession of Mt. Muthra Dei, it was also admitted that as a matter of fact all the three parties to the document were the owners. They proceeded to divide the estate, and agreed that only that party to whom particular items were allotted should be the sole owner thereof and the others would have no concern with it. The khewat of 1321F. has been produced, and shows that Shambhu Nath's name was recorded against the 20 biswas of the zamindari property in Mahrampur, and he was described as the adopted son of Bal Kishen.

The mortgage deed of 5th December 1913 was executed not only by Shambhu Nath and Shiam Lal, Bal Kishen's daughter's son, but also by Mt. Muthra Dei his widow. It recited that the hypothecated property detailed at the foot of the document had been allotted to Shambhu Nath under the deed of partition of 1898, and that the other executants had joined in the execution of the document for the satisfaction of the creditors in order to assure title, that Shambhu Nath had absolute power of hypothecation of the property, and that they would have no objection regarding this bond. No details of the properties hypothecated were given in the body of the document except a reference that the 10 biswas share in mauza Mahrampur was free from previous incumbrance, but at the foot of it the zamindari property was specified, then there was a note by the scribe, and then at the bottom and on the margin was mentioned

"one pucca built chabutra situate in mohalla Panni Gali, Agra, bounded as set forth below."

followed by its four boundaries.

One of the mortgagees, Sobha Ram when in the witness-box, admitted that he was aware of the fact that the property had originally belonged to Bal Kishan and that it had devolved on Mt. Muthra Dei, his widow. He however stated that Shambhu Nath showed him the deed of partition, and he also took some legal advice and was assured that Shambhu Nath was full owner, as he represented himself to be. As regards the chabutra his statement was that he wanted the whole house to be mortgaged, but eventually it was agreed that only the chabutra of the house should be hypothecated which according to him was worth about Rs. 500. He stated that the property hypothecated was the same chabutra as is described in the amin's map as "deorhi do do manzila" two-storeyed antechamber. The plantiff's pleader on 11th August 1926 also made a similar statement that the two-storeyed deorhi shown in the amin's map was the same chabutra which had been hypothecated.

On the date when this mortgage deed was executed Shambhu Nath had undoubtedly a vested interest in this property. Whether we treat the deed of partition as the result of a family arrangment between the various members or as an alienation by the Hindu widow in favour of Shambhu Nath, there is no doubt that the effect of it was to vest the title to this property in Shambhu Nath at least during the lifetime of Mt. Muthra Dei. It is therefore quite clear this was not a transfer of a mere spes successionis. The learned advocate for the appellant has argued that, qua the interest which Shambhu Nath acquired after the death of Mt. Muthra Dei, the hypothecation was that of a mere chance of succession. If the mortgage deed be taken to be a transfer by all the three executants, though the recital was to the effect that only one of them was the owner, then undoubtedly it would be an alienation by a Hindu widow at least, and would not be void ab intitio but only voidable at the option of the future reversioner when the succession opens. On this hypothesis also the mortgage deed cannot be treated as a transfer of a mere chance of succession. Assuming however that the transfer cannot be treated as one by the widow at all, but that she joined in the deed merely to assure the mortgagees that she had no title, even then it seems to us that if the mortgagees acted on the representation made to them by Shambhu Nath that he was entitled to transfer the property absolutely, then if Shambhu Nath has since become full owner he and his representatives are

bound by the deed. That there was a clear representation made in the document does not admit of any doubt. The only point urged on behalf of the appellant is that the mortgagees themselves were fully aware of the true state of affairs and that they were in no way misled. Reliance is placed on he case of *Mulraj* v. *Indar Singh* (1), where it was laid down that if the transferees themselves were cognizant of all the circumstances, and were in no way misled by the statement in the deed, it could not be a case of erroneous representation within the meaning of S. 43, T. P. Act. In the present case the facts known to the plaintiff were that the property had originally belonged to Bal Kishan and that it had been divided among his ladies after his death under a deed of partition of 1898. In that deed Shambhu Nath was described as the adopted son of Bal Kishan, and there was an admission on behalf of Mt. Muthra Dei that he had title to the property. In 1321 F., corresponding to 1913, Shambu Nath's name was entered as the proprietor of this property in the revenue papers, and he was described as the adopted son. One of the plaintiffs has sworn that he took some advice and was informed that Shambu Nath was the owner. All that may be said against him is that if he had been more careful and diligent and had made proper enquiries he might have come to know that only a Hindu widow's estate devolved upon Mt. Mathura Dei and that she had no power to transfer an absolute estate to Shambu Nath. The argument on behalf of the appellant is that all the necessary facts were within the knowledge of the plaintiffs, and they must be presumed to know the law, and therefore it must be assumed that they were aware of the fact that Shambu Nath was not the full owner. In our opinion there may be an erroneous representation both on questions of fact and on inferences to be drawn from documents of title. If the plaintiffs were as sure that under the deed of partition Shambu Nath was fully entitled to the estate as absolute owner, and they believed it to be true and acted upon it they are entitled to protection even though, if they had been more careful, they might have found out that that was not a true representation.

The learned Subordinate Judge has come to the conclusion that S. 43, T. P. Act, applies to this case and that it is not open to Shambu Nath or his representatives to turn round and challenge the validity of the mortgage on the ground that he was not the owner of the property at that time. There is no doubt that after the death of the ladies in the family this property has devolved on Shambu Nath and he is the full owner. We would therefore overrule this objection.

The third point urged is that the deed is defective on the ground of a fraud that was perpetrated against the registration law. The contention is that the chabutra was a fictitious property which did not exist, and there was no intention on the part of the mortgagor to transfer it or on the part of the mortgagees to take it as security, and that its name was merely used for the purpose of deceiving the Sub-Registrar and inducing him to accept the deed of registration. This contention is raised on behalf of Kanhaiya Lal, who is a subsequent mortgagee of this property. If such a plea were raised by a person who is neither a party to the instrument nor his representative-in-interest there could be no doubt that it would be open to a Court to go into the question of the real intention of the parties and ascertain whether this item was intended to be transferred. S. 92, Evidence Act, applies only to transactions inter partes and would not be a bar to such an enquiry.

The question before us is whether a representative-in-interest of the executant of the document can go behind the deed and prove an alleged understanding that a certain item of the property would not be transferred. With the exception of a few cases decided recently the cases referred to in argument are not directly in point. In those cases either the property itself did not exist and was a wholly fictitious item, or the mortgagor had no title to it and the parties never intended that the property should be transferred. For instance the case of *Harendra Lal Roy* v. *Hari Dasi Debi* (2) decided by their Lordships of the Privy Council was a case of a non-

(1) A. I. R. 1926 All. 120=92 I. C. 471=48 All. 150.

(2) A. I. R. 1914 P.C. 67=23 I. C. 637=41 I.A. 110=41 Cal. 972 (P.C.).

existent property. In the case of *Bishwa Nath* v. *Chandra Narain Chowdhury* (3) the mortgagor did not legally own the property purporting to be transferred, and there it was found that there was no real intention to transfer it. Similarly the case of *Mukat Nath* v. *Shyam Sunder Lal* (4) was a case not inter partes. *Ram Lal* v. *Tamkin Bano* (5) was also a case where the property did not exist.

The case of *Raghunath Tewari* v. *Sitaram Singh*, *A. I. R.* 1927 *All.* 797 decided by one of us was also a case where it was in the alternative found that the two mango trees said to have been situated in Fyzabad did not in fact exist and never belonged to the mortgagor. In the same way the case of *Pahladi Lal* v. *Mt. Laraiti* (6) and *Dirghal Singh* v. *Pahladi Lal* (7) may be distinguished.

But in the case of *Durga Prasad Sahu* v. *Tameshar Prasad* (8) it was held that if the parties found that by selling also a small bit of property which was not otherwise intended to be sold they would have the convenience of avoiding a (long) journey, it cannot be seen why the inclusion of that property should be treated as an act done only to commit fraud on the law of registration. But examining the facts found by the learned Judges it is quite clear that they never came to the conclusion that there was no intention to transfer that item. On the other hand they distinctly found that the transaction was a bona fide one and that that small bit of property had been sold. This case therefore is not a direct authority for the proposition that an enquiry into the intention of the parties is not permissible. In the case of *Lachman Das* v. *Ram Prasad* (9) one of the two learned Judges, viz. Ashworth, J., was of opinion that, in view of the provisions of S. 92, evidence to show the intention of the parties that ownership in a particular item would not pass could not be proved. The other learned Judge did not express himself clearly on that point in this case. But in a subsequent case of *Kanhai Lal* v. *Mahadeo Prasad* (10) which corresponds to *Ram Krishna* v. *Anand Krishna*, *A. I. R.* 1929 *All.* 578, the same view was elaborated, and it was laid down that S. 92, Evidence Act, prevented such an enquiry and that proviso (1) to that section did not entitle a party to the instrument to prove any such intention as would be at variance with the terms of the document. These are the views expressed by single Judges in two separate cases, and the same view to some extent may be said to have been expressed by the Bombay High Court in the case of *Vishvanathbhat Annabhat Pujari* v. *Mallappa* (11) if it be assumed that the learned Judges regarded a transfer by the guardian of a minor as one by the minor himself. On the other hand the contrary view has been expressed by the Madras High Court in the case of *Gokarakonda Narasinha Rao* v. *Gokarakonda Papunna I. L. R.* 43 *Mad. p.* 476, although S. 92 or its proviso has not been expressly referred to therein.

It cannot be doubted that an allegation that one item of the properties covered by an instrument was not intended to be sold amounts to a variation in the terms of that document, and would prima facie come within the scope of the substantive portion of S. 92, but there is a proviso to that section which states that any fact may be proved which would invalidate any document such as fraud . . . . . illegality, etc. Thus the very section provides an exception in a case where a fact sought to be proved though varying the terms of the instrument, would invalidate the document itself. By way of illustration cases of fraud and illegality are specially mentioned. It seems to us that the section contemplates that no party to an instrument or his representative should be allowed to uphold the written contract and yet try to establish a contemporaneous oral agreement so as to vary the terms of it ; but, it does not prevent even a party to such an instrument from establishing any fact which would make the document itself invalid, or establish any fraud, or show

(3) A. I. R. 1921 P. C. 8=60 I. C. 833=48 I.A. 127=48 Cal. 509 (P.C.).
(4) A. I. R. 1929 All. 659=117 I. C. 341.
(5) [1919] 41 All. 385=49 I. C. 543.
(6) [1919] 41 All. 22=48 I. C. 200.
(7) [1920] 42 All. 176=54 I. C. 528.
(8) A. I. R. 1924 All. 897=82 I. C. 243=46 All. 754.
(9) A. I. R. 1927 All. 422=100 I. C. 1029=49 All. 680.
(10) [1913] 18 I. C. 389.
(11) A. I. R. 1925 Bom. 514=92 I. C. 629=49 Bom. 821.

the transaction to be illegal, for the effect of such a plea is not to vary the terms of the document, but to nullify it. The appellant by trying to show that there was no intention to transfer a specific item of the property which was fraudulently included in the deed in order to deceive the Sub-Registrar is trying to establish a fact which, if accepted, would invalidate the document itself. There is also no reason to suppose why the word "fraud" used in this proviso should be confined to fraud practised on the person who is establishing the plea. It is wide enough to include a fraud in the registration law. Similarly, illegality may be due to various circumstances. Having regard to all these points we are of opinion that S. 92, coupled with proviso 1 does not debar Kanhaiya Lal from showing that the parties never intended to mortgage this particular item of property and that therefore the registration was invalid. Kanhaiya Lal is a defendant in the action and is trying to prove a fraud to which he was not a party personally.

That a fictitious inclusion of an item of property never intended to be sold can amount to fraud on registration admits of no doubt. The document has to be presented for registration before a Sub-Registrar within whose circle a property to which the document relates must be situated: S. 28, Registration Act. If the parties never intended that a certain item should be sold at all and transferred under the deed, the deed does not relate to it, and by concealing the fact from the Sub-Registrar they are committing a fraud on the registration law.

Although the case decided by their Lordships of the Privy Council in *Bishwanath Prasad* v. *Chandra Narayan Chowdhury* (3) is distinguishable, because there the deed was not actually registered, we would point out that the main basis of their Lordships' decision is quoted at p. 516 (*of* 48 *Cal.*) in the following words:

"In coming to the conclusion that this appeal must be dismissed, their Lordships' judgment rests on the view that none of the parties ever intended that the one kauri share in mauza Kolhua should vest in Udit or should pass by the mortgage from him to the mortgagee."

We may also note that in several cases quoted above, although the dispute did not arise between the persons who were parties to the instrument or the property did not exist, the learned Judges emphasized the fact that there was no intention to transfer the property in question. We therefore think that it is open for us to enquire into this matter.

The first point to consider is whether this property existed. In the mortgage deed it was described as a chabutra, which commonly means a raised platform, and in most cases is a platform which is uncovered. But in Fallon's dictionary it is defined as a

"raised bank or terrace open or covered, detached from the residence, a platform."

Chunna Lal Sorin, one of the witnesses for the defendants, in the examination-in-chief stated:

"There is no chabutra in front of his house. But there is a covered piece of land, it might be called a chabutra or any other name might be given to it."

When the learned Subordinate Judge inspected the locality he noted that:

"The alleged chabutra is a stone-paved platform about four square yards (four yards square) in area just in front of the entrance gate (door) of the house and attached to it. There is some structure over it."

According to the amin's map this is more like a verandah with walls on two sides and open on the other sides with three steps leading up to it. There is some structure on the second storey, but it is not clear whether it covers the whole of its roof or only projects over a part of it. The amin was not examined in order to explain his map. In the absence of any other definite evidence on the record we must take the inspection note of the Subordinate Judge as describing the structure correctly. The learned Subordinate Judge himself was not reluctant to describe it as a stone-paved platform. In these circumstances, we are of opinion that sitting on the appellate side we should not hold that the description of this property as a "chabutra" was such as was wholly inapplicable to the antechamber or verandah attached to this house. In this view of the matter we are unable to hold that the item included in the hypothecation bond was a non-existent property, that is to say property which never existed on the spot and which could therefore never have been intended to be hypothecated.

It is clear now that this item did exist and was owned by the mortgagor. The only question that remains for consideration is whether there is any sufficient circumstantial evidence which would induce us to take a contrary view and hold that there was really no intention to mortgage this item.

There is no positive and direct evidence on behalf of the defendants on this point, but their learned advocate relies on the following circumstances. Compared with the bulk of the property hypothecated this item was almost insignificant and, according to Sobha Ram, plaintiff, it was not worth more than Rs. 500 to him. It is indeed doubtful whether it was even worth that amount. This piece of land is the main entrance to his residential house, which was not hypothecated, and it would have been clearly inconvenient to the mortgagor if this entrance should pass out of his possession. The zamindari property was situated at a considerable distance from this locality, and there is no reason to suppose that the mortgagee was anxious to take this verandah as a substantial security for his money. It is doubtful whether it would have been of any real utility to any purchaser who happened to take it in execution of the mortgagees decree. It is on these facts that we are asked to hold that there could not have been any intention to mortgage this property. No doubt the circumstances are highly suspicious, but the burden of establishing fraud undoubtedly lies on the party who pleads it. The presumption of law is in favour of the validity of the registration. There are two positions. Either the parties never intended to hypothecate this item, and it was agreed that this item should be fictitiously entered with a view to deceive the Sub-Registrar or they found that it was more convenient to get the deed registered at the headquarters, and such registration could not be effected without including an item of the property situated within the circle of the Sub-Registrar. In the latter case it is possible that they intended to mortgage the property, though the sole object was to get the registration effected. Both these hypotheses are possible. As the latter hypothesis cannot be excluded we as an appellate Court are reluctant to find in favour of the defendant and hold that fraud has been established. The parties might very well have intended this item to be hypothecated in order to confer jurisdiction on the Sub-Registrar, and we see no reason to presume in the absence of any direct evidence or stronger circumstantial evidence that fraud was perpotrated.

Under the mortgage deed the rate of interest fixed was As. 6-8 per mensem compoundable every year. The learned Subordinate Judge has allowed pendent lite interest at 6 per cent per annum simple. As the litigation did not last long this rate works out to be a higher rate. We must therefore give effect to the defendant's objection that pendent lite interest should only be allowed at the contractual rate. Future interest after the date fixed will be at 6 per cent per annum simple. We fix this day as the date for payment. With the modification in the rate noted above, the appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 793

SEN, J.

Sheikh Gausi and *others*—Appellants.

v.

Mohammad Sharif aud *others*—Respondents.

Second Appeal No. 1030 of 1928, Decided on 12th March 1930, against decree of Second Addl. Sub-Judge, Jaunpur, D/—21st February 1928.

Mahomedan Law—Gift of musha followed by all that donor can do to wipe himself off and put donee in same kind of possession as himself is valid.

Gift of an undivided share of joint property by a co-owner in constructive possession of the same through other co-owner is valid provided he does all that lies in his power to do to wipe himself off and to put his donee into same kind of possession as he himself had over the property: 11 *All.* 460 (*P.C.*) and *A. I. R.* 1927 *All.* 345, *Ref.* [P 794 C 2]

Mushtaq Ahmad—for Appellants.

M. A. Aziz—for Respondents.

Judgment.—The facts which have given rise to this appeal, lie within a very narrow compass. On 4th June 1926, Mulu executed a deed of gift in favour of Mohammad Sharif Khan, his maternal grandson. The deed of gift comprised three kinds of property, (a) a house, (b) a kolhu and (c) shares in 14 plots. The last mentioned property forms part of a fixed rate holding, held by Mulu, jointly with Gausi and others.

The defendants did not allow the plaintiff to take possession of this property; hence the suit for a declaration of title to a one-third share out of 3.96 in the fixed rate holding with a prayer for possession in the alternative.

The suit was resisted mainly upon the ground that the donor had not delivered possession to the donee under the deed of gift, and that no valid title had passed to the plaintiff. The Court of first instance repelled this plea and gave the plaintiff a decree for possession. The lower appellate Court has affirmed this decision.

The main contention put forward by the defendants-appellants is, that the property in suit, is in the possession of the defendants and that the donor was not in possession of the same on 4th June 1926, when the gift was made in favour of the plaintiff. The law on the point is clear. There could not be a valid gift in favour of any person so long as there was no delivery of possession by the donor to the donee. Whether the gift has not been perfected would depend upon the nature of the property donated and the nature of possession having regard to the character of the property. The question is whether the donor had done everything which reasonably lay in his power to do in order to complete the gift. It has to be remembered that Mulu, the donor and the defendants were co-owners in the property in dispute. It has also to be remembered that the lower appellate Court has arrived at a distinct finding that the possession of the defendants is not adverse to that of Mulu. The further fact which has to be borne in mind is that the present action has been launched by Mohammad Sharif Khan, who is a minor with Sheikh Mulu his maternal grandfather as his next friend.

It has been contended by the respondent that the lower appellate Court intended to find that Mulu, the donor, was in constructive possession of the fixed rate holding at the time of the gift, and he made a constructive delivery of possession in favour of the plaintiff-respondent. I have been taken through the judgment of the lower appellate Court and I do not find that there is a clear finding on this point. For the proper disposal of this appeal, I think it necessary to remit the following issue:

"Was Mulu, the donor, in constructive possession of the property gifted, on 4th June 1926, and did he constructively deliver possession thereof to Mohammad Sharif Khan, the plaintiff-respondent?"

The lower appellate Court is directed to submit its finding on the above issue within two months of the receipt of the record. Upon return of the finding that the usual ten days' time will be allowed for objections.

(On receiving the finding his Lordship delivered the following) —

Judgment.—The finding of the lower appellate Court is that Mulu, the donor, was in constructive possession of the fixed rate holding at the date of the gift and that he had done everything which he could be reasonably expected to do to put the minor donee to get possession of the gifted property. Objection has been taken to this finding but the objection has no force and cannot be seriously entertained. As was observed by the Privy Council in *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1), the doctrine of musha ought to be confined within the strictest limits being a doctrine wholly unadopted to a progressive state of society. Mulu had a share in the fixed rate holding jointly with the defendants. He was in constructive possession of the holding through the defendants. He did all that lay in his power to do to wipe himself off and to put his donee into the same kind of possession as he himself had over the property. This gift was therefore complete under the Mahomedan law. This case is not dissimilar to *Ahmadi Begum* v. *Abdul Aziz* (2), in which the gift of an undivided share of joint property in favour of the daughter was upheld by this Court.

This appeal is without force and is dismissed with costs including in this court-fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

(1) [1889] 11 All 460=16 I. A. 195 (P.C.).
(2) A. I. R. 1927 All. 345=49 All. 503.

A. I. R. 1930 Allahabad 795 (1)

MUKERJI AND BENNET, JJ.

Mt. Chuman—Defendant—Appellant.

v.

Nanhe Singh — Plaintiff — Respondent.

Letters Patent Appeal No. 81 of 1929, Decided on 27th March 1930, against judgmeht of Ashworth, J., D/- 29th November 1928.

Agra Tenancy Act (2 of 1901), S. 202—Suit for ejectment—Plea of tenancy—Civil Court must refer parties to get declaration as to tenancy.

If in a suit for ejectment from a plot of land brought in civil Court the defendant pleads a tenancy, the obvious duty of the civil Court is to refer to the revenue Court under S. 202 to obtain a declaration of status of the tenant. It is not open to such a Court to decide the case the merits. [P 795 C 1]

M. N. Raina—for Appellant.

Harnandan Prasad—for Respondent.

Mukerji, J.—This is a Letters Patent appeal against a judgment of a learned Judge of this Court and arises in the following circumstances. The respondent Nanhe Singh brought a suit for ejectment of the appellant Mt. Chuman and for recovery of two plots of land, namely 602 and 683. The defendant pleaded that she was an ex-proprietary tenant of these plots. On these pleadings the obvious duty of the Court of first instance was to refer to the revenue Court under S. 202, Tenancy Act, 1901, to obtain a declaration as to her status. Instead of doing that, the learned Munsif took it upon himself to decide the case on the merits and he decreed it.

On an appeal by the defendant, the learned Subordinate Judge discussed the merits of the case. He thought that there were two conflicting judgments of the revenue Court and the later judgment should prevail, viz: the one in which it was held that the defendant was an ex-proprietary tenant, and the revenue papers which recorded her as an ex-proprietary tenant should not be disturbed. This later judgment was given because the respondent had made an application to the revenue Court to remove the name of the appellant from the papers. It appears that previously there was an application by the respondent to have rent assessed on these two plots on the ground that the defendant was an ex-proprietary tenant. But in that instance the appellant-defendant had avoided an assessment of rent on the land on the allegation that the lands were her groves and not an ex-proprietary tenancy. The learned Subordinate Judge, having held that the judgment of the revenue Court was binding on the parties, dismissed the suit.

The matter having come up before this Court, the learned single Judge thought that the defendant could not be allowed to make contradictory statements at different times and decreed the suit. It appears to us that the matter should go back to the Court of first instance, so that the procedure which ought to have been followed at once, should now be adopted.

We set aside the judgment of this Court and the decrees of the Courts below and remand the case to the Court of first instance with the following direction. An issue will be framed as to whether the defendant is a tenant of the land and a tenant of the plaintiff. This issue will be sent under S. 273, Tenancy Act, 1926, to the revenue Court for decision. The Munsif will decide the case in accordance with the decision of the revenue Court. Costs here and hitherto will abide the result.

V.B./R.K. *Case remanded.*

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* * A. I. R. 1930 Allahabad 795 (2)

BOYS, J.

Emperor—Applicant.

v.

Nazir Husain—Opposite Party.

Criminal Ref. No. 233 of 1930, Decided on 17th June 1930, made by Sess. Judge, Dehra Dun, D/- 27th February 1930.

(a) Criminal P. C., Ss. 258 (1) and 259—Charge framed—Complainant and his witnesses absenting on day fixed for their cross-examination — Magistrate should either adjourn case or acquit accused.

A complaint was lodged against the accused charging him with having shoe-beaten the complainant. A charge was framed against the accused and a date was fixed for the complainant to attend with his witnesses for cross-examination. The complainant and also his witnesses failed to attend. On their failure to appear the Magistrate passed an order discharging the accused, purporting to act under S. 259, being unaware as to what other course he should have adopted.

Held: that there were two courses open to him: firstly, to adjourn the case; or secondly, if he felt that there were no good grounds for adjourning the case to find the accused "not guilty" and acquit him, acting under S. 258(1). [P 796 C 2]

* * (b) Criminal P. C., S. 258 (1) — "Not guilty," meaning explained—Words.

The finding "not guilty" is a technical expression and not necessarily equivalent to a finding that the accused did not commit the acts charged. [P 796 C 2]

M. Waliullah—for the Crown.

Judgment.—This is a reference by the Sessions Judge of Dehra Dun asking this Court to order a re-trial, if it thinks fit, in a case where an accused person has been discharged, the Magistrate purporting to act under S. 259 although, a charge having been framed, he could not act under that section. The facts are simple. A complaint was lodged against the accused charging him with having shoe-beaten the complainant. The assault was in itself comparatively trifling but for the well-known fact that beating with shoes adds insult to any injury that may be inflicted. A charge was framed against the accused and a date was fixed for the complainant to attend with his witnesses for cross-examination. The complainant and also his witnesses failed to attend, and I may state immediately that I am not able to find on the record, nor is the Assistant Government Advocate able to show me, that the complainant has ever explained his failure and the failure of his witnesses to attend. In this connexion the Magistrate in his final order pointed out that even if the complainant had missed his train he could have come by lorry as the Magistrate waited for him till 2 p. m. It is some indication that the complainant did not miss his train and that the witnesses also failed to appear. There is room therefore for holding that there may be some substance in the accused person's petition to this Court that the complainant and his witnesses deliberately stayed away because they did not want the trouble of going out into the camp where the Magistrate was, and were quite willing to harass the accused and his witnesses by letting them go unnecessarily. However that may be, there is no explanation before me and apparently none available as to why the complainant and his witnesses failed to appear.

On their failure to appear the Magistrate passed an order discharging the accused, purporting to act under S. 259, Criminal P. C. He admits that he could not act under that section as the accused had been charged, but he quite properly states his difficulty that he is unaware what course should have been adopted and practically invites assistance on this point. There were two courses open to him: firstly, to adjourn the case. He has given good reasons for not wishing to adopt that course. Secondly, if he felt that there were no good grounds for adjourning the case he should have found the accused "not guilty" and acquitted him, acting under S. 258 (1). It is true that he had so far formed an opinion that the accused was guilty, in that he had framed a charge against the accused and there had been no subseqent evidence given to suggest that the charge had been wrongly framed, but the accused was entitled to a final judgment, not merely on the preliminary evidence of witnesses on examination-in-chief, but on that evidence after it had been submitted to cross-examination; and if the complainant himself, in the particular facts of the case, is adjudged responsible for the witnesses of the prosecution not being available for cross-examination, he is himself responsible for rendering that testimony unsafe to rely upon. The Magistrate should then have held that in the circumstances of the case he had no alternative but to find the accused "not guilty" and have not acquitted him. The finding "not guilty" is a technical expression and not necessarily equivalent to a finding that the accused did not commit the acts charged.

I set aside the order of the Magistrate discharging the accused and for that order, there being no adequate grounds for ordering the case to be taken up afresh, substitute an order of acquittal. To this extent the reference is accepted. Let a copy of this order be sent to the Magistrate for his information.

B.V./R.K. *Reference accepted.*

A. I. R. 1930 Allahabad 796

SULAIMAN AND NIAMATULLAH, JJ.

Riyazuddin—Applicant.

v.

Bar Association, Agra — Opposite Party.

Civil Revn. No. 54 of 1929, Decided on 25th April 1930, against order of Dist. Judge, Agra, D/- 3rd January 1929.

Legal Practitioners Act, S. 36—Notice to show cause served on person on 18th December—Application by him on 2nd Janu-

ary to issue summons to seven vakils—Summons declined and person asked to file affidavits of vakils—No affidavits filed and he was declared tout on 3rd January on resolution of Bar Association—Sufficient opportunity is not given to him to satisfy Court that he was not tout.

Notice to show cause was served on person on 18th December just a few days before X-mas holidays began. On the re-opening of the Court he applied on 2nd January for the issue of summons to a number of witnesses including seven vakils. The Judge instead of issuing summons and allowing him to take the risk if they were not served in time declined to issue the summons and directed him to produce affidavits from the vakils. As no affidavits were filed the Judge on the resolution of the Bar Association declared him to be a tout on 3rd January.

Held: that sufficient opportunity was not given to him to satisfy the Court that he was not a tout. [P 797 C 2]

M. A. Aziz—for Applicant.

U. S. Bajpai—for the Crown.

Sulaiman, J.—This is an application in revision by Riyazuddin from an order of the District and Sessions Judge of Agra declaring him a tout. The notice to show cause was served on 18th December 1928 just a few days before the Xmas holidays commenced. The affidavit filed before us shows that on that date his child was seriously ill and died on 22nd December 1928. On the re-opening of the Court he applied on 2nd January 1929 for the issue of summonses to a number of witnesses including seven vakils who were practising in the District Court. There is no doubt that he applied rather late, but the delay is now explained by his affidavit. The learned Judge instead of issuing summonses and allowing the applicant to take the risk if they were not served in time declined to issue the summonses and directed him to produce affidavits from these vakils. It is quite obvious that the applicant had no power to compel these vakils to swear affidavits although he could have easily got them summoned as witnesses. As no affidavits were filed the learned Judge on the resolution of the Bar Association declared him a tout on 3rd January. Subsequently he made an attempt to produce certificates of good character given to him by 12 vakils which he filed on 4th January. His request for a re-consideration of his case was refused. Even on the materials which were before the Judge it appeared that there were certificates of seven vakils granted to him in August 1928, just three months before the resolution of the Bar Association. Referring to the certificates the learned Judge remarked :

"Apparently the resolution of the Bar Association relates to the activities of Riyazuddin subsequent to that date."

We think that sufficient opportunity was not given to the applicant to satisfy the Court that he was not a tout. If the summonses had been issued and they were not served on the vakils, the matter would have been different. As they were practising in the Court there was a good probability of some of these vakils being actually served. We accordingly allow this revision and set aside the order of the Court dated 3rd January 1929 passed against Riyazuddin. This order does not of course preclude any further proceedings being taken against him.

P.N./R.K. *Revision allowed.*

A. I. R. 1930 Allahabad 797

SULAIMAN AND KENDALL, JJ.

Ram Sundar Mal and *others*—Plaintiffs—Appellants.

v.

Collector of Gorakhpur and *another*—Defendants—Respondents.

First Appeal No. 459 of 1926, Decided on 25th February 1930, from decision of Dist. Judge Gorakhpur, D/- 8th June 1926.

(a) Hindu Law—Impartible estate—Mere separation in general status does not destroy notional jointness—Presumption of jointness can be rebutted by express or implied intention to give up chance of succession.

A mere separation in food, mess or worship, that is to say, in the general status of the family, or even a partition of the partible property inter se, would not destroy that notional jointness which entitles a member of the junior branch to succeed to the impartible estate, and the presumption of jointness can be rebutted only by showing that there was an intention express or implied on behalf of the junior members of the family to give up their chance of succession to the impartible estate. [P 801 C 2]

In the case of partible property where separation involves a division and separate possession of shares by each separated member, every fact, which shows that the members are not living as one unit and are either separate in residence, mess, worship, business or cultivation, would be some evidence of disunion. But in the case of impartible property where the estate cannot be divided and a separated junior member cannot get any share on a partition, ordinary facts, which would be some evidence of separation with regard to partible property, would not be sufficient. Separation of the general status of the family does not

necessarily imply a clear intention to renounce or surrender the right to succeed in case succession opens. There must be such evidence, direct or circumstantial, as would show an intention express or implied to give up the right to succession. It is not correct to say that in the absence of direct and positive evidence showing a clear abandonment or renunciation of the right to succeed, mere circumstantial evidence and inferences deducible from conduct would be wholly insufficient to prove an expression of an intention to give up such right. Such intention can be implied both from circumstantial evidence and from the conduct of the parties. But the conclusion must be irresistible and the circumstances must point not to mere separation in general status but separation relating to the impartiable property itself that is to say, an abandonment of the right to succeed to it. [P 802 C 1]

In the case of a partible estate distant relationship would indeed leave but a very weak presumption of jointness. But if in the case of an impartible estate no occasion for such succession has so far arisen, the presumption of law cannot disappear. The burden still is on the party who alleges that the estate was the separate property of the last male holder. Mere separation of the place of worship does not imply any intention on the part of the junior members to give up their right of succession to the estate. [P 803 C 1]

The mere existence of strained relations would not be tantamount to an abandonment by the junior branch of their right of succession. On the other hand, they might very well entertain the hope of ultimate succession and look forward to the day when the last holder who had no male children died leaving a widow whom they could supersede.

Separation or partition inter se among the members of the junior branch of their partible property is no evidence of the abandonment of their right of succession. The junior members are entitled to deal with their partible property in any way they like, and their action cannot imply any intention on their part to give up their chance of succession to the impartible estate itself : *A. I. R.* 1928 *P. C.* 63, *Foll.*; 9 *M. I. A.* 539 and 13 *M. I. A.* 113, *Dist.*; *A. I. R.* 1921 *P. C.* 62 ; 10 *All.* 272 ; 33 *All.* 590 ; *A. I. R.* 1915 *P. C.* 30, *Distinguished in* 38 *All.* 590 ; *A. I. R.* 1923 *Mad.* 402 ; 1 *Cal.* 153 (*P.C.*); 29 *Cal.* 828 (*P. C.*) ; 9 *M. I. A.* 66 (*P. C.*) and 13 *M. I. A.* 333, *Ref.* [P 804 C 1,2]

(b) Registration Act, S. 28—Fraud on registration.

The object of the parties to get registration effected at any particular place cannot per se amount to a fraud on the registration department. They are the best judges of their own convenience. The inclusion of a bit of a property howsoever small does not necessarily imply any fraud on registration. So long as the parties satisfy the requirements of S. 28, Registration Act, they are acting well within their powers.

If in order to enable themselves to present a deed for registration at a particular registration office, the parties to the deed include a small list of property situated within the jurisdiction of that office in the deed, honestly believing that that property belongs to the transferor, and intending that it should pass from the transferor to the transferee they are not guilty of committing any fraud on the Registration Department and the deed is valid : *A. I. R.* 1914 *P. C.* 67 and *A. I. R.* 1921 *P. C.* 8, *Ref.* [P 811 C 1,2]

(c) Evidence Act, S. 92—Person, not party to the instrument, can give evidence, challenging the nature of transfer.

Section 92, which excludes evidence of any oral agreement modifying the written contract applies only as between the parties to the instrument and their representatives in interest. It does not preclude a person who is not a party to the instrument, from giving evidence, challenging the nature of the transfer : *A. I. R.* 1923 *All.* 659 and 43 *Mad.* 436, *Ref.*; *A. I. R.* 1925 *Bom.* 514 and *A. I. R.* 1926 *Pat.* 582, *Dist.* [P 811 C 2 ; P 812 C 1]

P. L. Banerji, *K. N. Laghate* and *N. Upadhiya*—for Appellants.

B. E. O'Conor and *U. S. Bajpai*—for Respondents.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for recovery of possession of four villages together with a sitting room called nashistagah. The suit relates to a part of the estate known as Majhauli Raj. The plaintiffs in the suit are transferees from Balbhaddar, who claimed through his deceased father Indarjit to have succeeded to this estate. Two suits had been filed, viz., suit No. 20 and suit No. 21 of 1923, the first one by the claimant Balbhaddar himself and the second by his transferees. The main suit which related to the bulk of the estate was compromised. The present appeal arises out of the second suit No. 21.

In the plaint it was stated that Majhauli estate is a very ancient impartible estate, which was founded by Raja Bishwa Sen a long time ago. A long genealogical table was attached to the plaint which shows that the claimant is more than 100 generations from the founder, whose time might very well go back 2,000 years. The last male holder was Raja Kaushal Kishor, who died on 7th January 1911, leaving two widows, Rani Shyam Sunder and Rani Janki Kunwari surviving him. He left no child. Rani Janki Kunwari died in 1917 and the estate is in the possession of the Court of Wards, who hold charge of it on behalf of Rani Shyam Sunder. The plaintiffs alleged that according to the genealogical table set up by them the succession opened to Indarjit, the father of Balbhaddar, on the death of Raja

Kaushal Kishor. The plaintiffs' case was that Balbhadar's branch of the family was joint in status so as to become entitled to the estate in preference to the widows. The plaintiffs had acquired the property in dispute in this appeal under a sale-deed, dated 30th October 1922.

On behalf of the defendant the fact that Majhauli estate was an ancient impartible raj and was founded by Bishwa Sen was admitted, and it was also admitted that only one person owned the raj at a time and that the other members of his family cannot get their share by partition. The pedigree set up by the plaintiffs was denied, and it was also not admitted that Balbhadar's branch had remained joint with the main line. It was further alleged that there was a custom in this family under which a widow was entitled to succeed for her lifetime, but no general tribal custom was put forward. A further custom of non-alienability was also pleaded. The validity of the sale-deed in favour of the plaintiffs was also challenged on the ground of a fraudulent registration on account of the inclusion of an item of property not intended to be sold.

The learned District Judge, who has taken great pains over the case and has written an able judgment, framed five issues relating to : (1) the pedigree ; (2) the jointness of the plaintiffs' branch with Raja Kaushal Kishor ; (3) the special custom of succession of widows ; (4) not-transferability and; (5) the fraud on registration.

The learned District Judge has found the issues relating to the pedigree, the customs and the validity of the plaintiff's sale-deed in favour of the plaintiffs, but has dismissed the suit on the main ground that the two branches were not joint.

The learned advocate for the appellants challenges the finding of the Court below which is against him, and the learned counsel for the respondents has also tried to support the decree by challenging the findings relating to the pedigree and the registration and half-heartedly the finding relating to the custom of succession by widows.

The legal question of the right to succeed to an impartible estate that is or has been the property of a joint Hindu family has been discussed at considerable length by the learned District Judge, who has examined a large number of cases on the point. He was however at a considerable disadvantage inasmuch as the latest and the most authoritative pronouncement of their Lordships of the Privy Council which has set at rest some of the doubts which prevailed previously, was not available to him. This case is *Konammal* v. *Annadana* (1). The main point which the learned Judge had to consider and which it is our duty to decide is whether it is incumbent upon a claimant to an impartible estate to establish a jointness in general status between the two branches of the family in order to supersede a widow, or only a notional jointness with the burden on the opposite party to show a definite renunciation of their right to succession. Mr. Piare Lal Banerji who has argued the case with great ability, has placed before us almost all the previous cases that are relevant to this question.

The previous case law was summarized by their Lordships of the Privy Council in the leading case of *Baij Nath Prasad Singh* v. *Tej Bali Singh* (2) which is known as *Aghori Barhar* case. It is therefore wholly unnecessary to refer at length to the previous cases. Their Lordships pointed out that the earliest case known as the *Shivagunga* case, *Katama Natchiar* v. *The Raja of Sivagunga* (3) was one where the property was the self-acquired and separate property of the last holder and that the *Tipperah* case *Raja Suraneni Venkata Gopala Narasimha Row* v. *Raja Suraneni Lakshma Venkama Row* (4) was under the Dayabhag Law and not the Mitakshra. Their Lordships also remarked that *Sartaj Kuari* v. *Deoraj Kuari* (5) had stood too long to be now touched, but it merely affirmed the general proposition laid down in the *Tipperah* case (4)

" that when a custom is found to exist it supercedes the general law which however still regulates all beyond the custom."

(1) A. I. R. 1928 P. C. 68=108 I. C. 354=55 I. A. 114=51 Mad. 189 (P. C.).
(2) A. I. R. 1921 P. C. 62=60 I. C. 534=48 I. A. 195=43 All. 228 (P. C.).
(3) [1863] 9 M. I. A. 539.
(4) [1869] 13 M. I. A. 113=12 W. R. 40=2 Suther. 265=2 Sar. 496 (P. C.).
(5) [1888] 10 All. 272=15 I. A. 51=5 Sar. 139 (P. C.).

In conclusion their Lordships laid down that

"the zamindari being the ancestral property of the joint family, though impartible, the successor falls to be designated according to the ordinary rule of the Mitakshara law, and that the respondent, being the person who in a joint family would, being the eldest of the senior branch, be the head of the family, is the person designated in this impartible raj to occupy the gaddi."

This leading case did therefore re-affirm the law laid down in some of the earlier cases and explained the ratio decidendi in *Sartaj Kuari's* case (5) and in the *Tipperah* case (4). It is however to be noted that *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6) known as the *Telwa* case had been distinguished by the learned Judges of the Allahabad High Court, who thought that it was decided on its special facts without laying down any general proposition of law in *Baij Nath Prasad Singh* v. *Tej Bali Singh* (7). That case however was not referred to by their Lordships in their judgment in appeal.

There can be no doubt that the impression created in India by the *Telwa* case (6) was that in order to succeed to an impartible estate on the ground of jointness of the family it was necessary to show jointness in the general status of the two branches. In the *Telwa* case (6) Sir John Edge put the issue to be "whether the two brothers had separated" (p. 1192 *of* 42 *Cal.*). Reference was made to the fact that one brother had built a pucca house to the westward of the family house, established a tulshi pinda there and removed his family to his pucca house and lived there separately from his brother, building a wall in between; their expenses were also found to be separate, and the evidence proved a complete separation "in worship, in food and in estate." On this finding the claimant was unsuccessful as against the widow. That this is how the *Telwa* case (6) was understood by some High Courts is clear from the following remark of Wallis, C. J., in *Gurusami Pandyan* v. *S. P. Chinna Thambiar* (8) (at p. 8 *of* 44 *Mad.*):

"The *Telwa* case (6) lays down, that in determining which line of succession to follow the test is whether the last owner who left no male issue was or was not separated from the other members of the family, and expressly negatives the contention that, to let in the rule of succession as to separate estates, there must have been something in the nature of a partition of the impartible estate, or of an abandonment express or implied of the right to succeed to it as joint family property."

The question came up again for consideration before the Madras High Court in *Annandana Jadaya Gounder* v. *Konammal*, *A. I. R.* 1923 *Madras* p. 402 before Krishnan and Ramesam, JJ., who dealt with the subject exhaustively, reviewing almost the whole of the previous case law. But in view of the *Telwa* case (6), they felt it incumbent upon themselves to go into the question of facts relating to the jointness or separation. At p. 406 Krishnan, J. remarked:

"To show that an impartible estate has become the separate property of the holder it is not absolutely necessary to prove that there was some express division in which that property was involved or that the rights of others in it were abandoned."

Similarly Ramesam, J., at p. 415, after stating that an impartible zamindari may be the self-acquired property of a particular member, or might be renounced by a member of the family, or might be allotted to a member in a family partition, dealing with it, remarked that he did not claim to exhaust the modes in which it had become the separate property of a member.

This last-mentioned case went up in appeal before their Lordships of the Privy Council, and the judgment was affirmed: *Konammal* v. *Annadana* (1). As this judgment is instructive we must refer to it at some length, because in our opinion it definitely settles the law. The suit was brought by Konammal, the mother of the last holder Narayanappa, who according to the pedigree given on p. 121 (*of* 55 *I. A.*) was the great-great grandson of the common ancestor Lakshmanappa; and the defendant in possession of the estate was Annadana, who was great-great-great-grandson of the same ancestor. Their Lordships started with the presumption of jointness and held (p. 123 *of* 55 *I. A.*) that the onus of proving that the estate had become the separate property of the junior branch was on the plaintiff who had based her claim on the ground that her son's branch had held the property as their

(6) A. I. R. 1915 P. C. 30=30 I. C. 833=42 I. A. 192=42 Cal. 1179 (P. C.).
(7) [1916] 38 All. 530=38 I. C. 894.
(8) A. I. R. 1921 Mad. 340=61 I. C. 242=44 Mad. 1.

separate and absolute property. Their Lordships pointed out that prior to the decision in *Baij Nath Prasad Singh* v. *Tej Bali Singh* (2) the authority of some of the earlier cases which had proceeded on the footing that the estate though impartible must still be regarded as joint family property for the purpose of succession, had been somewhat shaken by the decisions in *Sartaj Kuari* v. *Deoraj Kuari* (5), *Venkata Surya Rao* v. *Court of Wards* (9) and *Gangadar Rama Rao* v. *Raja of Pittapur* (10) and the two later decisions in *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6) and the *Bettiah Raj* case *Bishun Prakash Narayan Singh* v. *Janki Koer* (11). As to the *Telwa* case (6) their Lordships definitely remarked that

"this case cannot now, in their Lordships' opinion, be treated as laying down any proposition of law for the purpose of the present case, as it does not deal with the question whether an impartible estate is to be treated for purposes of succession as joint family property or with the legal consequences that follow if it is."

The *Bettiah Raj* case (11) contained some observations going much further, but they were explained by Lord Dunedin in *Baij Nath Prasad Singh* v. *Tej Bali Singh* (2). Reviewing the cases their Lordships re-affirmed the early decisions of the Board, which had applied the test whether the facts showed a clear intention to renounce or to surrender all interest in the impartible estate. In particular reference was made to *Chowdhry Chintamun Singh* v. *Mt. Nowlukho Konwari* (12) where there had to some extent been a separation in the family, but it was held that the question was, whether the plaintiff's father and his branch had waived their right of succession and had impressed upon the taluka the character of separate property. Having examined some of the other cases also their Lordships concluded :

"Those authorities" in their Lordships' opinion, go far to support the inference deduced by Ramesam, J., from an examination of the cases, that in order to establish that an impartible estate has ceased to be joint family property for the purpose of succession, it is necessary to prove an intention expressed or implied on behalf of the junior members of the family to give up their chance of succession to the impartible estate : p. 127."

Their Lordships next proceeded to deal with the grounds of separation, and thought that the fact that the defendant's ancestor had been set aside by usurpation in favour of the younger brother was not of itself sufficient to show that the other line had thereby lost their rights as members of the joint family to succeed to the estate on failure of his line. Their Lordships held that the fact that the members of the joint family had exercised their right of partition over their partible property, would not divest them of their interest in the impartible estate over which they had no right of partition, for it certainly could not be put upon the ground of surrender or renunciation, there being nothing in the fact of these partitions of their partible property to suggest any intention of renouncing their rights of succession to the impartible estate, nor the receipt of any consideration for such renunciation. As regards the evidence relating to separation in food, worship and estate, their Lordships attached very little importance to separation in food and very little weight to the absence of joint worship, and found that the alleged separation of the defendant's branch inter se was not conclusive.

This case therefore is the clearest authority for the proposition that a mere separation in food, mess or worship, that is to say, in the general status of the family, or even a partition of the partible property inter se, would not destroy that notional jointness which entitles a member of the junior branch to succeed to the impartible estate, and that the presumption of jointness can be rebutted only by showing that there was

"an intention expressed or implied on behalf of the junior members of the family to give up their chance of succession to the impartible estate."

In the case of partible property where separation involves a division and separate possession of shares by each separated member, every fact, which shows that the members are not living as one unit and are either separate in residence, mess, worship, business or cultivation, would be some evidence of disunion.

(9) [1899] 22 Mad. 383=26 I. A. 83=7 Sar. 481 (P. C.).
(10) A. I. R. 1918 P. C. 81=47 I. C. 354=45 I. A. 148=41 Mad. 778 (P. C.).
(11) A. I. R. 1920 P. C. 34=62 I. C. 289 (P. C.).
(12) [1875] 1 Cal. 153=2 I. A. 263=3 Suther. 204=3 Sar. 537 (P. C.).

But in the case of impartible property where the estate cannot be divided and a separated junior member cannot get any share on a partition, ordinary facts, which would be some evidence of separation with regard to partible property, would not be sufficient. Separation of the general status of the family does not necessarily imply a clear intention to renounce or surrender the right to succeed in case succession opens. There must be such evidence, direct or circumstantial, as would show an intention expressed or implied to give up the right to succession. We do not agree with the learned advocate for the appellants that in the absence of direct and positive evidence showing a clear abandonment or renunciation of the right to succeed, mere circumstantial evidence and inferences deducible from conduct would be wholly insufficient to prove an expression of an intention to give up such right. No hard and fast rule can be laid down as to the quantum of evidence required for such proof. The passage quoted from their Lordships' judgment itself states that the intention may be expressed or implied. Such intention therefore can be implied both from circumstantial evidence and from the conduct of the parties. But the conclusion must be irresistible and the circumstances must point not to mere separation in general status but separation relating to the impartible property itself, that is to say, an abandonment of the right to succeed to it.

Many of the passages quoted by Lord Dunedin in *Baij Nath Prasad Singh* v. *Tej Bali Singh* (2), from previous judgment of their Lordships go clearly to establish that the separation to be proved is one relating to the impartible estate itself. In view however of the latest clear pronouncement, it is not necessary to elaborate this point any further.

The learned District Judge has discussed this question at considerable length in connexion with his finding on Issue 2 (pp. 120 to 129). He has devoted considerable thought to the consideration of the question whether the *Telwa* case (6) was an authority in support of the defendant's contention. He concluded, to quote his own words:

"The *Telwa* case (6), does, by necessary implication, repeal the contention that there can be no separation without relinquishment by the junior member of his contingent right of succession" (p. 127, line 26.)

He further thought that

"there is no difference between partible and impartible property in this respect so that a separation can be brought about merely by the unequivocal expression of an intention to that effect by any member of the family. It is however clear to my mind that a member who thus brings about a separation may be the holder of the impartible property himself (p. 128, line 12). . . . The *Telwa* case (6) is an instance of a holder of an impartible estate determining the contingent right of the junior member by giving expression to a clear intention on his part to separate (p. 128, line 22)."

Finally he remarked :

"It must therefore be taken for granted that the *Telwa* case (6) stands as a clear authority for the proposition that a separation is possible in a family owning impartible property alone without any relinquishment by the junior member of his contingent right of succession (p. 129, line 20)."

It may here be pointed out that their Lordships in the case of *Chintamun Singh* v. *Nawlukho Konwari* (12) had remarked :

"The plaintiff's father and his branch had waived their rights of succession, or by their joint action impressed upon the taluka the character of separate property"

and not to the individual volition of the holder of the estate for the time being. In view of the pronouncement in the latest case it is quite clear that the learned District Judge has approached the case from a totally wrong standpoint inasmuch as he thought that it was wholly unnecessary to establish any relinquishment of the right of succession. We must therefore examine the facts found by him or disclosed by the evidence from this new angle of vision. Eight circumstances were relied upon by the defendant to establish separation between the two branches. They are enumerated at pp. 129 to 130 and have been discussed at pp. 130 to 143. We shall take them in the order in which they stand.

Point 1.—The first point is that the claimant is too distantly related to the alleged common ancestor, and that accordingly the presumption of jointness, becoming weaker after each generation, has altogether disappeared. A shorter pedigree is given by the learned Judge at p. 96, which shows the descendants of the common ancestor Raja Bodh Mal, according to the plaintiffs, which, as we shall show later, has been satisfactorily established

The last male holder was the seventh in descent from the common ancestor. Indarjit, the deceased father of Balbhaddar, who was alive when Raja Kaushal Kishor died, was eighth in descent from him. No doubt in the case of a partible estate such a distant relationship would indeed leave but a very weak presumption of jointness. But if in the case of an impartible estate no occasion for such succession has so far arisen, the presumption of law cannot disappear. The burden still is on the party who alleges that the estate was the separate property of the last male holder. The relationship of the claimant was equally distant in *Ram Nundan Singh* v. *Janki Koer* (13), but no argument was addressed to nor was it suggested before their Lordships that the distance of relationship was in itself sufficient to destroy the presumption. As a matter of fact in many of the cases relating to impartible property the pedigree as a rule has been a long one. In particular we may refer to the pedigrees in *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (14) as given in *Naraganty Achmmagaru* v. *Venkatachalapati Nayanivaru* (15) and *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (16) as given in *Sree Rajah Yanumula Gavuridevamma Garu* v. *Sree Rajah Ramandora Garu* (17). They are both set forth in the judgment of Ramesam, J., which was affirmed by their Lordships of the Privy Council. In *Annadana's* case (1) itself the relationship was also fairly remote. The learned Judge has not held this circumstance to be fatal, but has merely considered it to weaken the presumption.

Point 2— Separation in residence, mess and worship for a long period is next relied upon. There is no doubt that there is evidence which the learned Judge has accepted showing that on the death of Raja Bodh Mal his eldest son Bhawani Mal became the Raja and made a babuai grant to his youngest brother Anand Mal, who is alleged to be the ancestor of Indarjit. This happened some 200 years ago, and a share in one of the villages so granted, viz., Dharamner, is still in the possession of Balbhaddar. The learned Judge has thought that Ex. P-7 (p. 183) shows that

"the descendants of Anand Mal were living in village Dharamner ever since 1833."

He has then thought that:

"it is fair to presume that ever since the grant Anand Mal's descendants have been living in this village."

The learned Judge is wrong in both of his conclusions. All that Ex. P 7 indicates is that the village, though included in the raj, was a babuai property in the possession of the collaterals, and that it was settled by Government directly with them. There is nothing in this rubkar to suggest that these grantees had even built any house at Dharamner and were residing in that village at that time. As a matter of fact, Dharamner is only ten miles from Majhauli, and it is not impossible for the younger members of the family to live at Majhauli and manage their estate in Dharamner. Much less is there any justification for presuming that the descendants of Anand Mal have been living separately ever since the making of the babuana grant, which took place some 200 years ago. The oral evidence of the defendant cannot satisfactorily establish such separate residence for a period prior to the Mutiny, as the witnesses cannot speak of it according to their personal knowledge. There is, however, the undoubted fact that Indarjit and his family are living at Dharamner and not occupying any part of the residential quarters at Majhauli. It may therefore be taken that at least from about the time of the Mutiny or a little earlier there has been separate residence and consequently separate messing. The finding of the learned Judge (p. 131, line 3) that the descendants of Anand Mal have been separated in food and residence from the holder of the estate for more than 200 years cannot be accepted. He has however conceded that mere separation in food and residence is ordinarily inconclusive (line 8), particularly as he found that

"there is no evidence to show that the descendants of Anand Mal built up a separate house (line 28)."

(13) [1902] 29 Cal. 828=29 I. A. 178=8 Sar. 351 (P.C.).
(14) [1862] 9 M. I. A. 66=1 W. R. 30=1 Suther 560=1 Sar. 826 (P.C.).
(15) [1882] 4 Mad. 250.
(16) [1871] 13 M. I. A. 333=13 W. R. 21 (P.C.).
(17) 6 M. H. C. R. 93.

The same remarks apply to the separation in worship. The learned Judge has conceded (p. 131, line 33) that

"there is no evidence on the record to show the state of affairs before the time of Indarjit Mal."

But there can be no doubt that during the lifetime of Indarjit and since his death there has been no joint worship and no attendance on the occasion of religious festivals for the performance of periodic worship; and that the two families have separate priests or gurus. As regards the oral evidence relating to a Tulsi Chaura (a platform with a Tulsi plant on it), the learned Judge has thought that the evidence was utterly unreliable, and had been produced in order to introduce a feature which had been referred to in the *Telwa* case (6). His ultimate finding was that the total separation in worship afforded a very strong indication of a general disruption of the family connexion.

We have already referred to *Konammal's* case (1) in which their Lordships of the Privy Council remarked that the circumstance that the defendant's branch had not any part assigned to them in the annual festival of the local temple in which the jagirdar took a prominent part, has no bearing on the present question. In our opinion when there was separate residence, it is not at all surprising that there should be regular attendance for purposes of worship at different temples. There is no suggestion that the members of the junior branch changed their religion. A mere separation of the place of worship does not in our opinion imply any intention on the part of the junior members to give up their right of succession to the estate.

Point 3.—Reliance was next placed on want of social intercourse. Indeed the oral evidence led on behalf of the defendant was to the effect that there was actually enmity or hostility between the two branches, and that invitations were not issued to the members of Indarjit's family on festive occasions and marriages and other ceremonies. It seems to us that the evidence on this point is somewhat exaggerated, bnt assuming that this was so, the mere existence of strained relations would not be tantamount to an abandonment by the junior branch of their rights of succession. On the other hand they might very well entertain the hope of ultimate succession, and look forward to the day when the last holder who had no male children died, leaving a widow whom they could supersede. We think that the learned District Judge has attached too great a weight to the supposed estrangement between the two branches as showing a complete separation.

Point 4. — It is in evidence that Indarjit Bahadur Mal as well as Balbhaddar Mal had been mortgaging and selling little parcels of their share in village Dharamner without reference to the Raja. The learned Judge has not attached any value to this fact, but has considered that it may contribute its quota to the cumulative effect produced by the other circumstances. We have already referred to *Konammal's* case (1) where their Lordships remarked that the separation or partition inter se among the members of the junior branch of their partible property was no evidence of the abandonment of their right of succession. The junior members are entitled to deal with their partible property in any way they like, and their action cannot imply any intention on their part to give up their chance of succession to the impartible estate itself.

Point 5. — The learned Judge has relied strongly on the fact that no financial help was given to Indarjit's branch by the holder of the estate and has considered that this circumstance fortifies the conclusion as to the complete severance. The evidence on this point leads us only to a period of the last 30 years, and it may be assumed that during Indarjit's time no financial help has been received by his family. At least there is no reliable evidence on behalf of the plaintiffs to prove that it was. This branch had been given some villages as a grant, and it is not strange that they did not expect any further help from the estate. Such a circumstance would be strong evidence in the case of an ordinary joint Hindu family qua their partible estate, but is not of the same impartance in the case of a succession to an importible estate.

Point 6. — The strongest reliance has been placed on behalf of the defendant on certain admissions of separa-

tion by statement and conduct of Indarjit and Balbhaddar. Raja Kaushal Kishor died on 7th January 1911 and on his death the name of his senior widow Mt. Rani Shyam Sunder was entered in the revenue papers in respect of the villages forming part of the estate, and admittedly no claim was put forward by Indarjit in the revenue Courts. In para. 26 of the plaint there was a suggestion that Indarjit and Balbhaddar tried to take possession of the raj but were unsuccessful. This in our opinion is not a true statement. As a matter of fact, three successive Collectors, Mr. (now Sir) J. H. Simpson, Mr. Silberrad and Mr. Collet have all stated that no claim to the estate was put forward on behalf of Indarjit or Balbhaddar. We accept that statement as perfectly correct. It may therefore be taken for granted that no attempt was made by Indarjit or Balbhaddar soon after the death of Raja Kaushal Kishor to assert their right of immediate possession, but mere omission or silence is not necessarily an admission of want of title.

It is also clear that the suit was instituted after considerable delay and in fact within two days of the expiry of the period of limitation, and not till certain speculators had come on the scene and acquired a portion of the estate by way of speculation. The defendant further relies on certain positive acts which it is suggested, amounted to a clear admission on the part of Indarjit. So far as the three District Collectors referred to above are concerned, they all admit that they had no personal talk with Indarjit himself, and their interviews were with Balbhaddar alone : Mr. Simpson (p. 591, line 26) ; Mr. Silberrad (p. 593 line 11) ; Mr. Collet (p. 82). So far as the oral conversations go, although one may suspect that Balbhaddar might have been speaking both on behalf of himself and his father, it is legally impossible to bind Indarjit by what Balbhaddar might have said, particularly when there is no evidence on the record to show that Balbhaddar had authority to speak on behalf of Indarjit. It does however appear that when Mr. Simpson was approached by Balbhaddar for the grant of some scholarship for the education of Balbhaddar's son, because he would be the next heir to the estate, an objection was raised by Kedar Narain Mal, who asserted that he himself was in the senior line. An enquiry was ordered by the Collector through Mr. Ganga Ram, a Deputy Collector. The report of the Sub-Divisional Officer is printed on p. 377, and shows that he took down the statements of a number of people and ultimately came to the conclusion that Indarjit's branch represented the senior line. In that proceeding Indarjit was admittedly represented by a vakil and he filed a genealogical table of Dharamner Babus and also filed a copy of judgment of 1867, if not also other evidence, and also examined no less than 22 witnesses. Thus Indarjit was fully aware that the enquiry was going on and was taking an active part in the proceedings. The enquiry was based on two assumptions. One was that Daryao Mal was in the senior branch, the dispute being confined to the question whether Indarjit or Kedar Narain represented the senior line of Daryao Mal's branch, and the second was the assumption that succession had not opened out at that stage. No doubt by implication it may be said that Indarjit by his conduct was accepting the posi tion that the death of the Raja had not opened out the succession to him. On the other hand, it may well be urged on behalf of the plaintiffs that Indarjit was merely trying to lay the foundation for his claim by removing the first obstacle placed in his way by Kedar Narain. If he succeeded in procuring all the available evidence and establishing that he represented the senior branch, there would be time,enough for him to claim the estate later. In this connexion it may also be pointed out that the report shows that the Rani's servants were taking an interest in this enquiry, presumably on the side of Kedar Narain.

But the strongest answer to the defendant's contention is that the state of jointness or separation has to be considered at the time when the succession opened, viz. 7th January 1911, and not subsequently, though the subsequent conduct of the parties may be some evidence of such separation. If in January 1917 Indarjit was entitled to succeed, he did succeed automatically by inheritance, and unless there has subsequently been a surrender or relinquishment of

his estate by him, any admission of his would not destroy his right. We cannot take these proceedings in any way to indicate that Indarjit, knowing that he had succeeded to the estate, definitely abandoned his claim and relinquished his rights, surrendering them in favour of the Rani. At best the proceedings show that Indarjit was not fully cognizant of his legal rights, and this is not to be wondered at in view of the impression which had prevailed in India in consequence of the *Telwa* case. But there is also a possibility that Indarjit was trying to establish that he represented the senior line as a first step towards the acquisition of the estate.

It may further be pointed out that the case of the defendant was that there was a custom in the family under which a widow could succeed. It is therefore also possible to attribute the conduct of Indarjit to a belief in his mind that such a custom existed, though this hypothesis is not a very probable one.

A few other facts in this connexion have been referred to by the learned District Judge. Although Balbhaddar Narain did not succeed in getting the scholarship for his son from the Collector, the junior Rani granted a scholarship of Rs. 8 per month to his son from her private purse and later, after the death of the junior Rani, it was continued and then enhanced to a sum of Rs. 50 per month distributed among the four sons of Balbhaddar Narain. The receipt of these scholarships by Balbhaddar has not been pleaded as amounting to any estoppel against him, and would not in our opinion amount to such estoppel. The scholarship was granted by way of a gratuity as an act of grace and favour and not as consideration for any relinquishment of Balbhadar's right. There can therefore be no estoppel against him on this ground. We think that these circumstances are not sufficient to show that as a matter of fact there had been a complete separation and an abandonment of all right to succession and a renunciation of the inheritance before 7th January 1911 when Raja Kaushal Kishor died.

Point 7.—The next circumstance relied upon by the learned counsel for the respondent is the succession of women to the estate. The learned Judge has not accepted this contention and has found under his Point 7, that there is no instance in the family of a widow succeeding to the estate in the presence of joint collaterals. Three instances were relied upon on behalf of the defendant, and these instances have been discussed by the learned Judge in his finding on Issue 3 relating to the custom set up by the defendant. The plea of custom of the admission of a widow to succession to an impartible estate has not been pressed before us, but the three instances have been relied upon as showing a separation. It cannot be denied that if the defendant were to establish as a fact that at any time since the death of Bodh Mal a widow succeeded to the estate as Rani and held it to the exclusion of the next heir representing Indarjit's branch, so as to destroy their right, the necessary conclusion would be that there was a complete separation in the family and the right to succeed would not be revived after the succession has opened once again. The succession of a widow to the exclusion of an ancestor of Indarjit would in any case be very strong evidence to prove the separation in the two branches. But in our opinion none of the three instances satisfactorily establish the case put forward by the defendant.

Reliance is first placed on the succession of Bakht Kunwari when her husband Raja Bhim Mal died childless. The only evidence on which this plea is based is a decree, dated 30th May 1908, a copy of which was found on a record kept in the record room of the District Judge of Gorakhpur which was sent for by the plaintiffs.

As this is the first time that we have referred to this decree, it is necessary to point out that its genuineness was very strongly challenged on behalf of the defendant. The learned Judge considered this point at considerable length at pp. 100 and 101, and came to the conclusion that this is a genuine copy, and so is also a pedigree found on the same record. These documents are printed on pp. 3 and 1 of the Supplemental Record No. 2. We tested the genuineness of this copy in various ways. We satisfied ourselves that prior to Regn. 13 of 1808 which came into force in December 1808 the Zila Judge or the District Court had jurisdiction

to try all suits of a civil nature, no matter how high its valuation might be: vide, Regn. 2 of 1803, S. 3, and that his jurisdiction was only subsequently restricted. We also found that the seal of the Zilla Court had to be $1\frac{3}{4}$ inches in diameter (Regn. 2 of 1803, S. 14) and that the seal of the Provincial Court of appeal had to be two inches in diamater and did contain the words "the Seal of the Provincial Court of appeal." (Regn. 4 of 1803, S. 5). Ex. P-4 bears impressions of seals which are not decipherable, but another copy of it which is not marked as an exhibit and which was also on the same file and is before us shows that there are seals on it. There are impressions two inches in diameter in which the words "Baadalat Appeal Ilaqa Benares" can be read and so also the year 1212 Fasli. The paper and the writing on these appear to be old, and the learned District Judge, in spite of matters alleged to be suspicious which were brought to his notice, came to the conclusion that they were genuine copies.

Fortunately for the plaintiffs their learned advocate has discovered the report of that very case when the matter came up in appeal before the Sadar Diwani Adalat. That case is reported in S. D. A. (N. W. P.), Vol. 2, p. 169, and reproduces the same pedigree. It is interesting to note that Mr. Machnaghten in his Principles and Precedents of Hindu Law, Vol. 2, p. 192, has quoted this very pedigree in order to illustrate a rule of Hindu law relating to adoption. In the judgment of the Sadar Diwani Adalat the full pedigree down to Daryao Mal is given. We do not rely upon these reports as any evidence in the case at all, but merely to confirm our view that the copy of the decree filed in the Court below which was admitted as evidence by the learned District Judge is a genuine copy. The decree merely shows that Shamsher the eldest son of Daryao Mal came to Court on the allegation that Rani Bakht Kunwari had given away the raj to his father Partab Mal and made him the representative. This fact was denied by the defendant Rani Dilraj Kunwari, whose name was brought on the record after the death of her husband Raja Ajit Mal, and it was also asserted on her behalf that Bakht Kunwari had no such authority. It was found as a fact that although Bakht Kunwari had attempted to give the raj to Partab Mal, the chaukidars of the district and the other Rajas had assembled and given the raj to Sheo Mal, and that Raja Sheo Mal and after him Raja Ajit Mal were the persons entitled to the raj and not Partab. We fail to see how this circumstance can establish that Bakht Kunwari actually succeeded as Rani to the exclusion of the next heir so as to bring about a complete separation. The judgment does not say that the Rani herself succeeded to the estate, but that she attempted to give it away to Partab when her husband was killed. This, therefore, furnishes no instance of any importance.

The second instance relied upon on behalf of the defendant is the succession of Rani Dilraj Kunwari. The decree referred to above shows that on the death of Ajit Mal his widow Rani Dilraj Kunwari was brought on the record and the suit was continued as against her, but in the body of the judgment it also appears that she not only pleaded but led considerable evidence to show that when Tej Mal the son of Sarabjit Mal was born, Raja Ajit Mal went there on the 12th day after the birth, and having invited all the people of the village, and the hawan ceremony and worship performed, and Raja Ajit Mal and Rani Dilraj Kunwari took Ajit Mal as their son (Supplemental Record, p. 7, line 22). The finding at p. 8, line 20 was :

"When Tej Mal, son of Babu Sarabjit Mal was born Raja Ajit Mal and Rani Dilraj Kunwar defendant took him as their son, but since the death of Raja Ajit Mal, Rani Dilraj Kunwar defendant his widow is in possession."

It is, therefore, clear that in the presence of an adopted son Rani Dilraj Kunwar could not by any means succeed to the estate, and she took over possession merely because the adopted son was a minor boy. This is by no means an instance of the exclusion of the junior branch which destroyed their jointness. The result of the adoption in fact was that the two branches of Lakshmi Mal were absorbed into one and represented the senior line.

In this connexion we may also refer to a book called Viswan Vansa Vatika

and printed and published in 1887 which gives a history of this family presumably in accordance with the traditions handed down in the family. No serious objection to the admissibility of this book appears to have been raised in the Court below, nor has it been seriously objected to before us. Presumably it has been admitted in evidence on the supposition that it contains either the statement made by a person possessed of special means of knowledge (S. 32, Evidence Act) or contains a record of the custom in the family. Extracts from this book have been printed from pp. 155 to 165. The list of the Rajas omits the name of Bakht Kunwari, but mentions Rani Dilraj Kunwar (p. 157). But on p. 159 it is pointed out that when Raja Tej Mal was born, Maharaja Ajit Mal went to his place of birth and taking off his turban from his head put the same on the head of his nephew, and that on the death of the Maharaja the same boy had a right to sit on the gaddi, but that the widow took the management of the raj in her own hands. Later when Tej Mal was 16 years old he sat on the gaddi in 1815. Part of the extract which is not printed and which ought to be a continuation of the 21st line on p. 164 shows that she gave the raj to Tej Mal before she actually died. The learned counsel for the respondent relied on this passage, which says that she reigned for 12 years as Rani and wanted to give the raj to her daughter. But apparently this was so because her adopted son was a minor boy still under age.

In this connexion reliance is also strongly placed on the Kaifiat Mahtawi printed on pp. 177, 179 and 181, which go to show that on the death of Raja Ajit Mal the zemindari tenure was settled from 1216 to 1222 fasli with the attorney of Rani Dilraj Kunwari, and that the settlement was continued till 1224 fasli when Tej Mal's name was entered on the death of the Rani. The entry in the revenue papers merely indicates possession and is not any conclusive evidence of title. We may also point out that the judgment dated 30th May 1808 between Rameshwar Bahadur who belonged to Indarjit's family and Rani Dilraj Kunwari would outweigh entries in settlement papers made 30 years afterwards, based presumably on oral information received. The case of Rani Dilraj Kunwari is therefore not an instance of a succession to the exclusion of the junior branch.

The third instance relied upon is that of the defendant Rani Shyam Sunder Kunwar. The learned District Judge has summarily rejected this, and we fully agree with his view. Barring the fact that there has been delay in the institution of suits which may be explained away on various suppositions and the circumstance of the request for the small scholarship for Balbhaddar's boy, there is nothing else to show that Rani Shyam Sunder Kunwari's succession was accepted by Indarjit and is an instance in point. The suit is brought within 12 years and before her right to retain the property has matured by prescription, and the question which we have to decide is the state of the family before she took over possession, viz. when her husband died.

Point 8.—The last point relied upon by the respondent is the extent of the babuai grant to Anand Mal. The learned District Judge has himself not thought much of this point. On behalf of the defendant it was suggested that the babuai grant might have consisted of 133 villages which was nearly one-third of the entire estate. In the first place the babuana grant itself was denied by the defendant, and the argument is based merely on an alternative ground. In the next place it is not at all clear that the villages so granted amounted to anything like one-third of the entire estate. The learned Judge has discussed this matter on p. 142 and has pointed out that the area covered by the talukas now in the possession of the Rani would have comprised about 1,454 villages. Even if the area granted to the junior branch would now be represented by 133 villages it does not follow that 200 years ago this area would have been of a very great value, for aught one knows it may all then have been jungle land and small in comparison with the bulk of the estate. We agree with the Court below that the defendant has failed to make out this point.

This disposes of all the points which were relied upon on behalf of the defendant in order to prove a complete

separation of the two branches, so as to destroy the right of succession. As remarked above the learned District Judge was labouring under a wrong idea that a different principle had been laid down by the *Telwa* case, which was binding upon him. For instance at p. 120, line 8, he remarked that there was never any renunciation by Lakshmi Mal and Anand Mal and their descendants of their contingent right to succeed to the estate. At p. 123, line 44, he thought that for the purposes of succession to an impartible estate the general status of the family had to be taken into consideration. Finally at p. 143, line 5 he remarked:

"It is true that there is no evidence of a definite partition between the families or of a relinquishment of the right of succession by Indarjit Mal or by any one of his ancestors. But in view of my finding on the legal aspect of the question I think these elements are not necessary to constitute separation in a family holding impartible property alone."

On an examination of the entire evidence referred to by the learned District Judge, and after weighing all the circumstances brought out by him, we are unable to agree with his conclusion, in the light of the recent pronouncement of their Lordships of the Privy Council. We think that the burden lay heavily on the defendant to establish that the estate was held as his separate property by Raja Kaushal Kishor and that a separation had been brought about by an intention expressed or implied on the part of the junior branch to relinquish their right to succession to the impartible estate whenever a succession opened. We are of opinion that the evidence led in the present case falls short of making out of such a case. We must therefore hold that it is not established that Raja Kaushal Kishore was separate from Indarjit Bahadur in the sense that the latter had lost all right tc succession in case the former died without a child and without having disposed of his estate in his lifetime.

We now come to the question of the pedigree which has been found by the Court below in favour of the plaintiffs and which finding is challenged on behalf of the defendants. The book referred to above only indicates the senior line consisting of the successive Rajas. Although it supplies a few links it does not make out the whole pedigree for the plaintiffs. Similarly the oral evidence adduced on their behalf cannot take us back to any period earlier than Daryao Mal. But up to Daryao Mal the pedigree is established by overwhelming evidence. Not only have we the fact that on an enquiry ordered by the Court of Wards which was holding charge of the estate on behalf of Rani Shyam Sunder Kumari it was ascertained on enquiry that Indarjit represented the senior branch of Daryao Mal, but that part of the pedigree is further established by other evidence in the case including the decree dated 5th September 1850, the judgment dated 24th December 1851, the judgment dated 30th November 1867 as well as entries in the khewats which are all printed in Supplemental Record No. 2 and the genuineness of which cannot be challenged. This portion of the pedigree has not been seriously challenged on behalf of the respondent. The attack has been directed against the upper portion of it between Bodh Mal and Daryao Mal. It must be conceded that if the pedigree, Ex. p. 6, and the decree Ex. p. 4 be entirely excluded from consideration, the rest of the evidence, oral or documentary, is totally insufficient to complete these links. The genuineness of these documents, particularly of the decree, has already been considered by us and we have accepted it in concurrence with the view of the District Judge. So far as the pedigree (Ex. p. 6) is concerned there is a note on it showing that it had been dictated by Sham Sher Mal himself and is therefore in that way brought home to his personal knowledge and fulfilled the requirement laid down in *Jagatpal Singh* v. *Jageshar Bakhsh Singh* (18). This point is discussed by the District Judge at pp. 102 and 103 of his judgment. He has excluded from consideration the other pedigree filed by Rani Dilraj Kunwar on the ground that it had not been brought home to her. The whole of the pedigree is incorporated in the decree itself. Under Regn. 4 of 1803, S. 13, true copies of the original decree preserved by the trial Court were to be deemed to be the original and admissible in evidence. Under the regulations then in force the decree had to contain

(18) [1903] 25 All. 143=30 I. A. 27=8 Sar. 367 (P.C.).

a correct copy of the pleadings, and the recital of the facts in the decree may then be taken to be secondary evidence of the admission of the parties. The pedigree was admitted by both the parties and is fully incorporated in the decree at p. 5, and brings it down from Bodh Mal to Daryao Mal in its entirety. The copy of the pedigree (p. 6) in the same way gives us a complete pedigree. We consider it unnecessary to refer to any other evidence in this case which has been discussed by the learned District Judge, for we accept his finding on this question of fact, that the full pedigree set up by the plaintiffs has been made out and that Indrajit Mal was the next member of the family representing the seniormost branch in the event of Raja Kaushal Kishor's line becoming extinct.

The only other point which now remains for consideration is an alleged fraud on the registration. This is the subject of Issue 5 which has been found in favour of the plaintiffs by the learned District Judge. His findings are on pp. 149 to 151.

The sale-deed by Balbhaddar in favour of the plaintiffs is dated 30th October 1922 and is printed on p. 583. The properties transferred are described on pp. 585 and 586 and in addition to the four villages sold a 1/3rd share in a sitting room in the garden appertaining to the Majhauli kothi in muhalla Daudpur, Gorakhpur, was also sold. It is clearly estabished that this sitting room is a circular tiled shed about 13¼ feet in diameter situated in a corner of this garden. As compared with the value of the four villages this property was insignificant. The villages were situated in Tahsil Deoria which has a separate registration office; and in the ordinary course the deed ought to have been presented for registration before the Sub-Registrar of Deoria, but for some reason best known to the parties it was thought either more advisable or more convenient to have this deed registered at the headquarters viz. at Gorakhpur. In order to effect this registration, the 1/3rd share in the sitting room or neshisrga was included in the deed. The Sub-Rregistrar, when he found that there was some property within his jurisdiction, was perfectly justified in accepting the deed, as it prima facie fulfilled the requirements of S. 28, Registration Act.

The defendants however urge that the sitting room was not a part of the impartible estate, but was the self-acquired property of Raja Kaushal Kishor and that in any event it would not have devolved upon Balhaddar and that therefore no title could pass to the vendees. It has further been urged that the whole object of the inclusion of this property was to bring about the registration to Gorakhpur, and that there was no intention to transfer this item at all.

It appears that this kothi was purchased at auction in the name of Dulhin Chandrika Kunwari at an auction purchase in 1893 (p. 293). Later on she made a gift of it to Raja Kaushal Kishor on 29th October 1896 (p. 297). In view of S. 66, Civil P. C., it is not open to the plaintiffs to urge that the auction purchase was a benami one, and that the real purchaser was the owner of the Majhauli estate. Curiously enough the Dulhin is described as such owner in the sale certificate (p. 293). It must therefore be assumed that Raja Kaushal Kishor acquired it in 1896 as his separate property. The question whether by incorporation during a period extending over 12 years the Raja could have converted the character of this kothi into one of impartibility is a moot point and has not been gone into by the learned District Judge. On behalf of the plaintiffs reliance is placed on the case of *Gurusami Pandiyan* v. *Chinnathambiar* (19). We however think that in the absence of any such plea or direct evidence we must assume that this kothi remained the separate property of Raja Kaushal Kishor and did not descend on Indrajit as a part of the impartible estate. It does not however follow that either the vendor Balbhaddar or his vendees, the present plaintiffs were aware of this auction purchase and the gift. The office of the Court of Wards is located in this kothi, and as shown from the description in the sale deed, the kothi goes by the name of Majhauli kothi which would be understood by the general public as a property belonging to the Raj. Ram Ghulam Mal, one of the plaintiffs, has sworn that he was assured by Balbhad-

(19) [1920] 53 I. C. 14.

dar that there was a kothi and a garden belonging to the estate situated in Gorakhpur (p. 41, line 10). The evidence of Sham Rathi (p. 44) also corroborates his statement. There is no evidence to show that Balbhaddar or his vendees had any knowledge of the auction purchase or the gift of 1896. The learned District Judge has found that Balbhaddar Narain Mal bona fide believed that this property was also a part of the estate (p. 151, line 6). There can be no doubt that the vendees also laboured under the same belief, and that they all had an honest belief that Balbhaddar had the right to transfer and the vendees to take the transfer of this property. But in view of the facts now discovered we must hold that Balbhaddar had in reality no title to it. The position then is that the vendor has no transferable interest in this item of the property which is of almost an insignificant value but that both the vendor and the vendees honestly believed that such an interest existed. This is the view expressed by the District Judge which we accept.

The learned Judge has thought that it follows from these two statements of fact that the registration is valid. He has thought that the question of an intention to transfer can only arise when the property is not owned by the person transferring it and is not believed by the parties to be owned by him, and that all that is necessary to validate the registration is that some portion of the property within the jurisdiction of the Sub-Registrar should be included.

It cannot be disputed that the object of the parties to get registration effected at any particular place cannot per se amount to a fraud on the Registration Department. They are the best judges of their own convenience. The inclusion of a bit of a property howsoever small does not necessarily imply any fraud on registration. So long as the parties satisfy the requirements of S. 28, Registration Act, they are acting well within their powers. In the present case there cannot be the least doubt that the main and principal object of the inclusion of this item was to get the deed registered at Gorakhpur. If that were not the primary consideration in their minds, it is possible that this one-third share in the sitting room might not have been transferred at all. But if in order to enable themselves to present the deed for registration at Gorakhpur they did honestly mean to transfer this small bit of property and bona fide believed that the property could be transferred by Balbhaddar, we do not see any fraud against the registration law. We do not agree with the view which the District Judge was inclined to take, that no question of intention can arise. In *Harendra Lal* v. *Haridasi Debi* (20) their Lordships at p. 989 remarked :

"This parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security."

Similarly in *Biswanath Prasad* v. *Chandra Narayan* (21) at p. 516 (*of* 48 *Cal.*) their Lordships observed :

"In coming to the conclusion that this appeal must be dismissed, their Lordships' judgment rests on the view that none of the parties ever intended that the one kauri share in mauza Kolhua should vest in Udit or should pass by the mortgage from him to the mortgagee."

No doubt those cases were distinguished in the case of *Durga Prasad* v. *Tameshwar Prasad* (22) which, unlike the case before their Lordships of the Privy Council, was not a case of an instrument executed by the parties.

The cases before their Lordships of the Privy Council were cases of a non-existing property and property which was known to both the parties not to belong to the vendor, and there could of course be no intention to transfer it. The present case is not such a one. Here the property existed and the parties believed that it could be transferred. It seems to us that S. 92, Evidence Act, which excludes evidence of any oral agreement modifying the written contract applies only as between the parties to the instrument and their representatives-in-interest. But even under the first proviso to that section any fact may be proved which would invalidate the document. The section would therefore not exclude evidence to show that a document was a mere paper transaction never intended to be given effect to or-

(20) A.I.R. 1914 P.C. 67=23 I.C. 637=41 I.A. 110=41 Cal. 972 (P.C.).
(21) A.I.R. 1921 P.C. 8=63 I.C. 770=48 I.A. 127=48 Cal. 509 (P.C.).
(22) A.I.R. 1924 All. 897=82 I.C. 243=46 All. 754.

acted upon. In the present case S. 92 cannot operate as a bar against the defendant, as Rani Shyam Sunder, whom the Court of Wards represents, was no party to the sale deed of 1922. We think that it is open to her to show by direct or indirect evidence that the parties had no intention of conveying a one-third share in the sitting room, and that Balbhaddar had no intention of selling and the plaintiffs had never any intention of purchasing the one-third share in this shed which was merely included in the sale deed in order that its name may be used for the purpose of getting the registration effected at Gorakhpur. We think that extraneous evidence of this kind is admissible where the person challenging the transfer is not a party to the instrument. We may in this connexion refer to the case of *Mukat Nath* v. *Shyam Sunder Lal* (23), which finds support from the case of *Gokarakonda Narsimha Rao* v. *Gokarakonda Papunna* (24).

The learned advocate for the appellants has relied on the case of *Vishvanathbhat Annabhat* v. *Maliappa* (25), but in that case the oral contract sought to be proved was one for reconveyance to the vendor. The judgment does not show on what ground the learned Judges thought that they could not allow evidence to be led to show the intention of the parties unless it be the fact that they thought that the case was covered by S. 92, Civil P. C., because the transfer had been made by the guardian of the minor plaintiff. The other case relied upon by Mr. Peare Lal Banerji does not in any way help him. This is *Ram Sumran Prasad* v. *Gobind Das* (26). That was a suit brought by a reversioner to challenge an alienation by a Hindu widow under an instrument to which he was not a party. The learned Judges found as a fact that there was a bona fide intention on the part of the widow to make a gift and that she had intended to part with it though the transferee afterwards changed his mind and did not take over possession.

Accordingly we cannot hold that the mere fact that the vendor and the vendees honestly believed that Balbhaddar owned the property is sufficient to validate the registration, even though neither party might ever have intended that this should be transferred.

But the burden of proving the fraud on registration undoubtedly lies upon the defendants. Prima facie the validity of the registration must be presumed and the defendants must place sufficient materials before the Court to exclude the case of an absence of fraud.

The circumstances relied upon on behalf of the respondent are that the property was insignificant, that the obvious object of its inclusion was to effect the registration at Gorakhpur, that being an undivided share it was not capable of immediate and exclusive possession, that the evidence of Ram Ghulam indicates that no serious enquiry was made by him to find out the title to it or to inspect the property thoroughly, that this property could not have been taken into account in calculating the consideration, and that it could not be made use of without a claim to a subsequent suit for partition. All these no doubt are suspicious circumstances. The oral evidence of Ram Ghulam and his pairokar Sham Rathi is direct and is to the effect that a transfer of this item was actually intended by the parties, though the object was to enable the registration to be effected at Gorakhpur. The existence of this motive cannot be doubted but is it a necessary conclusion that, with the object to get the deed registered at Gorakhpur in their mind, they did not also intend to transfer a small bit of the property? We think that in the circumstances which are undoubtedly established in the case there can be two possibilities. The parties might either have not intended that this small bit of property should pass from Balbhaddar to the plaintiffs or they might have intended that it should pass, the object in both the events being the same, viz. to enable the registration being effected at Gorakhpur. When the circumstances are capable of two explanations, and there is direct and positive oral evidence on the side of the plaintiffs and there is no direct and positive oral evidence on the side of the defendant to contradict it, and the learned District Judge who tried the original suit came finally to the conclu-

(23) A.I R. 1929 All. 659=117 I C. 341.
(24) [1920] 43 Mad. 436=56 I.C. 519.
(25) A.I.R. 1925 Bom. 514=92 I.C. 628=49 Bom. 821.
(26) A.I.R. 1926 Pat. 582=99 I.C. 782=5 Pat. 646.

sion that no fraud had been established, we feel very loth to take a contrary view in appeal. The burden of proving fraud lay on the defendant, and in the circumstances we must hold that that burden has not been discharged and the alleged fraud not established. As there was a big estate at stake, it is most likely that the parties took legal advice in the matter. Indeed, it was suggested in the course of the oral evidence that there were people belonging to the legal profession at Gorakhpur who were interested in this affair and were present at the time of the registration. There is no reason to suppose that they would have allowed the whole deed to fall through for want of a proper registration on account of an absence of an intention on the part of both the parties to transfer this small item. The probabilities are that in order to effect the registration as desired they deliberately included this item in the contract of sale and did intend that it should pass. We accordingly hold that no fraud on registration was committed in this case.

That in such an event the registration is valid finds support from the view expressed in an earlier case by the same Bench which decided *Durga Prasad Sahu's* case referred to above. This is the case of *Muhammad Abdul Hasan* v. *Fida Husain*, *A. I. R.* 1924. *All.* 473. The learned Judges in that case remark:

"The property, a grove situated within the jurisdiction of the Sub-Registrar of Budaun, did exist and mortgagor and mortgagee had reason to believe that it belonged to one of the mortgagors, Baqar Husain. There was no collusion between the mortgagor and the mortgagee, and a fictitious property was not entered with a view to obtain registration in a registration office where it would not otherwise have been possible."

As in *Pahladi Lal* v. *Mt. Laraiti* (27):

"the facts there are that the parties intended to deal with the property that is the grove situated in Ujhani; so the condition of the mortgagor's real title does not affect the question of registration."

We agree with this view and decide the issue in favour of the plaintiffs.

The last point relates to the alleged custom of admission of widows. With the exception of the three instances of Rani Bakht Kunwari, Rani Dilraj Kunwari and the present defendant Rani Shyam Sunder, which we have discussed at considerable length and shown that they do not amount to any real instance of such succession, there is no other instance cited in the direct line of the holders of the Raj.

But the defendant has led oral evidence to show that among descendants of ancestors three or four degrees higher than Raja Bodh Mal, who himself flourished about 200 years ago, there have been such instances. Not a single piece of documentary evidence has been produced in support of this case. Instances in order to be relevant ought to relate to succession to impartible estates and not to partible properties. As impartible estates are generally big estates, one would expect that documentary evidence in the form of khewats, if not of proceedings in Court, would be easily available to prove the succession of widows. No such documentary evidence is forthcoming. Oral evidence which is easy to procure has been led and an attempt has been made to show a number of such instances. These instances are all said to come, not from the Province of Agra, but from the Province of Oudh. Even though it may not be possible to exclude such alleged instances as being irrelevant, it is quite clear that their weight cannot be very great when we have to consider the custom prevailing in the Majhauli Raj. In this connexion it must be pointed out that in para. 30 of the written statement the custom pleaded was the family custom of Majhauli and not any tribal custom. Apart from that a period of 200 or 300 years may in itself be sufficient for the growth of a new custom in some other families of which instances have been sought to be given.

The learned District Judge has held that the alleged custom has not been established. We think that many of these instances quoted by the defendant's witnesses have really not been proved, and the evidence taken as a whole is altogether insufficient for proving such a custom of succession of a Hindu widow to the exclusion of a member of the junior branch when the joint status of the family has not been broken. The learned District Judge has discussed the oral evidence on pp. 146 to 148, and as we are in agreement with his conclusion, we do not think that we need discuss that evidence over again

(27) [1919] 41 All. 22=48 I. C. 200.

when the point is not very seriously pressed before us.

The result, therefore, is that this appeal is allowed and the decree of the Court below is set aside, and the plaintiff's claim is decreed with costs in both Courts.

K.N./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 814

BOYS, J.

Ram Nath — Decree-holder — Applicant.

v.

Ram Sahai — Judgment-debtor — Opposite Party.

Civil Revn. No. 57 of 1930, Decided on 29th May 1930, from order of Small Cause Court Judge, Allahabad, D/. 7th December 1929.

Limitation Act, Art. 182 (5)—Statement by decree-holder that previous application dismissed for default was filed merely to save limitation will not prevent extension of time.

Where a decree-holder's previous application for execution is dismissed for default, and even if he states that it was filed merely with the intention of saving limitation and not with the intention of securing execution, such application will extend time : *A. I. R* 1929 *All.* 625 (*F.B.*), *held applicable.* [P 814 C 2]

Zamirulhaq—for Applicant.

Majid Ali and *Sri Narain Sahai*—for Opposite Party.

Judgment. — A decree-holder filed within limitation an application for execution on 25th July 1927, but he allowed it to be dismissed for default. In April 1928 contention arose in Court between the judgment debtor and the decree-holder in regard to whether by a payment which the judgment-debtor was making the decree was discharged in full or not, and in the course of it the decree-holder had to make a statement, and in the course of that statement he was asked how it was that if he had not been paid anything he had not proceeded with his application for execution of 25th July. He explained his allowing that application to be dismissed for default by saying that he had never really intended it as an application for execution, but had only filed it in order to save limitation. This was a dangerous statement for him to make, as the reported decisions of this Court then stood, for Banerji, J., and myself had held that the mala fides of an application for execution could be considered, and if found would deprive the application of any effect in saving limitation.

On 15th March 1929 a fresh application for execution was filed and the judgment-debtor objected that it was barred by limitation. The learned Judge of the Court of Small Causes accepted this contention, holding that, as the decree-holder had with his own lips in the statement to which I have referred admitted that the application for execution was not put in with any intention to execute it, but had been put in solely for the purpose of saving limitation, the application could not be held to save limitation. I am informed that the learned Judge did have drawn to his attention the Full Bench decision in *Kayasth Co. Ltd.* v. *Sitaram* (1). He does not mention that case or the decision by Banerji, J., and myself which that Full Bench overruled. He applied the test of bona fides or mala fides exactly as it would have been applied if the decision of Banerji, J., and myself had still stood. There is no explanation of why he did not follow the Full Bench decision, but it may be because that decision dealt with a case where the mala fides had to be inferred from the facts of the case, and it is true that Sulaiman in his judgment in that case said that the matter might be different where the decree-holder admitted that his application was not intended as an application for execution.

In principle however there is in my opinion no difference between the two cases. In the one case the inference of what has been described as mala fides in the application for execution is drawn from the facts themselves ; in the other case it arises from the decree-holder's own admission. In principle there is no difference. In practice too, if an attempt were made to give effect to such a difference, it would only mean that a decree-holder would never admit in future that his application was not intended to secure execution, but only to save limitation. The present case therefore must also be governed by the decision of the Full Bench, and allowing this applicatation with costs, I set aside the order of the learned Judge of the Court of Small Causes and direct that

(1) A. I. R. 1929 All. 625=118 I. C. 17 (F.B.)

the case be returned to him for disposal according to law.

M.N./R.K. *Revision allowed.*

A. I. R. 1930 Allahabad 815

SEN, J.

Nathu Ram—Plaintiff—Applicant.

v.

Ganga Bux — Defendant— Opposite Party.

Civil Revn. No. 35 of 1930, Decided on 16th May 1930, from an order of 2nd Sub-Judge, Cawnpore, D/- 2nd January 1930.

Limitation Act, S. 5—Legal duty of Judge to determine question of "sufficient cause" for extension of period—Where review application was prima facie time barred, lower Court's order admitting it without sufficient cause being shown for delay is not only irregular but without jurisdiction —Proceedings consequent on review must be set aside as of no legal effect.

A legal duty is cast upon the Judge to determine the question in the first instance as to whether there is sufficient cause for extending the period of limitation under Limitation Act, S. 5. Where the Court below in an application for review which is prima facie time barred without determining the question of limitation proceeds to admit the application for review, the order passed by the Court is not only irregular but is possibly without jurisdiction. If review as apparently time barred is admitted without cause being shown for the delay the entire proceedings consequent on such review must be set aside as of no legal effect : 29 *I. C.* 975, *Foll.* [P 816 C 1]

Shambhu Nath Seth—for Applicant.

U. S. Bajpai and *G. S. Pathak*—for Opposite Party.

Judgment.—Nathu Ram sued Sunder Lal, Ganga Bakhsh and Ramadheen in the Court of Small Causes at Cawnpore for recovery of Rs. 267. Notice of the claim could not be served upon Ramadheen and he was exempted. Sunder Lal and Ganga Bakhsh in spite of service of summons did not contest the claim and an exparte decree was passed against them on 6th January 1928.

On 5th December 1929, Ganga Bakhsh applied to the Court for setting aside the ex-parte decree under O. 9, R. 13, Civil P. C. Notice of this application was given to the plaintiff and 21st December 1929 was fixed for its disposal. On that date Ganga Bakhsh applied to the Court that as there were technical defects in his application, the same should not be treated as one under O. 9, R. 13, Civil P. C., but should be considered as one for review of judgment under O. 47, R. 1, Civil P. C.

The Court accepted this petition. It may be noticed here that the period of limitation for the review of a judgment by a provincial Court of Small Causes is fifteen days from the date of the decree or order under Art. 161, Lim. Act.

On 21st December 1929 a formal application was put in for extending the period of limitation upon the ground of fraud. It was stated therein that the plaintiff in consideration of the receipt of Rs. 50 paid to him by the defendant had agreed to exempt him from the action and that he had been assuring the defendant from time .to time that he had exempted him from the claim and that there was no outstanding decree against him. The defendant averred that it was not till 2nd January 1920 when the amin appeared with a writ of attachment that he came to know that the decree had been obtained by the plaintiff against him for the entire amount on 6th January 1928. Upon these grounds the defendant prayed that the period for the application for review of judgment be extended.

The original application under O. 9, R. 13, Civil P. C., made on 5th December 1929, was accompanied by an affidavit but not the application dated 21st December 1929. No notice of this application appears to have been given to the plaintiff. The learned Judge of the Court of Small Causes did not initially or even at a subsequent stage of the case determine the question of limitation which was a vital question in the case. It has accepted the review and dismissed the suit against Ganga Bakhsh.

In *Krishna Swami Pani Kondar* v. *Rama Swami Chettiar* (1) the Judicial Committee observed

"that the admission of an appeal after the period of limitation has expired deprives the respondent of a valuable right by putting in peril the finality of the order in his favour

. . . .

Where an appeal had been preferred after the expiry of the period of limitation and was admitted by the Court "subject to any objections which might be taken at the hearing" their Lordships condemned this procedure in the following terms:

(1) A. I. R. 1917 P. C. 179=43 I. C. 493=45 I. A. 25=41 Mad. 412.

"Their Lordships therefore desire to impress on the Courts of India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal."

These observations should apply with equal force where an application for review of judgment has been made beyond the statutory period of limitation.

The period of limitation prescribed in the second schedule must necessarily be arbitrary. The reason for providing a shorter period of limitation for review of judgment in Small Cause Court suits may be two fold : (1) The expediency that the cloud of uncertainty as to the legality or enforcibility of the claim in petty cases ought not to be allowed to continue for a very long time and (2) in cases before the Courts of Small Causes where the record of the pleadings and of the evidence is more or less imperfect the Judge may have greater difficulty in remembering the facts and circumstances of the case after fifteen days than within fifteen days.

Ex facie the application for review of judgment was made beyond time. A legal duty was cast upon the Judge to determine the question in the first instance as to whether there was sufficient cause for extending the period of limitation under S. 5, Lim. Act. Where the Court below in an application for review which is prima facie time barred without determining the question of limitation proceeds to admit the application for review, the order passed by the Court is not only irregular but possibly without jurisdiction. If a review as apparently time barred is admitted without cause being shown for the delay the entire proceedings consequent on such review must be set aside as of no legal effect. This view was taken by this Court in *Janki Prasad* v. *Parmeswar Din Pande* (2) the facts of which bear a close resemblance to the present case.

Where sufficient cause had been shown for enlarging the time, the application for review ought to have been admitted as such. But the Court ought to have addressed itself to the next question namely whether any grounds of review had been made out under O. 47, R. 1, Civil P. C., Review is not sought in this case on the ground of discovery of new and important matter or evidence which after the exercise of due diligence was not available to the applicant when the decree was passed nor on account of any mistake or error apparent on the face of the record. The applicant pleads fraud. It was for the Court below to determine as to whether the alleged fraud was established and constituted "other sufficient reason" within the meaning of O. 47, R. 1, Civil P. C. The Court has not determined the vital issues either in their order of sequence or in any order at all. The points have been left undecided and yet a review has been granted.

If the applicant succeeded in getting over the bar of limitation and also in establishing a case under O. 47, R. 1, Civil P. C., the Court was bound under O. 47, R. 8, Civil P. C., to make a note in the register that the application for review had been granted. The Court then could either at once rehear the case or make an order in regard to the hearing as it thought fit. There are no materials before this Court to determine as to whether the requisition contained in O. 47, R. 8, Civil P. C., had or had not been complied with. The order sheet is silent on this point.

The procedure adopted by the Court below is open to serious criticism on the grounds indicated above. The initial issue as to limitation remains untried. No attempt is made to determine whether any grounds for review have been made out and whether the grounds alleged and proved fulfil the requirements of O. 47, R. 1, Civil P. C. It is manifest therefore that there has been no proper trial and the case must go back.

I allow the application for revision, set aside the order of the Court below and re-mand the case to the Court of Small Causes at Cawnpore with direction to re-admit it under its original number and dispose it of according to law. Costs here and heretofore shall abide the event. Costs in this Court will include fees on the higher scale.

G.P./R.K. *Case remanded.*

(2) [1915] 29 I. C. 975.

* A. I. R. 1930 Allahabad 817

KING, J.

Emperor

v.

Radha Raman Mittra—Accused.

Criminal Reference No. 336 of 1930, Decided on 17th May 1930, made by Addl. Sess. Judge, Meerut, on 14th May 1930.

*** (a) Criminal P. C., S. 540-A—No discretion is given to Judge to dispense with attendance of accused except for incapability of remaining before the Court.**

Under S. 540-A the Court can dispense with the attendance of an accused person who is represented by a pleader and proceed with the trial in his absence only if the Court is satisfied that the accused is incapable of remaining before the Court. No discretion is given to dispense with the attendance of an accused upon any other ground. [P 818 C 1]

(b) Criminal P. C., Ss. 540-A and 537—Wrongly dispensing with presence of accused—Accused represented by counsel and dispensation at request of accused—Irregularity can be cured.

Where the Judge wrongly dispenses with the presence of the accused at his own request, and the accused is represented by a counsel at his own request throughout the trial, the error is not such an illegality as to vitiate the proceedings or sentence against the accused and can be cured under S. 537: *A.I.R.* 1923 *All.* 81, *Rel. on*, [P 818 C 1]

(c) Criminal P. C., S. 438—Scope.

Although it is unusual for a Judge to make a reference regarding the legality of his own order, yet there is nothing in S. 438 to preclude him from doing so. The words "or otherwise" are wide enough to cover such a reference. [P 817 C 2]

Order.—This is a reference by the learned Additional Sessions Judge of Meerut, arising out of the following facts: The trial of P. Spratt and others under S. 121-A, I.P.C., commonly known as the Meerut Conspiracy Case, is proceeding in the Additional Judge's Court. One of the accused in that case, namely R. R. Mittra, applied to the Judge for permission to visit his widowed sister who was lying seriously ill at Calcutta. The Judge forwarded the application to the District Magistrate with the remark that if and when the Local Government or the Government of India should decide to send the applicant, or allow him to go, to his house, then it would be for the Court to consider the question of dispensing with his attendance under S. 540-A, Criminal P. C.

On the afternoon of 26th April 1930 the Judge received, through the usual official channels, an order from the Government of India stating:

"The Government of India agree that Radha Raman Mittra, an undertrial in the Meerut Conspiracy Case, may subject to the orders of the Court be permitted to visit Calcutta to see his sister who is ill, provided the Judge is satisfied that the absence of the accused during trial will not cause any delay or invalidate any part of the proceedings, that the accused is represented by counsel during the whole period of his absence, and he gives an undertaking that he will not attempt to engage in any kind of propaganda during his absence from Meerut."

R. R. Mittra thereupon petitioned the Judge to dispense with his attendance in Court for 15 days, so as to enable him to visit his sister at Calcutta, and gave an undertaking that he would be represented during his absence by two advocates whom he named, and that he would not engage in any kind of propaganda during his absence. The Judge then passed an order on the same date, 26th April 1930, dispensing with the applicant's attendance under S. 540-A, Criminal P. C., for a period of 15 days subject to the conditions above mentioned. Subsequently the Judge had to reconsider the provisions of S. 540-A in connexion with a similar application for leave of absence made by another accused in respect of whom the Government of India had passed a similar order. R. R. Mittra's application had not been opposed by counsel for the Crown, and the Judge by his order of 26th April had allowed the application somewhat hastily. Upon further consideration he felt grave doubt whether that order was strictly justifiable under S. 540-A. If the order were held to be incorrect, then the question arose whether the error or irregularity was curable under S. 537, or whether he should recall the witnesses whose evidence had been recorded in Mittra's absence.

He has therefore made this reference under S. 438 asking for orders on two points:

(1) Whether the order of 26th April is correct; (2) if not, whether it is merely an irregularity curable by S. 537, or whether the witnesses examined in Mittra's absence should be re-examined in his presence.

Although it is unusual for a Judge to make a reference regarding the legality of his own order I see nothing in S. 438 to preclude him from doing so. The words "or otherwise" are wide enough to cover the present reference. In the

peculiar circumstances of this case I think the Judge was fully justified in stating his doubts and making the reference. In any case the High Court is clearly empowered under S. 439 to pass orders on this reference.

On the first point I think it is clear that the order of 26th April was not strictly justifiable under S. 540-A. Under that section the Court can dispense with the attendance of an accused person who is represented by a pleader, and proceed with the trial in his absence, only if the Court is satisfied that the accused "is incapable of remaining before the Court." No discretion is given to dispense with the attendance of an accused upon any other ground. The Judge took the view (in his order of 26th April) that:

"if an accused is sent to Calcutta under the orders of Government . . . . he is incapable of remaining before the Court."

I think this reasoning is fallacious. The Government of India granted permission for the visit to Calcutta "subject to the orders of the Court," i. e., subject to the Court's dispensing with the attendance of the accused under S. 540-A. The Court could only dispense with the attendance of the accused on being satisfied that he was "incapable of remaining before the Court." It is clear that Mittra was not "incapable of remaining before the Court" if the words are construed in their plain and ordinary meaning. I hold therefore that the order of 26th April was not correct.

The next question is whether the error or irregularity in procedure is curable under S. 537. I think the answer is clearly in the affirmative. The Judge was wrong in dispensing with the attendance of the accused, but the error is of minor importance. The accused was represented by counsel, at his own request, throughout his absence. There is no suspicion of any unfairness and it seems hardly possible that the accused could have been prejudiced in any way. The Court has been too indulgent in granting his request, but that is not a matter of which he can justly complain. The error obviously does not go to the whole root of the trial. No vital rule of procedure has been broken. On the principles laid down in *Emperor* v. *Bachu Chaube* (1) the error is not such an illegality as to vitiate the proceedings against Mittra during his absence. I hold that S. 537 is applicable and that the error or irregularity in the proceedings will not vitiate any sentence or order that may be passed against Mittra unless it can be shown that such error or irregularity has in fact occasioned a failure of justice.

It follows that it is unnecessary to recall the witnesses examined in Mittra's absence, and to record their evidence over again in his presence, merely for the purpose of remedying a possible technical defect. The only question is whether the procedure adopted can be shown to have in fact occasioned a failure of justice. It seems prima facie unlikely that such an argument could be seriously advanced, but it is impossible for me to anticipate what points might be raised in support of such an argument. In my opinion it would be advisable for the Judge to question Mittra and his counsel on this point and if they can show that Mittra has in fact been prejudiced in any way by the evidence of any witness being recorded in his absence then that witness should be recalled and examined or cross-examined in his presence.

As Mittra must have availed himself of the concession granted by the order of 26th April it is unnecessary for me formally to set it aside. For the same reason I consider it unnecessary to issue notice to him under S. 439 (2) as my order cannot be held to be made "to the prejudice of the accused." My order regarding the legality of the order of 26th April, passed in his favour is purely of academic interest so far as he is concerned. He has already enjoyed the benefit of that order. The reference is accepted in the terms set forth above.

V.B./R.K. *Reference answered.*

(1) A. I. R. 1923 All. 81=71 I. C. 115=24 Cr. L. J. 67=45 All. 124.

A. I. R. 1930 Allahabad 818

BENNET, J.

Emperor—Applicant.

v.

Gaya Teli—Accused—Opposite Party.

Criminal Ref. No. 342 of 1930, Decided on 11th August 1930, made by Sess. Judge, Gorakhpur, D/- 15th May 1930.

Criminal P. C. (1898), S. 195 (1) (b)—Information to police about murder found false—No proceedings on this information—Order of commitment of informant to Sessions Court by Magistrate—Such com-

mitment should be quashed and Magistrate should be asked to try case under S. 211 (part 1), I. P. C.—Penal Code, S. 211.

The accused had given false information about murder to the police and hence no proceedings were taken on this information. The Magistrate made an order of commitment to the Sessions, as the report related to a capital offence.

Held: that such commitment should be quashed as the case did not go further than a police inquiry on the information. The Magistrate is in such cases competent to try the case of the accused under S. 211 (part 1), Penal Code: 4 *I. C.* 812, *Foll.* [P 819 C 2]

M. Waliullah—for the Crown.

Order.—This is a reference by the learned Sessions Judge of Gorakhpur against the order of commitment by a Magistrate, committing Gaya Teli for trial under S. 211, I.P.C. The accused Gaya Teli made a report in the thana against Gopal Singh and other persons of having murdered his father Krishna. The police found that that report was false, and no proceedings in Court were instituted on it. The commitment order states that as the report relates to a capital offence so the case is exclusively triable by the Court of Sessions and the Magistrate accordingly commits the accused to the Court of Sessions. It has been held by this Court in *Emperor* v. *Jagmohan* (1) that:

"where the offence under S. 211, I. P. C., consists in giving false information to the police and the case does not go further than a police inquiry the offence falls within para. 1, S. 211, I. P. C., and not within para. 2 even though the charge made in the report is one of murder. An offence under para. 2, S. 211, is triable by the Magistrate and the maximum penalty is two years' rigorous imprisonment, and that is a penalty which can be imposed by the Magistrate."

Accordingly following the ruling quoted I quash the commitment to the Sessions Court.

The next matter contained in the letter of reference is that the Magistrate had no jurisdiction to take cognizance of the offence, because the offence had been committed in relation to a proceeding in Court within the meaning of S. 195 (b), and there was no complaint of such Court before the Magistrate, as contemplated by that clause. The Sessions Judge considered therefore that without such a complaint the proceedings of the Magistrate were void. Now the offence charged under S. 211, I. P. C., relates to the making of a false report in the police station on 26th May 1929 against one Gopal Singh. No proceedings in Court took place against Gopal Singh. Accordingly it appears to me that it cannot be said that the offence was committed in relation to a proceeding in Court. Further without an application to the Magistrate it does not appear to me that the Magistrate would have been correct in acting under S. 476, Criminal P. C., and in sending for Gaya Teli for making an inquiry from him in regard to the report which Gaya Teli had made in the thana. It does not appear to me that the language of S. 476 contemplates such action on the part of a Magistrate. But even if the view of the learned Sessions Judge were correct and the case did come under S. 195 (b), then the Magistrate would have been acting correctly under S. 473 (1), because he is apparently the Magistrate who is now in charge of the Sub-Division in succession to the Magistrate before whom the case for murder was the subject of an inquiry, and he has made a commitment to the Sessions Court. But I do not consider that the case does come under S. 195 (1) (b), and accordingly it was correct for the Magistrate to proceed on the report of the prosecuting inspector, bringing to his notice the complaint which Gaya Teli had made to the police. I may note that the ruling *Emperor* v. *Jagmohan* (1) to which the learned Sessions Judge has made a reference was a precisely similar case in which Jagmohan was prosecuted for giving false information to the police, and there was no complaint mentioned under S. 195 (1) (b), but it is stated that the persons accused were charged before the Magistrate with the offence under S. 211, I. P. C.

Accordingly I pass the order in the present case that the commitment is quashed, and I direct that the Magistrate do proceed with the trial of this case under S. 211, I.P.C., part 1, against Gaya Teli according to law.

B.V./R.K. *Order accordingly.*

(1) [1909] 11 Cr. L. J. 54=4 I. C. 812.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

* A. I. R. 1980 Allahabad 820

BENNET, J.

Sheo Pratap Singh and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 355 of 1930, Decided on 4th August 1930, from order of Sess. Judge, Allahabad, D/- 9th July 1929.

*** (a) Criminal P. C. (1898), S. 4 (h)—Complaint and information differentiated.**

The essential difference between a complaint and information is that a Magistrate acts on a complaint because the complainant has asked him to act, but a Magistrate acts on information on his own initiative. In the case of a complaint the Magistrate is asked to prosecute the person named as accused and he has then to decide whether he will accede to the request or not. If he does not, then he must record his reasons under S. 202 (1), and may either make an enquiry himself or direct an inquiry or investigation or dismiss the complaint under S. 203 after recording his reasons. But in the case of receiving information, the Magistrate is not asked by anyone to issue process and if he does not choose to act on the information, he need not record any reason or pass any order. In the case of information there is no complainant to examine on oath. On a complaint the complainant is first examined on oath unless it has been made by a public servant acting in the discharge of his official duty: 1 *C.W.N.* 105; (1899) *A.W.N.* 201; 3 *C.W.N.* 65 and 43 *Mad.* 709, *Ref.* [P 820 C 2]

(b) Criminal P. C. (1898), S. 4 (h)—Complaint defined.

There is nothing in the definition of "complaint" which requires it to be made by the person aggrieved or only in a non-cognizable case: 18 *All.* 465, *Foll.* [P 821 C 1]

(c) Criminal P. C. (1898), S. 190 (1) (a)—Complaint, meaning illustrated—Criminal P. C., S. 4 (h).

A Tahsildar alleged in writing to a Magistrate that three persons named in the document have committed an offence and had made a definite request that they should be tried under the Penal Code. . . .

Held: that such a document sent by the Tahsildar to the Magistrate was a complaint: 12 *C.W.N.* 438; *A.I.R.* 1924 *All.* 190; 26 *I.C.* 148 and 11 *Mad.* 443, *Ref.* [P 822 C 1]

Mahmudullah, *A. M. Khwaja* and *Shyam Kishore*—for Applicants.

M. Walliullah—for the Crown.

Order.—This is an application in revision filed on behalf of three persons, Sheo Pratap Singh, Gaja and Baram Din Singh, who have been convicted by a Magistrate under S. 353, I.P.C., and sentenced to one day's simple imprisonment each and fines of Rs. 100, Rs. 20 and Rs. 25 respectively. An appeal was made to the learned Sessions Judge and dismissed by him, and the application in revision is directed against that appeal. In revision grounds 1 and 3 have been argued. Ground 1 alleges that

"the conviction of the applicants is wholly void and illegal inasmuch as the learned Magistrate omitted to inform the applicants under S. 191, Criminal P. C., of their right to have the case tried by another Court."

This argument assumes that the Magistrate acted under S. 190 (1) (c). The record shows that the Magistrate issued process on receiving a writing from the Tahsildar forwarding a writing from the amin, who stated that the accused had assaulted him in discharge of his duty. The question is whether the Magistrate acted on information under S. 190 (1) (c), or on a complaint under S. 190 (1) (a). If he acted on a complaint, S. 191, Criminal P. C., does not apply. A complaint is defined in S. 4 (h), Criminal P. C., which says:

"Complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer."

"Information" is not defined, but has been held to cover statements of witnesses: *Khudiram Mookerjee* v. *Empress* (1), communications by post: *Karim Bakhsh* v. *Adil Khan* (2), anonymous communications by post *In the matter of Hari Narayan Biswas* (3), and may be received in another capacity than that of Magistrate: *Sundaresam, In re* (4). The essential difference between a complaint and information is that a Magistrate acts on a complaint because the complainant has asked him to act, but a Magistrate acts on information on his own initiative. In the case of a complaint the Magistrate is asked to prosecute the persons named as accused, and he has then to decide whether he will accede to the request, or not. If he does not, then he must record his reasons under S. 202 (1), Criminal P. C., and may either make an enquiry himself, or direct an enquiry or investigation, or dismiss the complaint under S. 203, Criminal P. C., after recording his reasons. But in the case of receiving information, the Magistrate is not asked by anyone to issue process, and if he does not choose to act on the

(1) [1897] 1 C.W.N. 105.
(2) [1899] A.W.N. 201.
(3) [1899] 3 C.W.N. 65.
(4) [1920] 43 Mad. 709=21 Cr.L.J. 346=55 I.C. 684.

information, he need not record any reasons or pass any order.

A Magistrate acting under S. 190 (1) (c) upon information or upon his own knowledge or suspicion, acts in each of these cases of his own accord and initiative. It is for this reason that S. 191 provides that he must inform the accused that the accused may be tried by another Court. In the case of information there is no complainant to examine on oath. On a complaint the complainant is first examined on oath unless, as in the present case, the complaint has been made by a public servant acting in the discharge of his official duty: S. 200 (aa), Criminal P. C. Now the Tahsildar wrote a document in English on 12th March 1929 addressed to the S. D. M., that is, the Sub-Divisional Magistrate. In that document he states after setting forth certain facts:

"Sheo Pratap Singh and his servants have committed an offence described in S. 353, I.P.C. It is therefore requested that the three persons named overleaf be tried under the said section."

We have here in this document of the Tahsildar the allegation in writing to the Magistrate that the three persons named had committed an offence, and a definite request that they should be tried under S. 353, I.P.C. Accordingly all the ingredients of a complaint, as defined under S. 4 (h), Criminal P. C., are present. The document therefore is clearly a complaint. Some argument was made by the learned counsel for the applicants on the distinction between a complaint and information. He alleged, firstly, that a complaint can only be made in a non-cognizable case. There is no authority in the Criminal Procedure Code for this proposition. Secondly, he alleged that a complaint must be made by the person who is aggrieved. The contrary has been held in *Farzand Ali* v. *Hanuman Prasad* (5). There is nothing in the definition of "complaint" which requires it to be made by the person aggrieved. The third point was that a complaint must bear a court-fee stamp. It is not shown that a complaint by an official in an official capacity requires a court-fee stamp. The learned counsel then referred to a ruling of the Punjab Chief Court in 1913, reported in *Makhan Singh* v. *Gunner Jepson* (6). In that case the Cantonment Magistrate wrote a letter to an Assistant Commissioner suggesting that a person should be proceeded against for using abusive language to a gunner. It was held that the Magistrate addressed, in taking action, took cognizance under S. 191 (1) (c). But that case is distinguishable from the present case, because the Cantonment Magistrate had no official connexion with the gunner. Consequently in writing to the Assistant Commissioner the Cantonment Magistrate must have been acting in his private capacity and not in his official capacity.

The next case to which reference is made is reported in *Bansi Lal* v. *Emperor* (7). In that case an amin reported to the Collector, Mr. Foley, that he had erected eight boundary pillars on the western side of the village, and when he had gone to take his dinner the accused with 20 or 25 men went to the spot, destroyed the pillar and took away the materials with them. On this Mr. Foley passed the following order:

"See under what section Bansi Lal, Dasrathi Lal and their servants can be prosecuted, and prosecute them accordingly. Put up before Mr. Deb for the issue of necessary orders."

The case coming up before Mr. Deb he made the following order: "Summon Bansi Lal under S. 434." The accused was then put on trial before a Deputy Magistrate and convicted under Ss. 379 and 434, I.P.C., and Mr. Deb dealt with the appeal as District Magistrate. The Calcutta High Court held:

"It is now argued by the District Magistrate, Mr. Foley, in his letter showing cause that the amin filed a written complaint to him. This is contrary to the view taken by the Deputy Magistrate in his judgment, and it would not seem to us that the written report of the amin was a complaint, nor was it treated by Mr. Foley as a complaint but rather dealt with by him as Collector, as the Deputy Magistrate says it was, and hence Mr. Deb must be regarded as taking cognizance of the case under S. 190 (1) (c). So before hearing the appeal when he became District Magistrate he should have followed the procedure laid down by S. 191, because an appeal is part of the trial of an offence."

This passage shows that the Court considered that it would have been open to Mr. Foley to deal with the complaint as District Magistrate, but that Mr. Foley in fact did deal with the complaint as Collector. Their Lordships commenting on the order of Mr. Foley observed:

(5) [1896] 18 All. 465=(1896) A.W.N. 149.
(6) [1914] 15 Cr.L.J. 261=23 I.C. 469.
(7) [1903] 12 C.W.N. 438=7 Cr.L.J. 224.

"This is not the order which would be passed on a written complaint under S. 202 made to a Magistrate."

Therefore, so far as the ruling goes, it is authority for the proposition that a report by an amin to the head of the district might be treated by him as a criminal complaint, but that in the particular case before the Court the head of the district treated it in his capacity of Collector and not in his capacity of District Magistrate.

I may also refer to *Sarju Prasad* v. *Emperor* (8), in which there was the report of a Magistrate to the District Magistrate that an offence under S. 477, I.P.C., had been committed. This report was made after the Magistrate had ceased to exercise jurisdiction in the case, which had terminated. It was held that this was a complaint. In *Raja Ram* v. *Emperor* (9), a report by a District Judge was held to be a complaint. In *Queen-Empress* v. *Monu* (10) a report by a revenue officer to a Magistrate was held to be a complaint. I consider there is ample authority from the definition in the Code and from the rulings to which I have referred for the proposition that the document sent by the Tahsildar to the Magistrate in the present case was a complaint. Accordingly it was not necessary for the Magistrate to ask the accused under S. 191, Criminal P. C., whether they desired their case to be tried by another Magistrate. This disposes of the first ground of revision. The third ground of revision was that S. 353, I.P.C., has no direct application to the facts of the present case. In support of this the learned counsel referred only to the report of the amin. That report states that certain cattle were attached by the amin and that they were rescued by force (*ba zor chhin lia*). Evidence was given on the point and the finding of the Magistrate is:

"Baram Din Singh gave the peon, Mehdi Husain, a push and snatched away the string of the attached buffalo which he (Mehdi Husain) was holding. Gaja stopped the cattle from in front."

In the third definition of S. 349 force is said to be used

"by inducing any animal to move, to change its motion, or to cease to move."

In the present case therefore, when the accused caused the animals to cease to move, they were using force as in the definition of S. 349, I.P.C. I consider therefore that S. 353, I.P.C., does apply to the facts found by the lower Courts. In the result I dismiss the application in revision.

B.V./R.K. *Revision dismissed.*

(8) A.I.R. 1924 All. 190=81 I.C. 595=25 Cr. L.J. 947.
(9) [1914] 15 Cr.L.J. 700=26 I.C. 148.
(10) [1888] 11 Mad. 443=2 Weir. 238.

A. I. R. 1930 Allahabad 822

MUKERJI AND BOYS, JJ.

Acharji Ahir—Plaintiff—Appellant.

v.

Harai Ahir and *others*—Defendants—Respondents.

Second Appeal No. 1703 of 1928, Decided on 13th May 1930, from decree of 2nd Addl. Sub-Judge, Basti, D/- 16th May 1928.

Hindu Law—Joint family — Tenancy acquired while family is joint — Burden of proving that it was self-acquired is on member who asserts it — Landlord and Tenant.

The ordinary rule of Hindu law, that properties acquired while the family was joint and with the help of the ancestral or joint family property should be regarded as joint family property, and that the burden of proof that it was self-acquired property of a single member should be on that member applies to a case where the property in question is a tenancy: 40 *All.* 314, *Dist.* 46 *I. C.* 387, *Rel. on.* [P 823 C 2]

Harnandan Prasad—for Appellant.

N. Upadhya—for Respondents.

Mukerji, J.—This appeal raises a question of burden of proof in the following circumstances:

The plaintiff, who is the appellant before us, brought this suit, out of which this appeal has arisen, for a declaration of title, and, in the alternative, for possession over three kinds of land. We are no longer concerned with two kinds, but are concerned only with the third kind. It was an occupancy holding consisting of several plots of land recorded in the revenue papers in the name of defendant 1, Gopal. The plaintiff's case was that when these lands were acquired in the name of Gopal the family was a joint one and each and every member of the family, including the plaintiff, who is Gopal's brother's son, had a share in it. The plaintiff further says that there was a partition among the members of the family and certain plots were given to the plaintiff, but because of his pos-

session he was recorded only as a sub-tenant. The result was that Gopal was able to eject plaintiff from those plots. We are no longer concerned with those plots, but the plaintiff's case remains that the occupancy holding now in question was a part and parcel of the joint family property.

The defence was that the occupancy holding was Gopal's own, and the plaintiff had nothing to do with the property. There was a plea of limitation also. The Court of first instance found in plaintiff's favour holding that the tenancy having been acquired while the family was joint it must be treated as a part of the joint family holding. The learned Judge also found that the plaintiff was participating in the family property, and it was not true, as the defendant alleged, that the suit was barred by limitation owing to the plaintiff having lost possession.

The defendant Gopal appealed, and the learned Subordinate Judge, who heard the appeal, thought that the ordinary presumption of Hindu law did not apply where a tenancy was concerned. He put the burden of proof on the plaintiff to show that the tenancy held in the name of Gopal had not been acquired by Gopal for his own purposes, and that Gopal had acquired it not only for his own benefit but for the benefit of the entire family. Starting with this point of view, the learned Judge discussed the evidence and came to the conclusion that the plaintiff had failed to discharge the burden of proof that lay on him.

In this Court it has been contended on behalf of the plaintiff, who is the appellant, that the learned Judge of the lower appellate Court was wrong in putting the burden of proof on the plaintiff. We are of opinion that the learned Judge in the Court below was really wrong. He has relied on the case of *Kallu* v. *Sital* (1). In that case, on a remand by the High Court, the finding was that the letting of the land was to one Matola, and not Matola as representing the joint family. On that finding the learned Judges of this Court came to the conclusion that Matola was the tenant of the land and not the family, and that the family did not become the tenant simply because Matola let the other members share in the cultivation or to receive the profits thereof. This case is clearly distinguishable from the case before us. We may point out that in *Bhup Singh* v. *Jai Ram* (2), two learned Judges of this Court clearly recognized the facts that it is possible for a joint family to hold a tenancy although the same may be recorded in the name of a single member. The learned Judges also pointed out that in such a case S. 22, Tenancy Act, would not apply.

We cannot see why the ordinary rule of Hindu law, that properties acquired while the family was joint and with the help of the ancestral or joint family property should be regarded as joint family property, and that the burden of proof that it was self-acquired property of a single member should be on that member, should not be applied to a case where the property in question is a tenancy. The tenancy law itself does not make any such exception, as already shown in the two cases quoted above. The new Tenancy Act, we may point out simply as a matter of history, by enacting S. 26, recognized the correctness of the ruling in *Kallu* v. *Sital* (1), and enacted that where the contract is in favour of a single person, that contract will not make the property a joint family property where the contracting party is a member of such a family. It also enacted that where persons possessing a tenant's interest are joint in estate they shall be deemed, for purposes of succession, to be tenants in common. Thus the Act of 1926 also recognized the possibility of a joint family holding lands as an occupancy tenant, though it modified the rule of succession for the future.

In the result, we think that the case should be retried by the learned appellate Judge. We set aside the decree of the lower appellate Court and remand the appeal for retrial. The appeal will be readmitted on its original number in the register of appeals and will be decided having regard to the remarks contained in our judgment. Costs here and hitherto will abide the result.

S.N./R.K. *Case remanded.*

(1) [1913] 40 All. 314=44 I. C. 717.

(2) [1918] 46 I. C. 867.

A I. R. 1930 Allahabad 824

SEN AND NIAMATULLAH, JJ.

Parmeshwari Das—Plaintiff—Appellant.

v.

Lachhman Prasad—Defendant—Respondent.

Second Appeal No. 2326 of 1927, Decided on 27th May 1930, from decree of Small Cause Court Judge, Allahabad, D/- 13th September 1927.

Contract—Construction—Plaintiff agreeing to construct defendant's house and provide for funds approximately Rs. 2,000 —Plaintiff's money repayable gradually in ten years—House hypothecated to plaintiff to secure repayment — No provision made in case expenditure exceeded Rs. 2,000— On accounts being taken defendant was found liable for Rs. 1,400 over and above Rs. 2,000 — Defendant executing sarkhat for Rs. 1,400—Plaintiff suing on basis of this sarkhat prior to expiry of ten years of original agreement — As sarkhat was contract for distinct and separate sum, suit was not premature—Civil P. C., O. 2, R. 2.

Plaintiff had entered into a contract with the defendant agreeing to reconstruct defendant's house. The plaintiff was to provide the funds, approximately Rs. 2,000, for construction which the defendant was to repay with interest in the course of ten years. The house was hypothecated to plaintiff to secure repayment. No provision was made in the agreement in case the expenditure exceeds Rs. 2,000. There was no indication that the condition to repay by gradual instalments was to apply to such excess expenditure. On taking accounts it was discovered that plaintiff was entitled to recover from defendant Rs. 1,400 over and above Rs. 2,000. Defendant then executed a sarkhat for Rs. 1,400 with interest. The plaintiff brought a suit on the basis of the sarkhat to recover Rs. 1,400 with interest, before the ten years of the original agreement had expired.

Held: that the sarkhat was for a sum distinct and apart from the original agreement. Hence the suit was not premature although filed prior to the expiry of ten yeàrs.

[P 825 C 2]

K. Verma—for Appellant.

Harnandan Prasad, Ram Newas Shukla and *Nirmal Chandra Das*—for Respondent.

Sen, J.—This is an appeal by the plaintiff and arises out of a suit for recovery of Rs. 1,400 principal and Rs. 141 interest on a sarkhat executed by the defendant in plaintiff's favour on 1st July 1923. The suit was instituted on 1st July 1926. The defendant contested the suit chiefly upon the ground that the suit was premature, the claim being unenforceable for ten years, which had not expired. He also raised a few minor pleas which are not material to this appeal. The first Court repelled the defence and decreed the suit. The lower appellate Court held that the suit was premature and reversed the decree of the trial Court on this ground alone. The other pleas raised in the defendant's appeal have not been decided so far.

Lachhman Prasad defendant owned a house in mohalla Johntonganj in the city of Allahabad. This house was in a dilapidated condition. Under an indenture between the parties dated 19th June 1919 which was duly executed and registered, Lala Parmeshwari Das plaintiff agreed to rebuild the house in question upon the following terms:

(1) The house was to be constructed at an approximate outlay of Rs.2,000. (2) Lala Parmeshwari Das plaintiff was to provide the funds. The interest agreed upon was ten annas per cent per mensem. (3) The house was to remain in the occupation of the plaintiff as a tenant for the period of ten years certain and the plaintiff was not liable to ejectment during this tenure unless upon the happening of certain contingencies. (4) The house was to stand hypothecated to Parmeshwari Das to secure the payment of Rs. 2,000 together with interest at the stipulated rate. (5) The rent agreed was Rs. 50 per mensem. Out of this sum, Lala Parmeshwari Das was to pay Rs. 20 to the defendant and appropriate to himself Rs. 30 in part payment of the principal and interest due on the hypothecation bond. (6) The money due to the plaintiff under this contract was payable gradually in ten years.

There are no indications in the document that the parties intended that if any sums in excess of Rs. 2,000 were spent by the plaintiff towards the construction of the house, the conditions agreed upon with reference to Rs. 2,000 should also attach to those sums. There was no stipulation in the document that such sums if spent were recoverable by gradual payments made by the defendant during ten years. No interest for such amounts was provided for in the document; nor was it provided therein that the house was to stand hypothecated in security for the amounts spent by the plaintiff in excess of Rs. 2,000.

The construction of the house lasted from 18th July 1919 to 4th July 1920.

An account was taken on 1st July 1923, and it appeared that the plaintiff had spent Rs. 3,760-4-3 towards the construction of this house. Rs. 1,056-8-6 were due to him for interest. Credit was given to the defendant for Rs. 1,416-12-9. The balance due to the plaintiff was Rs. 3,400. Out of this sum Rs. 2,000 was secured to the plaintiff under the hypothecation bond, dated 19th June 1919. The defendant was liable to the plaintiff for the balance of Rs. 1,400 which was an unsecured debt.

The details of the account are clearly set out in paras. 3, 4 and 5 of the plaint. The defendant does not deny the correctness of these figures and indeed endorses their correctness: vide para. 13 of the written statement. On 1st July 1923, the defendant executed the sarkhat in suit for Rs. 1,400 with interest at the rate of ten annas per cent per mensem.

We have already noticed that there was no stipulation in the hypothecation bond, dated 19th June 1919, that if the plaintiff had to spend any amount in excess of Rs. 2,000 the said amount would be recoverable by gradual payments made by the defendant in the course of ten years. The terms of the sarkhat in suit need not be reproduced. It contains an unconditional promise to pay and is unhampered by any limitation of time. The liability of defendant for this sum of Rs. 1,400 is outside the mortgage contract. The sarkhat is an independent contract, complete in all its parts, and no portion of it can be supplemented by the terms of the mortgage contract. Where the terms of a contract have been reduced to the form of a document, no evidence of any oral agreement or statement was admissible as between the parties to such an instrument for the purpose of contradicting, varying, adding to or subtracting from its terms. This elementary rule of evidence has received statutory recognition in S. 92, Evidence Act. Where a suit had been instituted on a promissory note payable on demand and the defendant contended that it had been agreed between the parties that the plaintiff should not bring any suit to recover the amount until the happening of a certain contingency and that as such event had not happened the suit was premature, the contention was overruled and it was held that the defence put forward could not be entertained under S. 92, Evidence Act: *Vishnu Ram Chandra* v. *Ganesh Krishna* (1); *Ramjiwan* v. *Aghorenath* (2). A similar view has been taken by this Court : *In re Srecram* v. *Sobha Ram Gopal Rai* (3).

The lower appellate Court has gone off the rails completely in holding

"that the sarkhat sued upon is an integral part of the agreement entered into between the parties in 1919."

There is nothing in the sarkhat to show that it is a part of the agreement of the year 1919. The agreement related to a debt of Rs. 2,000. This debt was a secured debt. It was payable in ten years. The sarkhat is for a sum distinct and apart from the agreement. It is an unsecured debt. It is unfettered by any condition as to the time or method of payment. No one disputes that Rs. 2,000 secured by the registered instrument was payable in ten years. The learned Judge of the Small Cause Court does not explain how that stipulation can be made to apply to the amount claimed. The judgment closes with the following observation:

"The sarkhat sued upon is only an indication of the amount due by the defendant at a particular point of time. It is nothing else nor can it be construed otherwise."

Of course, the sarkhat indicates the amount of liability by the defendant to the plaintiff on 1st July 1923. But how does that fact justify the conclusion that the amount "can only be realized from the defendant after the lapse of ten years?" We find it impossible to follow the reasoning of the learned Judge.

On a true construction of the document, we have come to the conclusion that the sarkhat is a self-contained contract and the plaintiff's right to enforce payment is not controlled by any condition as to the time of payment. The suit therefore is not premature. We allow the appeal, set aside the decree of the lower appellate Court and remand the case to that Court with directions to readmit the appeal under its original number and dispose it of according to law. The appellant is

(1) A. I. R. 1921 Bom. 449=63 I. C. 673=45 Bom. 1155.
(2) [1898] 25 Cal. 401=2 C. W. N. 188.
(3) A. I. R. 1922 All. 218=67 I. C. 513=44 All. 521.

entitled to the costs of this appeal, including counsel's fee on the higher scale.

S.N./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 826 (1)

SEN AND NIAMATULLAH, JJ.

Ali Husain and *others*—Defendants—Appellants.

v.

Mohammad Nazir Ali and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 2038 of 1927, Decided on 8th May 1930, from decree of Addl. Sub-Judge, Jaunpur, D/- 2nd July 1927.

Contract Act, S. 23—Embezzlement by person in position of trust—Amount embezzled is civil debt and contract to pay it is not obnoxious to S. 23.

Where a person in a position of trust embezzles sums of money belonging to his master he exposes himself to the risk of a criminal prosecution, but he also remains under a civil liability to his master. The amount embezzled is a debt which he is responsible to pay, and if the man to whom such a civil debt is due takes security for that amount from his debtor, even though the debt arises out of a criminal offence, the agreement to pay the amount is enforcible in law and is not obnoxious to the provisions of S. 23: 11 *Bom.* 566, *Ref.*

[P 826 C 2]

S. N. Mukerji and *S. P. Sinha*—for Appellants.

Mahmoodullah—for Respondents.

Sen, J.—This is an appeal by the defendants and arises out of a suit for sale in enforcement of a mortgage, dated 18th March 1922, executed by Ali Husain, Waris Husain and Muhammad Husain for Rs. 1,500 in favour of Syed Nasir Ali Khan Bahadur Zulqadar.

Ali Husain Khan, who was a treasurer and in the employ of the plaintiff, appears to have misappropriated a sum of Rs. 2,209-12-5 belonging to the plaintiff. The latter dispensed with his services and instituted a criminal complaint against him on the charge of breach of trust. During the pendency of the said complaint the bond in suit was executed for a sum of Rupees 1,500 without interest, the plaintiff having forgone his claim as regards Rs. 709-12-5.

The suit was contested on the ground that the bond was executed in consideration of an agreement to compound the criminal case and offended against the provisions of S. 23, Contract Act.

The Court of first instance gave effect to this plea and dismissed the suit. The lower appellate Court, upon a consideration of the entire evidence, came to the conclusion that:

"the withdrawal of the prosecution was not the consideration for the agreement and therefore the agreement has not been rendered void by virtue of S. 23, Contract Act."

Where a person in a position of trust embezzles sums of money belonging to his master he exposes himself to the risk of criminal prosecution, but he also remains under a civil liability to his master. The amount embezzled is a debt which he is responsible to pay. Where a man to whom a civil debt is due takes security for that amount from his debtor, even though the debt arises out of a criminal offence, the agreement to pay the amount is enforcible in law and is not obnoxious to the provisions S. 23, Contract Act: see *Kessowji Tulsidas* v. *Hurjiwan Mulji* (1). We are clearly of opinion that the decree passed by the lower appellate Court is good in law and ought not to be interfered with in second appeal. We dismiss this appeal with costs, including in this Court-fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

(1) [1887] 11 Bom. 566.

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* A. I. R. 1930 Allahabad 826 (2)

SULAIMAN AND KENDALL, JJ.

Mt. Srimati—Judgment-debtor—Appellant.

v.

Sahu Nand Kishore—Decree-holder—Respondent.

Execution First Appeal No. 168 of 1928, Decided on 12th March 1930, against decree of Sub-Judge, Moradabad, D/- 28th January 1928.

*** (a) Transfer of Property Act, S. 75—Rights of subsequent mortgagee on property sold in execution of mortgage decree, to which subsequent mortgagee is party stated.**

When a property is sold in execution of a decree obtained on the basis of a prior mortgage in a suit to which the subsequent mortgagees are parties, the only right of the subsequent mortgagees is to redeem the prior mortgage in time. If they fail to do so and the property is allowed to be sold, it is sold free from all subsequent incumbrances, with the result that the auction-purchaser acquires absolute title thereto without any right in the subsequent mortgagees to enforce their claim as against him. [P 827 C 2]

(b) Decree—Execution—Judgment-debtor cannot put forward paramount title in execution department.

A judgment-debtor allowing a decree to go adversely against him cannot be allowed to

put forward his paramount title in the execution department and claim that a property which had been ordered to be sold under a decree passed against him is property which he had acquired under an independent title and should not be sold: 2 *Pat. L. J.* 219, *Ref.*

[P 830 C 1]

P. L. Banerji, *Iqbal Ahmad* and *Shabd Saran*—for Appellant.

N. Upadhiya and *N. P. Asthana*—for Respondent.

Sulaiman, J.—This is an appeal by a judgment-debtor Mt. Srimati from an order in execution dismissing her objections in execution proceedings arising out of the following facts: As there have been three separate litigations it would be convenient to give the dates of each separately. On 18th February 1904 Khalilurrahman executed a mortgage deed in favour of Kumar Sen, Bansidhar and Jagannath of 5 biswas of Shahpur Bhusauri along with other properties. On 23rd August 1915 a suit to enforce this mortgage was brought by the mortgagees, impleading the representatives of the mortgagor as well as Nand Kishore, the present respondent, as subsequent mortgagee (the latter held a mortgage dated 4th June 1910 to be mentioned hereafter). Nand Kishore did not contest the priority of the plaintiffs' claim and a preliminary decree was passed on 28th February 1917. A final decree was passed on 13th January 1917. None of the defendants including Nand Kishor paid the mortgage-money and the 5 biswas share was sold at auction on 23rd July 1917 and purchased by Kumar Sen and Bansidhar according to the sale certificate filed. Jagannath apparently had died, and it is suggested on behalf of the appellant that under some private partition his rights had passed on to Kumar Sen and Bansidhar.

On 18th February 1904 another mortgage deed was executed by the same mortgagors in favour of Narayan Das, Ganpat Rai and Chhedan Lal of another 5 biswas share in the same village Shahpur Bhusauri. A suit to enforce this mortgage was filed on 19th August 1915 by Ganpat Rai and Chhedan Lal, impleading the heirs of Narayan Das and also impleading Nand Kishore, the present respondent. It is suggested on behalf of the appellant that the rights and interest of Narayan Das had passed to Ganpat Rai and Chhedan Lal under some private partition. Nand Kishore did not challenge the priority of this mortgage and a preliminary decree was passed on 26th May 1916. A final decree was then passed on 26th September 1916. None of the defendants including Nand Kishore paid up the mortgage money and the 5 biswas share was sold at auction on 20th September 1917 and purchased by Kumar Sen for Bansidhar according to the sale certificate. It may be mentioned in this connexion that subsequently on 31st October 1917 Nand Kishore applied to have the sale set aside, but his application was dismissed and the sale was confirmed.

If these facts had stood by themselves there would have been no doubt that the failure of Nand Kishore, the subsequent transferee, to pay the amount of these mortgage-decrees and the auction sales, in consequence would have passed absolute title to the auction purchasers free from all subsequent incumbrances. When a property is sold in execution of a decree obtained on the basis of a prior mortgage in a suit to which the subsequent mortgagees are parties, the only right of the subsequent mortgagees is to redeem the prior mortgage in time. If they fail to do so and the property is allowed to be sold, it is sold free from all subsequent incumbrances, with the result that the auction purchaser acquires absolute title thereto without any right in the subsequent mortgagees to enforce their claim as against him.

The facts however did not end in this way. As mentioned above, Nand Kishore had obtained a mortgage deed dated 4th June 1910 from the same mortgagors covering the entire 20 biswas of Shahpur, that is including the 5 biswas in each of the previous mortgagees. On 4th September 1914 (even before the suits brought by the prior mortgagees) he sued to enforce his mortgage and impleaded Bansidhar Chhedan Lal, Narayan Das and Ganpat Rai, i.e., one out of the three mortgagees of the first mortgage of 1904 and all the three mortgagees of the second mortgage of 1904. In his plaint he did not expressly refer to these mortgages of 1904 and did not in express language say that they did not exist or that they had no priority over his mortgage of 1910. But he did assert that he had priority and that the other defendants were all subsequent

transferees or mere attaching creditors. In this way he did not impliedly admit the priority of their claims although he did not at the same time in clear language repudiate it. Bansidhar filed one written statement setting up his mortgage of 18th February 1904 as a prior claim. Chhedan Lal filed another written statement setting up his mortgage of 1904 as a prior claim, and Narayan Das and Ganpat Rai filed a joint written statement raising the same plea. Thus, two separate issues were framed by the trial Court as to the priority of these two mortgages.

It is a fact that neither Kumar Sen nor Jagannath was impleaded by Nand Kishore in his suit. It has been suggested on behalf of the respondent that either they were all members of the same joint family or the rights and interest of all had passed to Bansidhar. Ganpat Rai died during the pendency of the suit and his son Chhedan Lal was brought on the record in his place. While Nand Kishore's suit on the basis of the subsequent mortgage was pending, the auction purchases of 1917 in execution of the prior mortgagee's decrees to which Nand Kishore was a party took place. After those auction sales Kumar Sen and Bansidhar transferred the 10 biswas share purchased by them at the auction sales to Chhedan Lal on 7th May 1918. But owing to the gross negligence of Chhedan Lal neither the original deeds of 1904 nor copies of the decrees of 1916 and 1917 nor of the sale certificates of 1917 were produced in the trial. The learned Subordinate Judge dismissed the suit of Nand Kishore on 31st October 1918, but at the same time recorded a finding that the mortgages of 1904 had not been duly proved.

An appeal was preferred by Nand Kishore to this High Court in which he impleaded the same parties including Chhedan Lal. Ganpat Rai's son Chandu Lal died during the pendency of the appeal and the appeal abated as against him. Chhedan Lal also died and his daughter Mt. Srimati was brought on the record as his legal representative. Neither Chhedan Lal nor Bansidhar and others appeared before the High Court and the appeal was disposed of ex parte as against him. The learned Judges held that the plaintiff's suit should be decreed, and also directed that a statement showing the relative priorities of the various claims should be prepared and attached to the decree. They maintained the priority mentioned in the judgment of the trial Court. The appeal was decreed on 26th March 1925. A decree was prepared by this High Court in which the priorities of the various claims were set forth in detail and there was a specific recital to the effect that the two mortgages of 18th February 1904 shall have no priority as against the mortgage of Nand Kishore. Item 4 in the decree referred to the first mortgage of 1904 and items 5 and 6 referred to the second mortgage of 1904 as against Chandu Lal and Mt. Srimati. The appeal had abated against Chandu Lal and the recital as against his name was subsequently struck out. A final decree was passed by the Court below on 10th March 1927 after notice to the parties concerned and without any objection having been raised on their behalf. A belated attempt was then made on behalf of Mt. Srimati to get the decree amended by striking out the words "that the mortgages of 1904 shall not have priority against Nand Kishore's mortgage." This application was dismissed.

Nand Kishore then applied for execution of his decree and objections were filed on behalf of Mt. Srimati on the ground that Bansidhar had made purchases in execution of a prior mortgage decree from whom the objector derived title and that therefore she had a paramount claim and her share should not be sold.

The learned Subordinate Judge has dismissed the objections by a summary order without giving any facts and without any indication that he had appreciated the complicated nature of the previous history of this litigation. He has taken shelter under the order of this High Court dismissing the application for amendment which is not directly in point. It is therefore not at all clear what points were actually urged before him, or whether he has overlooked them, except as appears from the written objections filed in the Court below.

The facts stated above have been given to us by the learned counsel for the parties and the judgment has been dictated in their presence. We assume them to be accurate.

It will be convenient to consider whether Mt. Srimati, as a representative of the mortgagees who were parties to the suit brought by Nand Kishore, is now entitled to object to the execution of the decree. Nand Kishore had impleaded Bansidhar, one of the three mortgagees under the first deed, and all the three mortgagees under the second deed. The appeal abated against the heir of Ganpat Rai after Bansidhar had purchased the property in execution of Ganpat Rai's decrees. It is therefore clear that Ganpat Rai's heir, viz. Chandu Lal, was a mere pro forma respondent and his death does not affect the rights of the parties. Now both Bansidhar and Chhedan Lal had set up their respective mortgages as defence to the suit, and although these mortgages had not in express language been challenged in the plaint of Nand Kishore the Court framed two clear and specific issues as to their alleged priority. For some reason best known to the parties concerned, they apparently took no steps to substantiate the plea apart from having raised it in the written statements. As mentioned above no materials were placed before the Subordinate Judge trying Nand Kishore's suit which would either formally prove the mortgages of 1904 or show that decrees had been obtained on their basis, or that auction purchases had been duly effected and the right of redemption of Nand Kishore had been extinguished.

In the absence of such materials the Court below and the High Court could only hold that the priority of these two mortgages was not established. The decree which was passed by the High Court clearly contained that recital. No doubt the priority of the first mortgage of 1904 was raised by Bansidhar and not Chhedan Lal, whereas the priority of the second mortgage was raised by Chhedan Lal and his co-mortgagees and not by Bansidhar, but when issues were framed all the parties to the suit had full knowledge that the question was in controversy. Owing to the negligence of the defendants concerned the Court held that the priority had not been established. It seems to us that the mere fact that Bansidhar had in the meantime purchased the mortgaged properties at auction or that he along with Kumar Sen (not a party to the suit, had transferred the same to Chhedan Lal, who was a party to Nand Kishore's suit, cannot give higher rights to Chhedan Lal so as to get rid of the effect of the decree passed against Chhedan Lal. The priority of the claims was in dispute, the property had been sought to be sold in that suit, and it was the clear duty of Chhedan Lal to see that no adverse decree was passed against him. He failed to take necessary steps to place sufficient materials before the trial Court or the High Court with the consequence that a decree was allowed to be passed against him for the sale of 10 biswas which had been previously mortgaged in 1904 and which had been purchased at auction in execution of the prior mortgagee's decrees.

Chhedan Lal's representative cannot now be allowed to go behind that decree in the execution department and urge that the property which the decree orders to be sold should not be sold. It was the duty of her predecessors, Chhedan Lal and Bansidhar, to raise such a plea in the suit itself which they failed to do. We wish to express no opinion whether such a plea can be raised in a separate suit.

As regards the interest acquired by Mt. Srimati as a representative of Kumar Sen, one of the three mortgagees under the first mortgage of 1904, the point urged before us on behalf of the appellant is that Kumar Sen not having been impleaded by Nand Kishore in his suit his prior claim was not called into question and was not the subject of controversy in that suit, and that therefore the mortgage decree obtained by Kumar Sen and the auction purchase in execution of it remained wholly unaffected by the decree obtained by Nand Kishore. Now, if it were absolutely clear that Kumar Sen had an independent and separate right of his own under the first mortgage, and if it had so happened that a third party had purchased property at auction in execution of his decree, there would have been no doubt that his rights would not have been in any way affected by the decree passed against Nand Kishore. The position is however complicated because this point was not raised in the written objections filed in the Court below where there was an implied admission that the purchase had been made by Bansidhar with

out mentioning Kumar Sen, and it is suggested on behalf of the respondent that had that point been raised he would have been in a position to show that Kumar Sen was a mere benamidar for Bansidhar, or that he was a member of the joint Hindu family, or that by private partition his right and interest had passed to Bansidhar. The point not having been raised in the Court below they had no opportunity to meet this case.

It is also urged on their behalf that a judgment-debtor cannot be allowed to put forward her paramount title in the execution department and claim that a property which had been ordered to be sold under a decree passed against her is property which she had acquired under an independent title and should not be sold. The learned counsel for the respondent has also drawn our attention to the case of *Sham Lal Sahu* v. *Amar Prasad Chaudhury* (1), which is no doubt a somewhat analogous case. In that case a judgment-debtor who was a subsequent mortgagee was not to be entitled to plead in the execution department his right under an auction purchase for arrears of revenue which had priority over all incumbrances, and it was held that his remedy was by a separate suit. We think that the execution Court cannot go behind the decree and allow the judgment-debtor to put up a paramount title in the execution department.

If we were to decide this question finally ourselves we would have had to send down an issue for detemination by the Court below with liberty to both the parties to adduce fresh evidence. But we do not propose to do so because we accept the contention urged on behalf of Nand Kishore that such a plea cannot be raised in these execution proceedings.

On the face of it it looks as if it is a hard case for Mt. Srimati, but on the other hand it has been suggeted on behalf of the respondent that under his mortgage of 1910 he had paid off certain earlier titles. In any case if she has suffered it is due entirely to the gross negligence of her own predecessor.

The result is that we dismiss the appeal and direct that the objector should pay the costs of the decree-holder in the Court below, but the parties should bear their own costs of this appeal.

V.B./R.K. *Appeal dismissed.*

(1) [1917] 2 Pat. L. J. 219=39 I. C. 656=3 Pat. L. W. 422.

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* A. I. R. 1930 Allahabad 830

MUKERJI AND BANERJI, JJ.

Moti Lal Ramchandar—Applicant.

v.

Durga Prasad—Opposite Party.

Civil Revn. No. 210 of 1929, Decided on 24th June 1930, from order of Sm. C. C. Judge, Budaon, D/-6th May 1929.

***Provincial Small Cause Courts Act, S. 17—Application to set aside exparte decree not accompanied by either security bond or cash—But on direction of Court proper deposit made within time—Court can consider such application.**

An application to set aside an ex parte decree not accompanied by either security bond or cash cannot be treated as an application to set aside an ex parte decree. But where, after presentation of such application, the Court directs security to be furnished and the security is furnished within the time allowed by law for applying for setting aside an ex parte decree the application can only be considered to be a proper application on the date after the proper deposit was made and the Court can consider such application : 23 *All.* 470 ; 38 *All.* 425, *Dist.*; *A. I. R.* 1923 *All.* 270, *Cons.* 32 *Cal.* 333 and 43 *Mad.* 579 (*F.B.*), *Appr.* [P 831 C 1]

P. M. L. Verma—for Applicant.

Panna Lal—for Opposite Party.

Mukerji, J.—This is an application in revision under the following circumstances : A decree was passed on 4th March 1927, in favour of the applicant firm Moti Lal Ram Chandar Das. Durga Prasad, the defendant, presented an application to set aside the ex-parte decree and the decree was set aside by the learned Small Cause Court Judge.

By this revision the plaintiff seeks to set aside the order setting aside the ex parte decree on the ground that the application that was presented to the Court by Durga Prasad was not accompanied with either a security bond or the cash sum which had been decreed in favour of the plaintiff. Reliance is placed on the case of *Badlu Singh* v. *Panthu Singh* (1)

The facts are that Durga Prasad stated that he got notice of the decree on the 12th February 1929. On 23rd February 1929 he presented an application to set aside the decree. But that application was not accompanied by either a security bond or cash, and it is urged that the Court cannot look

(1) A. I. R. 1923 All. 270=71 I. C. 474.

at his application because petitioner did not comply with the provisions of S. 17, Small Cause Courts Act. That is quite correct, but the Court cannot treat an application as an application to set aside an ex parte decree unless and until the application is accompanied by cash or security bond. In this case two days after the presentation of the application, the Court directed security to be furnished and the security was furnished within the time allowed by law for applying for setting aside an ex parte decree. We are of opinion that the application must be deemed to have been a proper application only on 15th March 1929 and must be deemed as having been presented on that date after the proper deposit had been made. A number of cases have been cited by Verma to show that the Court cannot grant time to a judgment-debtor to furnish security. But in the present case the deposit having been made within time no such question arises as is dealt with in the cases referred to. In the case of *Jagan Nath* v. *Chote Ram* (2) and *Chote Lal* v. *Lakhmi Chand* (3) either no money was deposited or if any deposit was made it was not either within time or sufficient.

In the case of *Badlu Singh* v. *Panthu Singh* (1) mentioned above it does not appear from the judgment of the single Judge whether the payment of cash into Court was within time or beyond time. If the learned Judge meant to hold that if money is deposited within time, even then the application for restoration is to be dismissed we are unable to agree with that view.

Our attention has been drawn to the case of *Jenu Muchi* v. *Budhiram Muchi* (4) and *V. M. Assan* v. *M. E. Rahim* (5). We think that the view adopted in those cases is sound. Under the circumstances we dismiss this application with costs.

P.N./R.K. *Revision dismissed.*

(2) [1906] 28 All. 470=3 A. L. J. 318=(1906) A. W. N. 93.
(3) [1912] 38 All. 425=34 I. C. 118=14 A. L. J. 549.
(4) [1905] 32 Cal. 339=1 C. L. J. 43.
(5) [1920] 43 Mad. 579=55 I. C. 977 (F. B.).

A. I. R. 1930 Allahabad 831

NIAMATULLAH AND SEN, JJ.

Majid Husain Khan—Applicant.

v.

Ainul Aziz Khan and *others*—Opposite Parties.

Civil Revn. No. 35 of 1929, Decided on 12th March 1930, against order of Sub-Judge, Gorakhpur, D/- 4th September 1928.

(a) Civil P. C., S. 115—Finding arrived at by lower Court founded upon evidence—No revision lies.

No application for revision can be made under S. 115, Civil P. C., which is directed against a finding arrived at by the Court below which is founded upon evidence upon a point arising from the pleadings. [P 831 C 2]

(b) Civil P. C., S. 115—Court with power to entertain application rejecting it on merits—Only because no detailed reasons are given for view Court cannot be said to have acted with material irregularity.

Where a Court having jurisdiction to entertain an application, upon a review of the evidence rejects that application on the merits, the Court cannot be said to have acted with material irregularity or illegality in the exercise of the jurisdiction which it was possessed of, merely because the Court has not given detailed reasons for its view: 10 *All.* 467, *Diss. from.* [P 832 C 1]

M. H. Faruq—for Applicant.

M. Waliullah—for Opposite Parties.

Sen, J.—This is an application for revision under S. 115, Civil P. C., from an order of the Court below rejecting the application of Majid Husain Khan for leave to sue in forma pauperis. The Court below undoubtedly had jurisdiction to entertain the application and to pass orders thereon. Upon a consideration of the evidence that was before it, the Court below came to the conclusion that Majid Husain Khan had failed to make out that he was a pauper. The finding of the Court below is essentially a finding of fact. No application for revision can be made under S. 115, Civil P. C., which is directed against a finding arrived at by the Court below which is founded upon evidence upon a point arising from the pleadings.

It is argued that the Court below has not gone into the details as regards the exact property which the applicant was possessed of at the date of the application, its market value and the title thereto. Reference has been made to a decision of a single Judge in *In re, Mahomad Husain* v. *Ajudhia Prasad* (1). With utmost respect we are not prepared to

(1) [1888] 10 All. 467=(1888) A. W. N. 179.

accept the view propounded in this case. Where a Court having jurisdiction to entertain an application upon a review of the evidence rejects that application on the merits, the Court cannot be said to have acted with material irregularity or illegality in the exercise of the jurisdiction which it was possessed of, merely because the Court has not given detailed reasons for its view. We are clearly of opinion that the case does not fulfil the requirements of S. 115, Civil P. C., and reject this application with costs.

V.B./R.K. *Application rejected.*

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* A. I. R. 1930 Allahabad 832 (1)

SEN, J.

Rajdeo—Plaintiff—Applicant.

v.

Nath Prasad Misra—Defendant—Opposite Party.

Civil Revn. No. 47 of 1930, Decided on 23rd May 1930, from order of Small Cause Court Judge, Deoria, D/- 8th November 1929.

*** (a) Provincial Small Cause Courts Act, S. 25—Powers of Court under S. 25 are wider than those under Civil P. C., S. 115—Civil P, C., S 115.**

The discretion conferred upon the High Court for interference under S. 25, Provincial Small Cause Court Act is more extensive than the powers of Courts in revision under S. 115, Civil P. C. [P 832 C 1]

(b) Civil P, C., O. 20, R. 4—Small Cause Court Judge not required to write elaborate judgment—Judgment must indicate the application of judicial mind.

A Judge of the Court of Small Causes is not required under the law to write an elaborate judgment but there ought to be some indication in his judgment that he has applied a a judicial mind to the case. [P 832 C 2]

Rudra Narain—for Applicant.

Harbans Sahai—for Opposite Party.

Judgment.—The discretion conferred upon this Court for interference under S. 25, Provincial Small Cause Courts Act is more extensive than the powers of this Court in a revision under S. 115, Civil P. C. Plaintiff sued the defendant for recovery of a certain sum of money on a bond alleged to have been executed by the defendant. The defendant appears to have admitted the execution of the bond but to have denied that the bond was for consideration. The onus of proving the absence of consideration was clearly upon the defendant. The Court below framed the issue namely:

"Is the bond for consideration."

The suit was dismissed with the following finding:

"It appears that the bond is without consideration. The issue decided accordingly. Order: The suit fails and dismissed with costs."

A Judge of the Court of Small Causes is not required under the law to write an elaborate judgment but there ought to be some indication in his judgment that he has applied a judicial mind to the case. There is no indication of this in the present case. The plaintiff and the defendant were examined in this case. The Subordinate Judge does not even state that he believes the evidence of the defendant, upon whom the onus lay in preference to that of the plaintiff. The case has not been properly tried. I set aside the decree of the Court below and direct that the case be reinstated in the Court of the Judge of Small Causes at Deoria under its original number and disposed of according to law. Costs here and heretofore to abide the event. Costs in this Court will include fees on the higher scale.

G.P./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 832 (2)

KING, J.

Chiranji Lal—Defendant—Appellant.

v.

Bool Chand—Plaintiff — Respondent.

Stamp Report in First Appeal No. 66 of 1928, Decided on 28th May 1930.

Court-fees Act, Sch. 1, Art. 1—Cross-objection regarding costs and other matters—Art. 1 applies to part regarding costs.

Cross-objections relating partly to costs and partly to other matters are governed by Art. 1. The part relating to costs must be held to be part of the "subject-matter in dispute": 26 *All.* 291, *Rel. on*,; 64 *I. C.* 606, *Diss. from*; *A.I.R.* 1925 *Rang.* 145; *A.I. R.* 1926 *Lah.* 645, *Dist.* 8 *M. I. A.* 662 (*P.C.*), *Expl.* [P 833 C 1,2]

N. C. Vaish and *Benod Behari Lal*—for Appellant.

K. C. Mital—for Respondent.

Judgment.—This is a reference under S. 5, Court-fees Act, 1870. The plaintiff sued for the redemption of certain property upon payment of Rs. 5,911, which he deposited. The trial Court decreed redemption upon payment of Rs. 7,925 and ordered the plaintiff to deposit the balance of Rs. 2,014 within eight days. Parties were ordered to bear their own costs. The defendant appealed against the decree. The plaintiff respondent filed cross-objections (1) contesting his liability to pay the further sum of

Rs. 2,014; and (2) contesting the disallowance of his costs in the trial Court.

He paid an ad valorem court-fee on Rs. 2,014 only. The Chief Inspector of Stamps reported that the respondent was liable to pay a further court-fee of Rs. 30 on the amount of costs claimed by him, namely Rs. 625. The respondent's learned advocate contests the correctness of this report. The Taxing Officer agrees with the Chief Inspector but, in view of the general importance of the question, has referred the matter to the High Court for decision. Under Sch. 1, Art. 1, a memorandum of cross-objections is chargeable with an ad valorem fee on the "amount or value of the subject-matter in dispute." The question therefore is whether the costs which were disallowed by the trial Court, and are claimed in the cross-objection, should be included in the "amount or value of the subject-matter in dispute." Looking only at the language of the statute, apart from judicial decisions I should answer the question in the affirmative. The respondent expressly claims a certain sum which was disallowed by the trial Court. In my opinion that sum is part of the "subject matter in dispute" in the appellate Court. This view is supported by the preponderance of judicial decisions. The Chief Inspector relies upon *Debendro Mohan Rai* v. *Sona Kuer* (1) decided by a Bench of this Court. In that case it was held that where in a memorandum of appeal the disallowance of costs by the lower Court is made the ground of a claim for separate and distinct relief, the value of such distinct relief should be reckoned as part of the subject-matter in dispute for the purposes of Sch. 1, Court-fees Act. This is the only case on this point decided by this High Court which has come to my notice, and it certainly supports the Chief Inspector's view. The same view was taken by the Madras High Court in *In re Makki* (2).

Respondent's advocate seeks to distinguish these rulings on the ground that they relate to memoranda of appeal and that the principle of taxation applicable to a memorandum of appeal is quite different from that applicable to a memorandum of cross-objections. He cites certain rulings, namely *Lakhan Singh* v. *Ram Kishan Das* (3), *Ishdat Tewari* v. *Tameshwar Tewari* (4) and *Daroga Raut* v. *Mt. Parema Kuar* (5) in support of this contention. These rulings however do not help him as they all hold that a cross-objection must bear an ad valorem court-fee on the value of the subject matter in dispute, under Sch. 1, Art. 1, even if the court-fee on a memorandum of appeal in the same suit is payable under Sch. 2, Art. 17.

On the point whether the amount of costs which are specifically claimed in a cross-objection, after having been disallowed by the trial Court, should be included in the subject matter in dispute, the learned advocate has cited no authorities. The only authority which I have been able to discover in support of his contention is the case of *Kamal Kamini Debi* v. *Muhammad Emamuddin Sarkar* (6) decided by a single Judge of the Calcutta High Court. In this case it was held that a memorandum of cross-objections relating to costs only comes under Cl. (d), Art. 1, Sch. 2, Court-fees Act and a court-fee of Rs. 2 is leviable thereon. The learned Judge was much influenced by a remark made by their Lordships of the Privy Council in *Doorga Doss Chowdry* v. *Ramanath Chowdry* (7) that "the costs of a suit are no part of the subjectmatter in dispute." This ruling does no doubt support the contention that when costs form the subject matter of a cross-objection then those costs should not be included in the "subject matter in dispute" for the purpose of determining the proper court-fee.

This ruling has however been expressly dissented from by a division Bench of the Rangoon High Court in *Ma Shin* v. *Maung Shwe Hnit* (8), in which it was held that cross-objections relating solely to costs must be stamped ad valorem on the sum claimed as costs. The learned Judges pointed out that their Lordships of the Privy Council (in the case cited above) were not

(1) [1901] 26 All. 291=(1901) A. W. N. 21.
(2) [1896] 19 Mad. 350.
(3) [1918] 40 All. 93=43 I. C. 179.
(4) A. I. R. 1924 All. 175=83 I. C. 780=45 All. 537.
(5) [1918] 3 Pat. L. J. 197=45 I. C. 568.
(6) [1921] 64 I. C. 606.
(7) [1860] 8 M. I. A. 262=1 Sar. 772 (P.C.).
(8) A. I. R. 1925 Rang. 145=85 I. C. 257=2 Rang. 637.

construing the language of any part of the Court-fees Act but were dealing with an order in Council, and considering whether special leave to appeal should be granted, and therefore their dictum must not be extended further than the point which was immediately before them.

The Calcutta ruling has also been expressly dissented from in *Nihal Chand* v. *Amar Nath* (9), which was decided by a Division Bench of the Lahore High Court. The previous Rangoon ruling does not appear to have been considered by the learned Judges, but they took the same view, namely, that a memorandum of cross-objections relating to costs only is governed by Art. 1, Sch. 1, Court-fees Act, and must be stamped ad valorem.

I have no hesitation in following the two later rulings, in preference to the Calcutta ruling since they appear to me to be in accordance with the plain and ordinary meaning of the language in Art. 1, Sch. 1. Although they refer in terms to cross-objections relating to costs only, I think it is clear that the same principles are applicable to cross-objections relating partly to costs and partly to other matters. The part relating to costs must be held to be part of the "subject matter in dispute." I hold that the Chief Inspector was correct, and the respondent must pay a further court-fee of Rs. 30 on the amount which he claims in his cross-objection relating to costs.

M.N./R.K. *Reference answered.*

(9) A. I. R. 1926 Lah. 645=93 I. C. 272.

A. I. R. 1930 Allahabad 834

BOYS, J.

Aslop—Accused.

v.

Emperor

Criminal Ref. No. 272 of 1930, Decided on 17th June 1930, made by Second Addl. Sess. Judge, Meerut, on 14th April 1930.

Penal Code (1860), S. 498— First husband absolutely abandoning his wife and she marrying another man by recognized marriage—Person so married is competent to institute complaint under S. 498.

Where the husband of a woman absolutely abandons her, and she marries another man by a marriage which is recognized as valid among the people to which the parties belong, the second husband of the woman has full authority to institute complaint for enticing the woman away. [P 834 C 2; P 835 C 1]

K. C. Mukerji—for Accused.

M. Waliullah—for the Crown.

Order.—This case would have never been referred if the Sessions Judge had not applied to the circumstances of the case and evidence given in it the same sort of tests that might have been appropriate, had he been dealing with the question of whether some large estate was impartible or not, or whether there was a custom of some unusual nature existing in some particular family. The facts are simple. One Mt. Mulhu was first married to a man called Juma who proceeded to marry another woman, to ignore Mt. Mulhu and to leave her apparently entirely to her own devices and unprovided for three years and to ignore her going through the ceremony of marriage with another man. This the learned Sessions Judge does not consider constituted desertion, and apparently he holds that it does not amount to desertion because Juma could at the end of the three years, if he had liked, have reclaimed his wife. The next step is that Mt. Mulhu, by a well-recognized form of marriage, the karao form, marries a man called Bhagwana; and the accused had been found guilty of taking her away from the custody of Bhagwana and punished under S. 498. The accused have succeeded in persuading the Second Additional Sessions Judge of Meerut to refer the case to this Court on the ground that Bhagwana was not the lawfully married husband of Mt. Mulhu and had therefore no authority to institute a complaint under S. 498, I. P. C.

It is admitted that the karao form of marriage is a well recognized form amongst people of the caste and class of those with whom we are concerned. The admission that such a marriage can be regarded as a legally valid marriage presupposes that it is possible for the first marriage to be regarded as dissolved. Whether the Hindu law in its highest form recognizes or does not recognize divorce is immaterial. The fact that a second marriage in the karao form during the lifetime of the first husband is recognized and is admittedly recognized as valid amongst the class of people with whom we are concerned carries with it inevitably the proposition that the first marriage can under some cir-

cumstances be regarded as no longer a valid marriage. In the present case we have all the facts found which would be amply sufficient to show, and were in the opinion of the Magistrate amply sufficient to show, that the first husband had in fact absolutely abandoned his wife. Under those circumstances I can see no possible ground for holding that the karao marriage to Bhagwana was not a valid marriage. That is all there is in this point.

On the next point that the Magistrate exceeded his powers in giving two months' imprisonment in default of payment of the fine the Magistrate himself is agreed.

The result is that I accept the reference only so far that I reduce the period of imprisonment to be suffered in default of the payment of the fine from two months to six weeks. For the rest the reference is rejected.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 835

BENNET, J.

Mt. Ram Kunwar and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. 181 of 1930, Decided on 4th August 1930, made by Sub-Judge, Etah, D/- 20th March 1930.

Criminal P. C. (1898), S. 526 (8) and (1)—Sub-S. (8), S. 526 applicable only when party notifies his intention to apply for transfer—Onus is on applicant to prove it.

Section 526 (8) applies only where the complainant or the accused notifies to the Court, before which his case is pending, his intention to make an application for transfer to the High Court. The onus lies on the applicants to show that the information required by S. 526 was given to the Magistrate. [P 835 C 2]

L. W. Roy—for Applicants.

M. Waliullah and *Nanak Chand*—for Opposite Party.

Order.—This is a reference by the learned Sessions Judge of Etah recommending that the convictions of five persons under Ss. 147, 352 and 447, I. P. C., and sentences of one month's rigorous imprisonment and fines should be set aside. The ground of the recommendation is that the Honorary Third Class Magistrate before whom the accused were tried did not comply with the provisions of S. 526 (8), Criminal P. C., because he did not grant a sufficient adjournment for the accused to apply for a transfer. This sub-section applies only where the complainant or the accused notifies to the Court before which the case is pending his intention to make an application under S. 526. S. 526, sub-S. (1) refers to the High Court, and the whole section deals only with applications for transfer made to the High Court. It has to be shown therefore by the applicant in revision that the Honorary Magistrate was informed that the accused intended to make an application to the High Court for transfer. Two applications are relied on by the learned counsel for the applicant in revision. The first application is dated 21st December 1929 and merely states that the accused want their case to be transferred to another Court and ask that the case should be postponed for 15 days. The second application of 23rd December merely refers to the first application. In neither of these applications is there any statement that the accused intended to apply to the High Court for a transfer under S. 526. The applicants in revision have not furnished any evidence by way of affidavit or otherwise to show that they had any such intention.

So far as the record goes it is apparent that their intention was merely to apply to the District Magistrate, and the learned Sessions Judge notes that an application to the District Magistrate by the accused dated 20th December 1929 was shown to him. He states that he is forwarding this application to this Court, but neither counsel nor the Peshkar could discover this application on the record. Its (contents) therefore are uncertain, for on the one hand the Sessions Judge states that it was not an application for transfer and on the other hand the Honorary Magistrate stated that it was an application for transfer. Be that as it may, the onus lies on the applicants in revision to show that the information required by S. 526, sub-S. (8) was given to the Honorary Magistrate. They have failed to show that such information was given. Accordingly there is nothing illegal in the trial, and there is no ground on which this Court could interfere in revision. Therefore the reference is not accepted. Let the record be returned.

B.V./R.K. *Reference disallowed.*

A. I. R. 1930 Allahabad 836

BOYS, J.

Krishna Gopal Sharma—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1221 of 1929, Decided on 15th April 1930, from order of Sess. Judge, Jhansi, D/- 9th December 1929.

Penal Code, S. 124-A — Sentence—Accused publishing seditious article—Article merely copied from publications in regard to which there was no prosecution—This fact, as well as the primary intention of accused, to get members to leave council should be considered in awarding sentence.

The accused published an article in the newspaper which was seditious. But the article was copied from other publications in regard to the appearance in which no prosecution followed. The primary intention of the article by whomsoever it was written was manifestly merely to get members who are in the council to leave it.

Held: that it was fair to the accused also to assume that his primary intention in publishing the article was to win over those who were within the council to readiness to leave it and that this fact as well as the fact that the article was copied from publications in regard to which there was no prosecution, should be taken into consideration on the question of sentence. [P 837 C 1]

K. N. Laghate—for Appellant.

Sankar Saran—for the Crown.

Judgment. — This is an appeal of Pandit Krishna Gopal Sharma arising out of his conviction under S. 124-A, I. P. C., and a sentence thereunder of one year's simple imprisonment. The article appeared in a paper called the "Krantikari" published at Jhansi and is dated 8th April 1929. The article is in two portions: the first headed "Swaraj and Death," and the second headed "Sham Fight." It is admitted on behalf of the Crown that the whole article from beginning to end had already previously appeared in two other publications: one in Bombay and one in Calcutta. So far as the information before the Court goes no steps were taken in either Bombay or Calcutta to prosecute in regard to either of those publications. That is however of course no reason for holding that the article is not itself actually of a nature to bring upon persons responsible for it the consequences of S. 124-A, I. P. C.

No question has been argued before me on behalf of the appellant as to his responsibility or otherwise for the article. He does not appear to have at any time endeavoured to evade such responsibility otherwise than by urging that all he had done was to copy an article from other papers. The material answer in the appellant's examination before the Magistrate was to the effect that the article had already appeared in other papers and he copied it in his own as he did not think it was seditious. Manifestly the essential question is whether it was seditious. But on the question of sentence it is also very material to determine, if possible, whether the appellant thought the article to be seditious. On his behalf I have had only two arguments put to me: first that the article has only been "copied" from another paper; and secondly that the appellant did not "intend" to publish anything seditious. Neither of these questions are material except on the question of sentence.

I have however very carefully examined the article myself. So examined it becomes apparent that the second part of it, entitled "Sham Fight," clearly embodies the primary intention of the article, and in that portion of the article I do not find any words that the most captious person could suggest came within the scope of S. 124-A. There is a reference to the "unjust policy" of the bureaucracy, and there is a phrase "courting destruction for the nation." Manifestly these phrases are harmless in the connexion in which they are used. On the other hand the primary intention of this second portion of the article is very clearly merely to point out that, while a number of persons are all declaring themselves desirous of attaining an object described as "the main issue," some of them hold it best to confine their activities to steps outside the councils, while others think it best to enter the councils and do what they can there. The intention of this portion of the article is clearly to induce those who are working in the councils to come out and thereby more effectively assist in the prosecution of the main issue. Had this been all I have no doubt that this prosecution would never have been instituted. But when we look to see what the "main issue" is, to which reference is made at the end of the article, we find it in

the earlier portion of the article, headed "Swaraj and Death," described in words which, I do not think anybody could have any doubt, must bring the person responsible for them within the consequences of S. 124-A as being, putting it briefly, guilty of publishing a seditious article. So far therefore I am of opinion that the conviction is right.

Coming however to the two matters to which I have already made reference as having a bearing on the question of sentence, we find, firstly, that the articles have been copied from other publications in regard to the appearance in which no prosecution followed. This consideration has already been given weight to by the learned trial Judge in giving a sentence of only one year's simple imprisonment. There is however another point to which apparently attention was not directed in the lower Court and that is the point that the primary intention of the article, by whomsoever it was written, was manifestly merely to get members who are in the council to leave it. It is fair to the accused therefore also to assume that his primary intention in publishing the article was to win over those who were within the council to readiness to leave it. The "main issue" is disclosed in the earlier part of the article in words that are seditious, and for that the appellant must be held liable. But the fact remains that, doing my best to appreciate the merits or demerits of the case, it does appear to me that the very great probabilities are that this article would never have been published but for the primary desire to get members to leave the councils. This consideration has not been given weight to in the Court below, but I think it deserves consideration. Maintaining the conviction under S. 124-A I therefore reduce the sentence from one year's simple imprisonment to six months' simple imprisonment from the date of his surrender.

P.N./R.K. *Sentence reduced.*

A. I. R. 1930 Allahabad 837

MUKERJI AND BENNET, JJ.

Irfan Ali and *others*—Plaintiffs—Appellants.

v.

Official Receiver, Agra and *others*—Defendants—Respondents.

Letters Patent Appeal No. 137 of 1928, Decided on 17th February 1930, from judgment of Sen, J., D/- 12th June 1928.

(a) Deed—Construction—Importation of extraneous matter is forbidden unless required to show relation of language to existing facts—Evidence Act, S. 92, Proviso 6.

The importation of extraneous matter would be forbidden in construing a deed unless surrounding circumstances are required to show in what manner the language of the document is related to existing facts: *A. I. R.* 1924 *P. C.* 226, *Foll.* [P 839 C 1]

(b) Mussalman Wakf Validating Act (6 of 1913), S. 3, "Wakf"—Mere use of word "wakf" is not sufficient.

A mere use of the word "wakf" in a deed after the passing of Act 6 of 1913 cannot necessarily imply a dedication to the poor. The ultimate object of the wakf has to be implied by use of other words. [P 840 C 1]

Mukhtar Ahmad—for Appellants.

N. P. Asthana and *Baijnath Sahai*—for Respondents.

Mukerji, J.—This is a Letters Patent appeal which has arisen owing to a difference of opinion between two learned Judges before whom the First Appeal No. 247 of 1925 came for decision. The difference of opinion has arisen only on a point of law, and therefore it would not be necessary to state the facts in detail. Briefly, they are these. One Mubarak Ali died possessed of certain immovable property of considerable value. He died on 2nd January 1914. Before his death he executed several deeds. One was a document described as a will, which was executed on 22nd June 1909, another was a codicil to that will executed on 3rd January 1911, and lastly he executed the document which is in dispute before us. This purported to be a deed of wakf created by means of a will. It was executed on 23rd October 1913.

By the document of 23rd October 1913 Mubarak Ali provided (see p. 29 of the printed book) that he would remain in possession of his property during his lifetime and would support himself, his wife and the members of his family. Then he proceeded to appoint certain gentlemen mentioned in the deed, who were going to be the trustees of the

wakf that he was going to create. He also provided for the filling up of vacancies, if any, among the trustees. Para. 4 of the wakf deed provides that the trustees or mutawallis would pay the Government revenue payable on the property, meet the expenses of repairs and other expenses required for the maintenance of the property, pay the wages of the employees (evidently the men who were to manage the property, agents and others) out of the one-third income of the entire property. If a balance was left, it was to be employed by the mutawallis

"on good acts recognized as such by the Mahomedan law (as for instance fatiha, offerings for elders, education and marriage of children etc.)"

As regards the remaining two-thirds of the property, Mubarak Ali provided that out of the income of the property certain stipends should be allowed to his sons, daughters and the grandson. This was the subject-matter of the same para. 4. By para. 5 Mubarak Ali declared that the holders of the stipends should not be entitled to transfer them, and the stipends should not be liable to attachment or sale in any decree. By para. 6 the dedicator declared that the dwelling house was to be occupied by the stipendholders, but they would not be in a position to transfer the same, it being treated as a part of the wakf property. By para. 7 Mubarak Ali provided as follows :

"After the payment of the aforesaid stipends out of the two-thirds of the income, the balance, be whatever it may, will be reserved and applied in multiplying the property. It will be lawful for the trustees to make an addition to the monthly stipends out of the balance in their hands according as it may be advisable when the number of the children of the stipendiaries grows larger."

By para. 8 the trustees were made incompetent to transfer the wakf property. Para. 9 declared that in cases in which the trustees were not unanimous on any point, the point for decision was to be decided by majority of votes. Para. 10 enjoined on the trustees the duty of keeping regular accounts. By para. 11 Mubarak Ali declared that if any of the terms of the wakf that he was going to create were violated, it would be competent to the mutawallis or to the beneficiaries to take action to remedy the violation. He however emphasized the fact that the wakf that he was creating was for the family and not for the public and the public had nothing to do with it.

It appears that one of the sons of Mubarak Ali, namely Syed Ali Ahmad, was adjudicated an insolvent in the lifetime of Mubarak Ali himself. On the death of Mubarak Ali, the Official Receiver was induced by two of the creditors of Ali Ahmad to attach a part of the wakf property. Thereupon the mutawallis, after taking the permission of the insolvency Court, instituted the suit out of which this appeal has arisen, with the object of obtaining a declaration that the property was wakf and could not be touched by the Official Receiver for the benefit of the creditors of Ali Ahmad.

The Court of first instance dismissed the suit, holding that the wakf was not a valid one. We need not go over the grounds that were given by the learned Subordinate Judge ; they have not found favour with the two learned Judges before whom the appeal came, initially. In this Court, both the learned Judges were of opinion that the deed of wakf did not indicate expressly that there was a reservation of the ultimate benefit either for the poor or for any religious or pious object. One of the learned Judges was of opinion that the document did not even contain by implication such a reservation. The other learned Judge was of the contrary opinion. He held that the use of the word " wakf " by Mubarak Ali was, in itself, sufficient indication of his mind, namely, he meant that on the extinction of the line of the beneficiaries the property was to go for the benefit of the poor. It was owing to this difference of opinion that the appeal was dismissed and the decree of the learned Subordinate Judge was affirmed.

The sole point that we have to decide in this appeal is whether the document contained by implication a reservation of the ultimate benefit in favour of either the poor or for any religious or pious or other charitable purpose of a permanent character.

We do not think that it is expedient or even desirable to look into the earlier documents executed by Mubarak Ali in order that we might read his mind in the document of 1913. The circumstances of the family and the fact that

Ali Ahmad had become an insolvent incapable of paying his own debt are also matters which should not, strictly speaking, be taken into consideration in interpreting a document, which is otherwise capable of bearing a clear meaning. Under the well-known rules of interpretation the importation of extraneous matters would be forbidden, unless surrounding circumstances are required to show in what manner the language of the document is related to existing facts, as was done in the Privy Council case of *Narasingherji* v. *Garu* (1). As we have said, it is common ground that the document of 1913 does not contain any express reservation in favour of any religious, pious or charitable purpose of a permanent character. The general question therefore is whether the use of the word "wakf" by Mubarak Ali necessarily implies such a reservation in favour of the poor as to make the document a valid one under the law.

The learned Judges, who heard the appeal in the first instance, have extensively quoted from text-books and decisions of various Courts including the decisions of their Lordships of the Privy Council to show whether the mere use of the word "wakf" necessarily implied a gift to the poor, ultimately. The inquiry of the two learned Judges has resulted in different and contrary results. It appears to us that the legislature having passed an Act, relating to the subject, it would not be fruitful of any good to start a research into the previous state of the law as it existed before the legislature added one more Act to the book: see *Ramanandi Kuar* v. *Kalawati Kuar* (2).

The Musalman Wakf Validating Act (Act 6 of 1913), gives a definition of the word "wakf." It is defined as follows:

"Wakf means the permanent dedication by a person professing the Musalman faith of any property for any purpose recognized by the Mahomedan law as religious, pious or charitable."

Then in S. 3 the law provides that it shall be lawful for any person professing the Musalman faith to create a "wakf" which in all other respects is in accordance with the provisions of the Mahomedan law for certain purposes. One of the purposes mentioned there is "the maintenance and support wholly or partially of his (dedicator's) family, children or descendants."

According to this law, namely Act. 6 of 1913, it was declared competent to a Musalman to make a "wakf" for the benefit of his family and descendants. The law however goes on to provide that the ultimate benefit in such a case expressly or impliedly, is to be reserved for any purpose recognized by the Mahomedan law, as religious or pious or charitable purpose, of a permanent character.

To obviate all disputes as to whether a particular dedication was good or bad under the Mahomedan law, a rule was enacted. It must therefore follow that if a particular dedication does not answer to the rule, it must be treated as invalid. It may be that, on a correct interpretation of the Mahomedan law such a dedication would be quite good. But there being a difference of opinion on that point, the legislature desire to settle the matter, once for all, and it would do to say thereafter that, on a true interpretation of the Mahomedan law, a document creates a good wakf, although it cannot create a good wakf under Act 6 of 1913. When a definite rule of Mahomedan law was laid down by the legislature, it must follow that it overruled certain interpretations which did not find favour with the legislature. This can be the only meaning of passing a law by the legislature. This being the object of the legislature, and the language employed being clear, a document cannot be valid as creating a good wakf unless and until it contains at least an implied reservation that the ultimate benefit from the property is to go for a religious, pious or charitable purpose of a permanent character. If this view be correct, can it be said, with any justification, that the mere use of the word "wakf" will operate to make the document a valid dedication, in law, which means, again, the Act 6 of 1913. We are emphatically of opinion that this cannot be so. The word "wakf" has been used in the Act itself, (Ex. 3), and it has been given a definite meaning. The word has not been used by the legislature as meaning a dedi-

(1) A. I. R. 1924 P. C. 226=82 I. C. 993 = 51 I. A. 305=47 Mad. 729 (P. C.).
(2) A.I.R. 1923 P.C. 2=107 I.C. 14=55 I.A. 18=7 Pat. 221 (P.C.).

ation for the benefit of the poor alone. It includes a dedication for religious and pious objects as well. Some authorities have been quoted before us which go to show that where the word "wakf" has been used in a deed, the ultimate benefit from the property goes to the poor on the extinction of the immediate object of the dedication. This would mean that the word "wakf" has been used under the ordinary Mahomedan law, in a restricted sense. The legislature however has given it a much larger sense. We are therefore of opinion that a mere use of the word "wakf," in a deed, after the passing of the Act 6 of 1913, cannot necessarily imply a dedication to the poor. The ultimate object of the wakf has to be implied by use of other words.

It is not necessary to emphasize that, as the result of the provision of para. 7 of the wakf deed, there would be an accumulation from the property in the case of an extinction of the line of Mubarak Ali. The dedicator did not at all consider what was going to happen if his descendants died out, in course of time. As the stipends ceased to be paid the trustees would have in their hands the total income of the two-thirds of the property, and the only thing which they could do would be to purchase further property with the income. The result would be an accumulation of property without any definite object which is countenanced neither by the Mahomedan law nor by the Anglo-Indian law, namely S. 18, T. P. Act. In our opinion, the wakf which Mubarak Ali purported to create was not valid under the law, and the decision of the Court below must be affirmed. In the result, we dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 840

SULAIMAN AND NIAMATULLAH, JJ.

Gopi Rai—Applicant.

v.

Baij Nath Rai and *others* — Respondents.

First Appeal No. 102 of 1929, Decided on 1st July 1930, from order of Dist. Judge, Ghazipur, D/- 22nd February 1929.

(a) Civil P. C. (1908), Sch. 2, Para. 1 (3) —Dispute relating to genuineness of will in probate proceedings pending before Court cannot be referred to arbitration — Court cannot delegate its functions to private individual.

Judge has no jurisdiction to allow the dispute relating to the genuineness of a will in a probate proceeding pending before him to be referred to the arbitration of an arbitrator. He has got to be satisfied that the will is a genuine document before the order of granting probate is passed. He cannot delegate these functions to a private individual and decide the point through him : 21 *Bom.* 335 *Foll.* ; 31 *Cal.* 357 and 6 *I. C.* 912, *Ref.* [P 841 C 1]

(b) Evidence Act (1872), S. 115 — Dispute relating to genuineness of will referred to arbitration — Reference not objected to in lower Court—Applicant is not estopped from raising objection as to illegality in appeal—Practice—New plea.

Dispute relating to genuineness of will in probate proceedings was referred to arbitration by lower Court. No objection was taken to the award on the ground of illegality. But party to arbitration raising the point in appeal.

Held : that he was not estopped from raising the point of illegality of reference in appeal. [P 841 C 2]

U. S. Bajpai and *G. S. Pathak* — for Appellant.

Iqbal Ahmad and *K. Verma*—for Respondents.

Sulaiman, J.—This is an appeal by Gopi Rai, one of the objectors to an application for the grant of a probate. Baij Nath Rai, who claimed to be the executor under a will, dated 29th January 1928, executed by Nakched Rai, who admittedly died on 15th April 1928, applied for the grant of probate to him. Notices were issued to a large number of persons, many of whom were beneficiaries under the alleged will. Three of these persons only entered the caveat but the beneficiaries did not put in an appearance. An application was made on behalf of Baij Nath, the applicant, and six other persons to refer the dispute relating to the genuineness of this document to an arbitrator. The learned Judge allowed this application and referred the matter to arbitration, although the other beneficiaries had not joined in the application. The agreement of reference to arbitration permitted the arbitrator to import his own personal knowledge and decide the dispute on its basis. The arbitrator delivered his award basing his conclusion on his personal knowledge also and holding that the will had been proved to be a genuine document. Objections were filed to this award by some of the objectors, including Gopi Rai, but no objection was taken

that the reference itself was illegal. The learned Judge after considering the objections on merits overruled them and passed a decree in terms of the award. Gopi Rai now appeals from the order granting the probate, and on his behalf it is urged that the reference was wholly irregular and illegal.

It seems to us that the learned Judge had no jurisdiction to allow the dispute relating to the genuineness of a will in a probate proceeding pending before him to be referred to the arbitration of an arbitrator. The order granting probate is a judgment in rem and, so long as it is not revoked, is operative against the world. Before such an order is passed the Court has got to be satisfied in its own mind that the will is a genuine document and that probate ought to be granted. It cannot delegate its proper functions to a private individual and decide the point through him. If such a course were permitted, a door for fraud and collusion would be opened which it is against public policy to permit.

The point is not res integra but it is covered by authority. We may refer to the case of *Ghella Bhai* v. *Nandu Bai* (1) in which Farran, C. J. at p. 342 remarked that the Court had no authority to refer the factum of the will to arbitration and that clearly it would not refer such a matter in which there were beneficiaries interested whose consent had not been obtained, that the probate Court could not grant probate on the vicarious finding of an arbitrator but must itself be satisfied by admissible evidence that the will was the will of the testator and that the relevant provisions of the Code of Civil Procedure were not applicable to probate proceedings, and, on the other hand, the provisions of the Probate Act preclude the possibility of a Judge referring the question of the execution of a will to an arbitrator, particularly if all the beneficiaries had not appeared before him and consented to that course, even which was doubtful. We agree with these observations and hold that the District Judge could not act upon the award which was the result of a reference to arbitration, without even the consent of many of the beneficiaries. The same principle has been applied to compromises regarding the genuineness of the will in probate proceedings : vide *Manmohini Guha* v. *Banga Chandra Das* (2) and *Sarda Kanta Das* v. *Gobinda Mohan Das* (3). We have therefore both on principle and on authority, no doubt whatsoever in our minds that the order of the Judge was quite illegal.

(1) [1897] 21 Bom. 335.

The only point seriously urged on behalf of the respondents is that inasmuch as Gopi Rai had himself agreed to the reference and never objected to the award on the ground of illegality, he is estopped from raising this point in appeal. We cannot hold that there is any estoppel against Gopi Rai on this question of jurisdiction. That is a matter which we can take into account only when ordering costs. We accordingly allow this appeal and setting aside the order of the Court below granting the probate, send the case back to that Court with directions to restore it to its original number on the file and dispose of it according to law. In view of the fact that this objection has been taken for the first time in appeal before us, we direct that the parties should bear the costs of the proceedings incurred so far.

G.P./R.K. *Appeal allowed.*

(2) [1904] 31 Cal. 357=8 C.W.N. 197.
(3) [1910] 6 I.C. 912.

A. I. R. 1930 Allahabad 841

SEN AND NIAMATULLAH, JJ.

Babu Lal—Defendant—Applicant.

v.

Raghunandan—Plaintiff — Opposite Party.

Civil Revn. No. 25 of 1929, Decided on 12th March 1930, against order of Dist. Judge, Allahabad, D/- 21st November 1928.

(a) Civil P. C., O. 34, R. 6—Proceedings under O. 34, R. 6 are not proceedings in execution, but are proceedings in suit and provisions of O. 9 apply.

Proceedings started by an application under O. 34, R. 6, are not proceedings in execution. They are proceedings in the suit and, at any rate, of the nature contemplated by S. 141, which makes the provisions of O. 9, applicable to ex parte decrees passed in such proceedings : 16 *A. L. J.* 143 ; 40 *All.* 551, *Rel. on.* and 13 *All.* 356, *Dist.* [P 843 C 2]

(b) Civil P. C., S. 115—Dismissal of application for setting aside ex parte decree

under O. 34, R. 6 on erroneous ground that application was not maintainable—Revision lies—Civil P. C, O. 34, R. 6.

Dismissal of an application for setting aside an ex parte decree under O. 34, R. 6, on the erroneous ground that the application is not maintainable amounts to failure of exercise of jurisdiction vested in the Court by law and a revision lies. [P 843 C 2]

Harnandan Prasad—for Applicant.

Sochit Kumar Mitra—for Opposite Party.

Niamatullah, J.—This is an application for revision of an order passed by the learned District Judge of Allahabad confirming that of a Munsif of that district dismissing an application made by the applicant before us for an order to set aside an ex parte decree passed against him under O. 34, R. 6, Civil P. C.

The applicant Babu Lal executed a deed of simple mortgage in favour of Raghunandan for a certain sum of money on 15th July 1913. Raghunandan brought Suit No. 241 of 1924 for enforcement of that mortgage and for a personal decree in case the proceeds of sale of the mortgaged property proved to be insufficient to satisfy the decretal amount. A preliminary decree was passed on 22nd May 1924, in terms of the prayer made by the plaintiff in the aforesaid suit. Subsequently Datti Lal instituted suit No. 267 of 1925 for a declaration that the property mortgaged by Babu Lal belonged to him and that Babu Lal had no right to mortgage the same. The suit was decreed and the decree was affirmed on appeal. The result of the decree in the suit last mentioned was that the mortgaged property and consequently the expected proceeds of sale thereof were not available to the mortgagee.

On 30th August 1927, Raghunandan applied for a decree under O. 34, R. 6, Civil P. C., and obtained it ex parte on 22nd October 1927. On 22nd December 1927, Babu Lal applied under O. 9, R. 13, Civil P. C., for an order setting aside the ex parte decree on the allegation that he had sufficient cause for non-appearance on the date on which the ex parte decree was passed. The Court of first instance (a Munsif of Allahabad) dismissed it on the ground that an application under O. 34, R. 6, Civil P. C., is an application made in execution proceedings and consequently an application for an order to set aside an ex parte decree under O. 9, R. 13, is not maintainable. An appeal by Babu Lal to the learned District Judge was unsuccessful. He has come up to this Court in revision.

The question raised by this revision is whether proceedings under O. 34, R. 6, Civil P. C., should be considered to be proceedings to which the provisions of O. 9, Civil P. C., are applicable.

We are clearly of opinion that the view taken by both the Courts below cannot be supported with reference to the provisions of the Civil Procedure Code, Act 5 of 1908. The learned District Judge has not discussed the question of law which was raised before him and which arises before us. He seems to have accepted the ground on which the judgment of the Court of first instance proceeds. The latter relied on *Durga Dai* v. *Bhagwat Prasad* (1), which was decided when S. 90, T. P. Act 4 of 1882 had not been repealed and replaced by O. 34, R. 6, Civil P. C. It should be borne in mind in this connexion that a very material change has been introduced by O. 34, Civil P. C., which has taken the place of a number of sections of the Transfer of Property Act including S. 90. Under the Transfer of Property Act in suits for sale on foot of mortgages only one decree was to be passed and followed by an order absolute and if the proceeds of sale proved to be insufficient a decree over under S. 90 of that Act could be obtained. The provisions of O. 34 of the present Civil P. C., on the other hand, make clear provisions as regards a preliminary decree to be followed by another decree called a final decree. An application under O. 34, R. 6, Civil P. C., for a decree over is, of course, to be made after the final decree for sale has been completely executed and the proceeds of sale have been found to be insufficient for the satisfaction of the decretal amount. It was held under the Transfer of Property Act that an application for an order absolute under S. 89 of that Act, and also an application for a decree over under S 90, were applications in execution proceedings. It is not necessary for us to examine the soundness or otherwise of that view. It is enough to take it that this view prevailed, at any rate, in this Court.

(1) [1891] 13 All. 356=(1991) A. W. N. 104.

Durga Dai v. *Bhagwat Prasad* (1), relied on by the Court of first instance, proceeds on that view. It was observed that:

"the decree mentioned in S. 90, Act 4 of 1882 is one that is given in the execution proceedings arising under a decree for sale upon a mortgage and stands upon the same footing as an order absolute for sale, which the Full Bench of the Court has held to be a proceeding in execution."

In view of the scheme of O. 34, Civil P. C., it is difficult to treat an application under O. 34, R. 6, Civil P. C., as an application in execution proceedings which can in no sense be considered to be an application for execution or made in proceedings taken in execution of any decree which precedes it. A final decree for sale directs only the sale of the mortgaged property and cannot itself be considered to be a simple money decree or capable of execution for obtaining satisfaction of the decretal amount by attachment of other property belonging to the judgment-debtor or by process directed against his person. It is clear to us that an application under O. 34, R. 6, Civil P. C., starts a proceeding which may end in a simple money decree. It does not seek enforcement of any decree already passed in the mortgage suit.

In *Ahmad Khan* v. *Gaura* (2) it was held by this Court in reference to the present Code of Civil Procedure (Act 5 of 1908) that:

"a final decree in a mortgage suit is a decree in the suit itself and an application for a final decree cannot be deemed to be an application in execution."

This is clearly a departure from the old view, which maintained that an application for an order absolute under S. 89, T. P. Act, was an application in execution. It was held as a corollary from the last proposition that an application under S. 90, T. P. Act, was an application in execution. The case of *Ahmad Khan* v. *Gaura* (2), interpreting O. 34, R. 5, Civil P. C., corresponding to S. 89, T. P. Act, is an authority for the proposition that an application for a final decree is not an application in execution. It follows that an application under O. 34, R. 6, Civil P. C., cannot likewise be considered to be an application in execution.

The case of *Mohammad Iltifat Husain* v. *Alimunnissa* (3), decided by a Division Bench of this Court, is directly in point. It was held that:

"an application under O. 34, R. 6, Civil P. C. is an application in the original suit for a new decree, and it cannot be regarded as an application in execution."

The result is that proceedings started by an application under O. 34, R. 6, Civil P. C., are not proceedings in execution. They are, in our opinion, proceedings in the suit and, at any rate, of the nature contemplated by S. 141, Civil P. C., which makes the provisions of O. 9, Civil P. C., applicable to ex parte decrees passed in such proceedings. This being so the application made by the applicant for an order to set aside the ex parte decree passed under O. 34, R. 6, Civil P. C., was clearly maintainable.

It was contended that the order passed by the Courts below cannot be the subject of revision under S. 115, Civil P. C. We are however of opinion that the Court of first instance failed to exercise a jurisdiction vested in it by law on the erroneous ground that the application for an order to set aside an ex parte decree under O. 34, R. 6, Civil P. C., is not maintainable.

In the view of the case we have taken this revision is allowed. We set aside the orders of both the Courts below and remand the case to the Court of first instance for disposal of the applicant's application, dated 22nd December 1927, on the merits. Costs here and heretofore shall abide the result.

V.B./R.K. *Revision allowed.*

(1) [1918] 16 A. L. J. 143=43 I. C. 518.

(2) [1918] 16 A. L. J. 143=43 I. C. 518.

(3) [1918] 40 All. 551=47 I.C. 562=16 A.L.J. 437.

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* A. I. R. 1930 Allahabad 843

NIAMATULLAH AND BENNET, JJ.

Panna Lal — Judgment-debtor—Applicant.

v.

Bhola Nath and *others*—Auction-purchaser and Decree-holders — Opposite Parties.

Civil Revn. No. 249 of 1929, Decided on 10th July 1930.

*** (a) Civil P.C., O. 21, R. 89—Properties sold in separate lots to different auction-purchasers—Decree satisfied by sale proceeds of properties except to extent of price of house sought to be set aside—Deposit of amount of sale of latter property with five per cent of decretal amount held good deposit within R. 89.**

Where several properties are sold in execution of mortgage decree in separate lots to

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different purchasers, and decree is fully satisfied by the amount of properties sold except to the extent of price of house, sale of which was sought to be set aside, deposit by judgment-debtor of price of property sold to auction-purchaser, together with 5 per cent of this decretal amount, is good deposit within R. 89.
[P 844 C 2; P 845 C 1]

(b) Civil P.C., O. 21, Rr. 89 and 92—Order contravening Rr. 89 and 92 is revisable—Civil P. C. S. 115 (c).

Order contravening provisions of O. 21, Rr. 89 and 92, is an illegal exercise of jurisdiction and is a material irregularity within S. 115 (c)
[P 845 C 1]

(c) Civil P.C . O. 21, R. 92—R. 92 is mandatory—Order contravening rule is illegal.

Rule 92 is mandatory in its provisions. Order passed in contravention of this imperative rule is not a legal order. [P 845 C 1]

G. Agarwala—for Applicant.

P. L. Banerji and *H. P. Sen*—for Opposite Parties.

Niamatullah, J.—This is a revision from an order passed by the learned District Judge, Meerut, reversing an order of the learned Subordinate Judge of that district who set aside the sale of a house held in execution of a decree under O. 21, R. 89, Civil P. C.

Har Sahai obtained a decree for sale on foot of a mortgage in respect of several houses, and a shop including house No. 559 against the applicant Panna Lal and three others. Two of the houses, including No. 559 and the shop, were sold by auction and fetched sufficient price to satisfy the decree. House No. 559 was sold by a separate lot for Rs. 1,000 to Bhola Nath, the opposite party. The remaining house and the shop sold by separate lots fetched prices which together with Rs. 1,000, the price of house No. 559, fully satisfied the decree as we have already stated. Within thirty days of the sale of house No. 559 Panna Lal, who is probably solely interested in that house, deposited under O. 21, R. 89, Rs. 1,000 plus Rs. 50, and applied for an order setting aside the sale of house No. 559. The application was contested by the auction-purchaser, but the Court of first instance refused to confirm the sale and set it aside. On appeal by the auction-purchaser the learned District Judge reversed the order of the Court of first instance and dismissed the application under O. 21, R. 89, Civil P. C. Panna Lal has applied to this Court in revision. The deposit and the application made by Panna Lal under O. 21, R. 89 were objected to by the opposite party on two grounds, viz. (1) that no sale can be set aside under O. 21, R. 89 until the entire decretal amount, together with 5 per cent of the purchase money is deposited and that the applicant having deposited only Rs. 1,000, for which the house in question had been sold, the provisions of O. 21, R. 89, Civil P. C., were not complied with; and (2) that the auction-purchaser was not made a party to the application purporting to be one under O. 21, R. 89, Civil P. C. Both the Courts below overruled ground 2 which has not been pressed in this Court. As regards ground 1 which found favour with the lower appellate Court, though not with the Court of first instance, reliance is placed upon the wording of R. 89, O. 21, which directs payment to the purchaser of the sum equal to 5 per cent of the purchase money, and to the decree-holder, of the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. The argument ignores the latter half of R. 89 (b) which materially qualifies the provision for payment to the decree-holder. The judgment-debtor is entitled to deduct from :

"the amount specified in the proclamation of sale . . . any amount which may, since the date of such proclamation of sale, have been received by the decree-holder."

This part of the rule was apparently overlooked by the learned District Judge who appears to have been of opinion that, though Rs. 50 deposited for the auction-purchaser was adequate, the sum of Rs. 1,000 being part only of the decretal amount was insufficient and that though

"the decree-holder .... had stated in express terms that he did not object to the setting aside of the sale,

the auction-purchaser could successfully contest the application on that ground. It was stated before us on behalf of the applicant that the decree-holder had withdrawn the money fetched at the auction sale in full satisfaction of his decree. The learned advocate for the opposite party frankly stated that he was not in a position to controvert the applicant's assertion, though he would not expressly admit its correctness. We think that the Court of first instance was justified in the view it took. The decree-holder having had his decree fully satisfied by the amount fetched at the auction sales except to the extent of

Rs. 1,000 for which the opposite party purchased the house now in question, the only part of the decretal amount which need have been deposited by the applicant under O. 21, R. 89 (b), is Rs. 1,000 plus Rs. 50 for payment to the auction-purchaser. It is not disputed that he deposited these amounts besides the sum of Rs. 62 payable for charges incidental to the auction sale. On the merits therefore the order of the learned District Judge cannot be sustained.

The learned advocate for the opposite party strenuously contended that this Court cannot interfere in revision with the order of the learned District Judge which, assuming it to be based on an erroneous view of law, cannot be said to be without jurisdiction. Nor can the learned District Judge be said to have failed to exercise a jurisdiction vested in him by law or to have exercised it illegally or with material irregularity. It was also urged that if the Court of first instance had refused to set aside the sale, this Court could possibly have interfered with it in the exercise of its revisional jurisdiction, but in so far as the learned District Judge had jurisdiction to hear the appeal before him and to decide it, his order whether right or wrong in law cannot be considered to affect the exercise or the refusal to exercise his jurisdiction. We are unable to accept these contentions. O. 21, R. 92 is mandatory in its provisions and lays down that

"where in the case of an application under R. 89 the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale."

The applicant having made the deposite required by R. 89, the Court executing the decree or the lower appellate Court had no discretion in the matter and no power to refuse to set aside the sale. Any order passed in contravention of an imperative rule of law is not a legal order. While therefore it may be conceded that the learned District Judge had jurisdiction to hear and decide the appeal before him, he exercised that jurisdiction illegally by acting in the teeth of the provisions of O. 21, Rr. 89 and 92, Civil P. C. This being so, we are clearly of opinion that S. 115 (c), Civil P. C., applies to this case and that this Court can set aside the aforesaid illegal order in the exercise of its revisional jurisdiction. As to whether there is any difference in the extent of this Court's power to interfere with the order of the appellate Court, assuming it has a power to interfere with a similar order passed by the Court of first instance we think that there is none for the reason already stated, viz., that the District Judge exercised his jurisdiction as a Court of appeal in an illegal manner.

In the view of the case we have taken this revision must succeed. The application is accordingly allowed, the order of the learned District Judge is set aside and that of the Subordinate Judge is restored. The applicant will have his costs throughout.

G.P./R.K. *Revision allowed.*

A. I. R. 1930 Allahabad 845

MUKERJI AND BENNET, JJ.

Niranjan Singh — Plaintiff — Appellant.

v.

Mahabir Singh and *others*—Defendants—Respondents.

Letters Patent Appeal No. 103 of 1929, Decided on 14th April 1930, from a judgment of Ashworth, J., D/- 12th December 1928.

Adverse Possession—Cosharers—Shamilat land—Cosharer without interest in shamilat continuing in cultivating possession of land in shamilat without consent of owners of shamilat—Possession is adverse.

Where a cosharer who has no interest left in a shamilat on partition, but was under an impression that he had such interest, is in cultivating possession of land in shamilat and there is nothing to show that the cosharers consented to such possession, the possession becomes adverse so as to ripen into ownership by cultivation for more than twelve years.

[P 846 C 1,2]

U. S. Bajpai and *G. S. Pathak*—for Appellant.

Haribans Sahai—for Respondent.

Bennet, J.—This is a Letters Patent appeal by Niranjan Singh, the plaintiff, against a judgment of the learned single Judge of this Court by which the suit of the plaintiff for a declaration that he was in proprietary possession of certain plots was dismissed in its entirety. The lower appellate Court decreed the suit of the plaintiff for plots 308-10 and 308-11 and dimissed it for plot 324-14. The plaintiff filed an appeal in regard to the latter number which was dismissed by the learned single Judge, and the cross-objection of the defendants in

regard to 308-10 and 308-11 was allowed. Hence the present appeal of the plaintiffs. The facts as found by the lower appellate Court are as follows :

In the village of Deoraspur, mahal Madhoram, there are four principal pattis of which the plaintiff Niranjan is a cosharer in the patti which bears his name and the other three pattis are known as Patti Bhola, Patti Sheo Govind and Patti Ram Bharos, and in these three pattis the plaintiff Niranjan has no share. There are three shamilat pattis comprising various portions of land, and they are attached to the main pattis as follows :

1. Shamilat patti No. 1 appertains to the pattis of Sheo Govind and Bhola.

2. Shamilat patti No. 2 appertains to the pattis of Ram Bharos and Bhola, and it is in this patti that the three numbers in question are situate.

3. Shamilat patti No. 3 appertains to Niranjan Singh and Ram Bharos.

The fact is that under a partition, which was effected a long time ago, before the year 1890, as is stated by the learned counsel for each side, there was this division of this mahal, and apparently the parties were not very well acquainted with the way in which the shamilat pattis had been arranged. Apparently the parties were under the impression that the three shamilat pattis appertained to all the four principal pattis. The plaintiff is held by the lower appellate Court to have been in possession of plot 308/10 for 24 years, of plot 308/11 for 13 years and of plot 324/14 for eight years at the time of the suit. The question is whether the plaintiff has acquired the rights of an owner to hold the two plots as his khudkasht Nos. 308/10 and 308/11 for which he has obtained a decree from the lower appellate Court. That Court considered that the exclusive cultivation by the plaintiff of these two numbers for a period exceeding the statutory period of limitation of 12 years gave the plaintiff a right by adverse possession to hold these numbers as his khudkasht. On the other hand the learned single Judge of this Court approaching the matter from a different angle of vision considered that because the plaintiff had not asserted that his possession was adverse, and because the plaintiff had been under the impression that he was a cosharer entitled to hold those numbers in his cultivation as khudkasht, therefore the plaintiff would not acquire any title in these numbers by adverse possession ; that is, the learned single Judge of this Court considered that for adverse possession there must be a definite assertion by the plaintiff that his possession was adverse. We do not consider that under the circumstances of the present case it was necessary for the plaintiff to make any such definite assertion. His conduct in the possession of these plots was the conduct of an owner, as he was in the exclusive cultivatory possession of these plots. The written statement pleads that the defendants knew that the plaintiff had no right in these plots, because the plaintiff was not a cosharer in shamilat patti No. 2, Ram Bharos Bhola, to which these plots appertain. The written statement alleges that the possession of the plaintiff of these plots was that of a tenant of the defendants. That allegation has not been proved by the defence, and it is found that the plaintiff was not a tenant of the defendants. Accordingly the finding of the lower appellate Court is that the plaintiff cultivated these plots as an owner. Another point which has not been established by the defence is that in the annual settlement of accounts any reckoning was taken by the defendants of the cultivation of these plots by the plaintiff. It is not shown therefore that the cultivation by the plaintiff was a matter to which the defendants in any way consented. Accordingly the situation is that the plaintiff for 24 years cultivated one plot and for 13 years cultivated another plot without regard to the defendants who were the owners of the patti. Under these circumstances we consider that the action of the plaintiff amounts to an action which has ripened into ownership by adverse possession for more than 12 years. We therefore consider that the finding of the lower appellate Court is correct, and we allow this Letters Patent appeal and decree the suit of the plaintiff in regard to plots 308/10 and 308/11.

In regard to the third plot the plaintiff has again pleaded in Letters Patent appeal that there is an estoppel by acquiescence, and his counsel told us

that plot 324 14, for which the period of possession is eight years only, has a grove, and a temple and a well. But there is no finding of fact on the record that the grove, the temple and the well are in this number. All that is found is that the cultivation of the plaintiff of this number is for eight years. Under these circumstances we consider that the plaintiff has failed to prove that he has any title as owner in this plot. We therefore dismiss the Letters Patent appeal in regard to plot 324/14. The parties will get proportionate costs in regard to the success and failure of both the hearings in this Court.

V.B./R.K. *Appeal partly allowed.*

A. I. R. 1930 Allahabad 847

SEN AND NIAMATULLAH, JJ.

Mohammad Shafi and *others*—Defendants—Appellants.

v.

Mohammad Said and *another*—Plaintiffs and Defendant—Respondents.

Second Appeal No. 655 of 1926, Decided on 25th October 1929, from decree of Dist. Judge, Azamgarh, D/- 30th January 1926.

(a) Evidence Act, S. 115 — Estoppel upon representation—Declaration must have been made and believed and truth must have been inaccessible.

A party relying upon S. 115 has to establish not only that the opposite party had made a certain declaration, but that the said declaration had been believed and had been acted upon and that it was not reasonably possible for the said party to know the true state of affairs by pursuing enquiries reasonably and with diligence. Where truth is accessible to a party the plea of estoppel upon representation fails. [P 848 C 1]

(b) Transfer of Property Act, S. 41—Scope.

In order to attract the operation of S. 41 it is necessary for the party relying upon the section to establish that a particular person was the ostensible owner of the property with the consent, express or implied, of the person who was the real owner or was interested in the immovable property and to establish the further fact that the transferee had taken reasonable care to ascertain the nature and incidents of the title of the transferor before accepting the transfer. [P. 848, C. 1, 2]

P. L. Banerji—for Appellants.

Iqbal Ahmad and *M. Waliullah*—for Respondents.

Sen, J. — This is an appeal by the defendants from the judgment and decree of the learned District Judge of Azamgarh in a suit for redemption of two mortgages. One Chetu Lonia usufructuarily mortgaged one anna zamindari share of village Cheontahi to Jaglal Singh on 23rd December 1867 for Rs. 999. A six pies share of the same village was also usufructuarily mortgaged by Chetu aforesaid and his sister-in-law Mt. Jhuri to the same party on 24th August 1868 for Rs. 500. In 1873 strangley enough Jaglal Singh's name was recorded in the revenue papers as owner. On 24th October 1893 Jehli and Jageshar, heirs of the original mortgagors, sold the equity of redemption to one Bhawani Prasad, defendant 7. On 15th October 1902 Jaglal Singh made a submortgage in favour of the plaintiff. In 1904 Bhawani applied for the correction of the revenue papers and prayed that Jaglal Singh's name be recorded as mort gagee and not as owner. As a result, it was rejected, Bhawani Prasad being referred to a civil suit. No suit was instituted by Bhawani Prasad. On 4th June 1914 the heirs of Jaglal Singh, defendants second party, executed a sub-mortgage in favour of defendants first party. The mortgage-deed provided that the money was left in deposit with the submortgagee with a view to pay up the plaintiff's mortgage dated 15th October 1902. The mortgage of 1902 was redeemed. On 9th December 1922 the heirs of Jaglal Singh renewed the mortgage of the year 1914 by taking a further advance. On 12th September 1923 Bhawani Prasad, defendant 7, sold one anna out of one anna six pies mortgaged share to the present plaintiff. The plaintiff now brings this suit for redemption of the mortgage. The suit was instituted on 12th February 1925.

The suit was resisted inter alia upon the ground that it was barred by S. 41, T. P. Act. The Court of first instance dealt with the various pleas which were raised in defence, and, while recording the findings on the other issues in favour of the plaintiff dismissed the suit upon the ground that it was barred by S. 41, T. P. Act. The lower appellate Court has reversed this decision and decreed the plaintiff's suit.

It has been argued that the present suit is obnoxious to the provision of S. 115, Evidence Act, by reason of the fact that the plaintiff had made a declaration in the years 1902 and 1904 that Jaglal Singh was the owner of the property and not the mortgagee. Assu-

ming that such a declaration has been made it does not appear that the said declaration influenced the conduct of the defendants appellants, or their predecessors-in-title in any way so as to operate to their prejudice. There were conflicting documents before the Court below. In some of these documents a statement was made more or less loosely worded which is capable of the construction that Jaglal Singh was being described as the full owner of the property in dispute. There were other documents, notably an earlier mortgage bond of the year 1902, in which Jaglal Singh was represented as the mortgagee of the property in the most unequivocal terms. If the defendants behaved diligently and prudently and pushed their enquiries further afield it would have been impossible for them not to know the true legal position of Jaglal Singh. A party relying upon S. 115, Evidence Act, has to establish not only that the opposite party had made a certain declaration but that the said declaration had been believed and had been acted upon and that it was not reasonably possible for the said party to know the true state of affairs by pursuing enquiries reasonably and with diligence. Where truth is accessible to a party, the plea of estoppel upon representation fails. In agreement with the Court below, we hold that the plaintiff is not barred by S. 115, Evidence Act, from maintaining the present suit for redemption.

The plea founded upon S. 41, T. P. Act is equally untenable. According to the finding of the lower appellate Court, the mortgagee was not an ostensible owner with the consent, express or implied, of the mortgagors. Indeed, in an earlier mortgage deed dated 8th July 1902 the mortgagee had admitted that he was no more than a mortgagee of the property in dispute. The learned District Judge remarks:

"If the defendants first party had taken pains to ascertain all these facts they must have known what the real position of their transferors was."

In order to attract the operation of S. 41, T. P. Act, it is necessary for the party relying upon the section to establish that a particular person was the ostensible owner of the property with the consent express or implied of the person who was the real owner or was interested in the immovable property and to establish the further fact that the transferee had taken reasonable care to ascertain the nature and incidents of the title of the transfer or before accepting the transfer. Two things stand in the way of the appellants. The transfer in their favour was not from an ostensible owner. Again, the title of the transferor had not been enquired into at or before the execution of the mortgage in their favour. S. 41, T. P. Act therefore is clearly inapplicable. We dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 848

SEN AND NIAMATULLAH, JJ.

Mathura Das and *others*—Defendants—Appellants.

v.

Secy. of State and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 1949 of 1927, Decided on 7th May 1930, from decree of Dist. J. Saharanpur, D/- 6th July1927.

(a) Contract Act, S. 126 — Contract of guarantee need not be in writing—It may be by words or implied from conduct.

A contract of guarantee need not necessarily be in writing; it may be express, by words of mouth, or it may be tacit or implied and may be inferred from the course of conduct of the parties concerned. [P 849 C 2]

(b) Contract Act, S, 128 — Conditions contained in security bonds are subject to restrictions which follow from nature and character of principal's engagement—Security bond executed in favour of Government on behalf of treasurer temporarily appointed—No covenant in bond that in case of his reappointment security also would continue—After termination of appointment surety not notifying that his security ended—Some time after this appointment was over he being reappointed in same capacity—Surety was not liable for losses accruing during subsequent appointment — Contract Act, S. 14, Excep.

Contracts of guarantee have to be interpreted having due regard to the relative position of the contracting parties and to the circumstances surrounding the contract. The conditions contained in general terms are subject to restrictions which follow from the nature and character of the principal's engagement. One has no hold on the surety beyond the proper meaning of his written engagement.

A security bond was executed in favour of the Government on behalf of a certain treasurer who was temporarily appointed as such. The security was to continue during this appointment and there was no covenant that if after the temporary appointment he is again appointed in the same capacity, the security also would continue. After the first appoint-

ment ended, the surety did not notify that his liability under the original contract came to an end. The principal debtor was subsequently reappointed as treasurer.

Held : that the surety was not liable for any loss accruing to Government during his subsequent appointment : *Curling* v. *Chalklen*, 3 *M. & S.* 502; *Peppin* v. *Cooper*, 2 *B. & Ald.* 431; *Blest* v. *Brown*, 4 *D. G. F. & J.* 367 and *Pearsall* v. *Summersett*, 4 *Taunton's Reports*, 893)), *Rel. on.* [P 851 C 2]

P. L. Banerji and *Bhagwati Shankar* —for Appellants.

U. S. Bajpai—for Respondents.

Sen, J.—This is an appeal by three defendants in a suit instituted by the Secretary of State for India in Council for recovery of Rs. 3,016-4-5 under the following circumstances:

One Mutsaddi Lal was a cashier attached to the Thomason Engineering College at Roorkee. He went on leave on 3rd August 1917. Hira Lal, defendant 1, who was a store-keeper in the said college, was appointed to officiate for him from 7th August 1917. Hira Lal was required to find sureties for a sum of Rs. 2,000 to indemnify the Secretary of State for any loss arising either from defalcation or neglect during the period of his incumbency. On 7th August 1917, the defendants executed a security bond in favour of the plaintiff.

Mutsaddi Lal went on leave on 3rd August. The parties are agreed that the term of Hira Lal's incumbency during his officiating appointment lasted from 7th August 1917 to 12th October 1917, when Mutsaddi Lal returned and Hira Lal reverted to his substantive appointment as store-keeper. On 1st April 1919, Mutsaddi Lal went on leave for a second time, Hira Lal was again appointed to officiate in his place. Mutsaddi Lal appears to have submitted his resignation on or about the 15th July 1920, a date about the correctness of which we are by no means certain, and Hira Lal was confirmed in his place. No second security bond was executed by the defendants on the occasion of Hira Lal's appointment upon the retirement of Mutsaddi Lal.

No loss appears to have accrued to the Government by reason of any act or omission on the part of Hira Lal during his first incumbency. On or about the 18th October 1921, Rs. 3,016-4-5 appear to have mysteriously disappeared from the office safe which was in the charge and control of Hira Lal. The suit which has given rise to the present appeal was instituted on 31st March 1925, against Hira Lal and the present appellants for recovery of Rs. 3,016-4-5 on the allegation that the above loss accrued to the Government by reason of neglect on the part of Hira Lal and that defendants 2 to 4 were liable for the same under the terms of the surety bond executed by them in favour of the Secretary of State on 15th August 1917.

The suit was contested by Hira Lal and the other defendants upon different grounds. We are not concerned with the defence of Hira Lal for the purpose of this appeal. The Court of first instance passed a decree against him for the amount claimed. He appealed, and the decree of the trial Court was confirmed. Hira Lal has submitted to that decree. Defendants 2 to 4 contested the suit upon the ground that the surety bond was operative during the period of the first incumbency and did not operate for any subsequent period by reason of the reappointment of Hira Lal either as an officiating cashier or upon his confirmation to that office.

Under the terms of the surety bond the liabitity of the defendants was limited to a sum of Rs. 2,000. The defendants contended inter alia that the claim of the Secretary of State could in no case extend beyond the aforesaid amount. This plea found favour with the trial Court which, while repelling the plea of the defendants-appellants, that they were not liable at all, passed a decree against them for Rs. 2,000. This decree has been affirmed in appeal by the lower appellate Court.

A contract of indemnity or a contract of guarantee may be created either by parol or by a written instrument. Ch. 8, Contract Act, is not exhaustive on the subject. A contract of guarantee need not necessarily be in writing; it may be express, by words of mouth, or it may be tacit or implied and may be inferred from the course of conduct of the parties concerned. In this case the only contract which has been set up is the one evidenced by the the document dated 15th August 1917.

Contracts of guarantee have to be interpreted having due regard to the relative position of the contracting parties and to the circumstances sur-

rounding the contract. It is important to note that conditions contained in general terms are subject to restrictions which follow from the nature and character of the principal's engagement. In *Pearsall* v. *Summersett* (1), it was held that the extent of the condition of an indemnity bond might be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplated.

The security bond has been executed on the model form prescribed by the Government of India by its Resolution No. 3857, dated 5th November 1885. Apparently, the said form was intended to be used in cases of a single appointment, presumably of a permanent character, and not to cases of successive appointments to the same office, as has happened in the present case. This fact appears to have been overlooked either by accident or by inadvertence when Hira Lal was appointed for the second time consequent upon the resignation of Mutsaddi Lal. It is not improbable that the authorities of the Thomason Engineering College at Roorkee might have thought that the security bond which had been executed on 15th August 1917, was of sufficient amplitude to safeguard and protect the interest of the Government against any loss as might accrue during the second or subsequent incumbency.

The lower appellate Court was of opinion that the case before it was one of difficulty. It does not however appear that any subtle question of law or intricacies of facts were involved in the case. It has already been observed that the case hinged upon the construction of the document dated 15th August 1917, which was a vital document and was indeed the basis of the suit. The lower appellate Court does not appear to have considered the terms of the decument. Indeed its findings proceed upon a number of assumptions. These assumptions are at variance with the pleadings. The lower appellate Court states as follows:

"The lower Court has thought that the deed of suretyship had concern even with those appointments that were given afterwards. What I see is that no further deed of suretyship was taken. Certainly it was thought that the deed already executed related to these new appointments. There is no doubt that Hira Lal knew this as he did not care to get the old deed renewed or furnish new sureties. The authorities at the College too appear to be under the same impression. The sureties did not come forward to notify that their suretyship had ended."

It was no duty of Hira Lal to offer a fresh instrument embodying a contract of guarantee, when no such security was asked for from him. Similarly the sureties lay under no obligation to come forward and notify that their liability under the original contract had come to an end. It did not matter what the plaintiff thought or what any of the defendants considered to be the legal effect of the document dated 15th August 1917. It was not pleaded in this case that the reason for the non-execution of a fresh contract of guarantee was that the parties who were vitally concerned in the matter were agreed that the document, dated 15th August 1917, was to remain operative in connexion with the subsequent appointment of Hira Lal to the said office. This was neither pleadad nor proved. Lord Westbury has made the following pronouncement in *Blest* v. *Brown* (2) at p. 376:

"It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound therefore merely according to the proper meaning and effect of the written engagement that he entered into."

In order to determine the liability of the defendants-appellants, it is necessary to examine the nature and import of the recitals contained in the security bond. If the recitals are wide enough so as to continue the liability of the defendants-appellants in cases of successive appointments of Hira Lal to the same office, it may be possible to hold that the liability of the defendants-appellants did not end with the expiry of the first appointment which was temporary and short termed. But is there a covenant of that character to be found in the instrument? The instrument dated 15th August 1917, states that Hira Lal and the three sureties are bound to the Secretary of State for India in Council for a sum of Rs. 2,000 and provides:

"(1) Hira Lal was on 7th August 1917 appointed to, and now holds and exercises the,

(1) [1815] 4 Taunton's Rep. 593.

(2) [1862] 4 D. G. F. & J. 367=6 L. T. 620=10 W. R. 569=8 Jur. (n.s.) 602.

office of treasurer; (2) That Hira Lal "by virtue of such office" is in charge of and has control over funds belonging to the Government. (3) That if by reason of any act or omission, such as neglect, any property belonging to the Government in the charge of Hira Lal be "consumed, wasted, embezzled, stolen, misspent, lost, misapplied, etc.," Hira Lal and all the sureties are jointly and severally liable to the Government for any loss or losses—the liability of the sureties being limited to the extent of the sum secured by the security bond; (4) The liability is to continue "while the said Hira Lal has held or shall hold and enjoy the said office of treasurer as aforesaid" and the liabilities are to continue during the time that "the said Hira Lal has acted or shall continue to act in the said office of treasurer as aforesaid."

The security bond closes with the following paragraph :

"And it is lastly agreed and declared by and between the said (principal) and the said (one surety) and (other sureties) as his the said (principal) sureties and the said Secretary of State that on the vacation of the said (principal) of his said office of treasurer, Thomason College, the above-mentioned landed property for Rs. 2,000 or any notes that may be substituted therefor as aforesaid shall not be at once returned to him, but shall be and remain with the said (the authority with whom the notes are deposited) for the term of six months as security against any loss that may have been incurred by the Secretary of State owing to the neglect or default of the said (principal) or any other person or persons aforesaid and which may have not been discovered until after the vacation of his appointment by the said (principal); provided always that the return at any time of the said Government promissory notes shall not be deemed to affect the right of the said Secretary of State to take proceedings upon the said bond against the said (principal) and (sureties) in case any breach of the conditions of the said bond shall be discovered after the return of the said Government promissory notes."

Hira Lal was originally appointed to the office of cashier for a short time. The said office referred to in the instrument, clearly indicates his appointment which commenced on the 7th August 1917. "The said office" terminated on 12th October 1917, when Mutsaddi Lal returned to his appointment and resumed his duties. Mutsaddi Lal continued to be the treasurer for about 17 months. Nobody knew on 7th August 1917, when Hira Lal was temporarily appointed, that Mutsaddi Lal may not return on the expiry of his leave. No undertaking appears to have been given to Hira Lal that if Mutsaddi Lal retired or resigned, Hira Lal was to be confirmed in that appointment. Under the circumstances one should not expect to find in the security bond a covenant of liability regarding subsequent contingencies if and when Hira Lal was again appointed as cashier either temporarily or as a permanent incumbent. The security bond does not contain such a covenant. The security bond was apparently intended to be operative during the time that Hira Lal held his office as cashier by virtue of his appointmnet commencing from 7th August 1917. The security bond was, it is clear, to hold good during and for the consequence of this appointment in this office and not for any successive or subsequent appointment. Upon the expiry of the aforesaid appointment the security bond spent its force and no liability could attach to the defendants-appellants for any loss arising to the Government during the subsequent appointment of Hira Lal for which no engagement of security was given.

It is always unsafe to construe one document by referring to another document which is not pari materia in terms. It is, therefore, not necessary to refer to cases of construction of documents the terms of which are neither parallel nor identical. There are, however, cases where a security bond has been executed in favour of the Government or in favour of a public body in pursuance of a statutory regulation. In all such cases the office is created by statute and the preferment depends upon election. It has been held that if the same officer has been re-elected or re-appointed to the same office, the previously executed security bond does not hold so as to extend the liabilities of the sureties in case of loss arising in the course of the subsequent appointment; see *Curling* v. *Chalklen* (3) and *Peppin* v. *Cooper* (4). The rulings on this point do not proceed upon any artificial rules of construction; and the principle underlying those decisions appears to be applicable to the present case. I would, therefore, hold that on the true construction of the security bond, dated 15th August 1917, the defendants-appellants are not liable. I would therefore allow the appeal and modify the decrees of the Courts below by dismissing the plaintiff's suit as against the appellants.

Niamatullah, J.—I concur.

S.N./R.K. *Decrees modified.*

(3) 3 M. & S. 502.
(4) 2 B. & Ald. 431.

A. I. R. 1930 Allahabad 852

SEN AND NIAMATULLAH, JJ.

Madan Lal—Plaintiff—Appellant.

v.

Chiddu and *others*—Defendants—Respondents.

Second Appeal No. 1999 of 1927, Decided on 12th June 1930, from decision of Addl. Dist. Judge, Aligarh, D/- 18th October 1927.

(a) Hindu Law—Alienation — Coparcener —Alienation made by one member of joint family is voidable only at option of other members and not by alienor or his transferee.

It must be accepted as settled that an alienation made by a member of a joint Hindu family is voidable at the option of the other members thereof, or any one of them, but it cannot be impeached by the alienor himself or by any transferee who has not acquired by transfer or prescription the interest in the property alienated of the entire joint family : 33 *All.* 783 (*F.B.*) ; 35 *All.* 353 ; 36 *All.* 141 ; 42 *All.* 50; *A. I. R.* 1925 *All.* 339 and *A. I. R.* 1929 *All.* 243, *Rel. on.* [P 853 C 2]

(b) Hindu Law—Alienation—Father—Purchaser in execution of decree against father can challenge alienation on ground of legal necessity of that part of property.

An auction-purchaser at a sale held in execution of a simple money decree against the father, of a part of joint family property can impeach an alienation of that part of the property made by the father on the ground of want of legal necessity etc., where the joint family consists of father and his sons : 15 *All.* 339, *Rel. on.*; 35 *All.* 353, *Cons.* [P 855 C 2, P 856 2]

K. D. Malaviya—for Appellant.

T. A. K. Sherwani—for Respondents.

Niamatullah, J.—This is a plaintiff's appeal arising out of a suit brought by him for recovery of Rs. 218 by a sale of a house hypothecated to him under the mortgage deed dated 20th November 1923 executed by defendant 1 Chiddu in favour of the plaintiff-appellant. Defendants 2 to 6 are the sons of the mortgagor. Defendant 7 is his wife. Defendant 8 is one Bal Kishen who purchased the house to which the mortgage deed in suit related at an auction sale held in execution of a simple money decree passed against Chiddu on 22nd August 1925. The suit was not contested at all by defendants 1, 4, 5, 6 and 7. Defendants 2 and 3 who originally contested it subsequently withdrew in favour of the plaintiff. Defendant 8 contested the plaintiff's claim on the ground that the mortgage deed in suit was executed by defendant 1 without any legal necessity presumably for immoral purposes. Both the Courts below have held that the mortgage deed in suit was not justified by any legal necessity. The learned Additional District Judge has gone further and found that the money advanced by the plaintiff under the mortgage deed in suit was borrowed by defendant 1 for gambling to which he was addicted, and that the plaintiff was fully aware of the absence of legal necessity for the loan which he advanced. He has not however found that the plaintiff was also aware that defendant 1 required money for gambling. In any case the finding was sufficient for the view which he took, namely that the mortgage deed in suit was invalid and not enforceable against the family or the family property to which the deed related.

It is contended before us, as was contended before the Courts below, that the members of the joint Hindu family to which the property in suit belongs are the only persons who can impugn the validity of the mortgage deed in suit and that defendant 8 cannot, by virtue of the auction sale at which he purchased, be considered to represent the interest of the entire coparcenary body. It is therefore argued that it is not open to defendant 8 to put the plaintiff to proof of the validity of his mortgage as one made for legal necessity.

The learned advocate for the appellant, Mr. K.D. Malaviya, who has argued his case with skill and ability, has placed before us all the authorities bearing on the question. The earliest case to which it is necessary to refer is *Muhammad Muzam Ullah Khan* v. *Mithu Lal* (1), in which a subsequent purchaser who remained in possession adversely to the joint Hindu family for more than 12 years was held by the majority of the learned Judges composing the Full Bench to be competent to impugn the validity of a mortgage made by the head of a joint Hindu family on the ground of want of legal necessity. In this view it is obvious that the interests of all the coparceners were conveyed to the subsequent transferee who acquired it by adverse possession, though originally he had obtained a transfer from one member alone. Chamier, J., went further and held that the mortgage sought to be enforced not being proved to be for legal necessity

(1) [1911] 33 All. 783=11 I. C. 220 (F.B.).

was invalid and could not confer any title ; hence any party to the suit in which the question arises, being himself in possession, can put the plaintiff to proof of the validity of his mortgage regardless of the weakness of his own title. This view proceeds on the assumption that an alienation made by one member of the family without the consent of the other members, and without legal necessity is void and not merely voidable, and as such it can be ignored. Chamier, J., based his view on the authority of the Full Bench case of *Chandra Deo Singh* v. *Mata Prasad* (2), which he treated as an authority for the proposition that a transfer made by the father without legal necessity conveys no title. Though he doubted that an alienation by one member of the family without the consent of the others and not for legal necessity is void and not voidable, he held in substance that it is void in so far as he maintained that it conveys no title. A transfer voidable in its nature is good till it is avoided by those at whose option it is voidable. Later decisions of this Court definitely hold that such a transfer is only voidable : see *Jagesar Pande* v. *Deo Dat Pande* (3). In a recent case *Madan Lal* v. *Gajendrapal Singh* (4) it was assumed to be settled law, on the decisions of this Court of which the case last noted is an instance which proceeds on the authority of two Madras cases and a case of this Court, viz. *Sheo Ghulam* v. *Badri Narain Lal* (5).

Two Privy Council cases which lead to the contrary result if not positively against that view, were not brought to the notice of the Court then or at any subsequent occasion when the question arose. In *Lachman Prasad* v. *Sarnam Singh* (6) a mortgage made by three members of a joint Hindu family was sought to be enforced against the mortgagors and other members of the family. Their Lordships referred to the principles of Hindu law and observed :

"Now these are the principles which govern this and all other cases of the kind and according to these principles there can be no doubt that the present mortgage is void."

The report of counsel's argument as given in the volume of *Indian Cases* shows that it was actually argued on one side that it was voidable and not void. It is to be observed that the decision of the case would have been the same if the mortgage had been recorded as voidable. In a later case, *Manna Lal* v. *Karu Singh* (7), the High Court gave the plaintiff mortgagee a decree for sale of the father's share, he being the mortgagor, exempting the shares of the sons. Their Lordships of the Privy Council held that :

"upon the finding of the High Court this decree was too favourable to the plaintiff and incorrect. The law was finally established no doubt since that decision by this Board in the case of *Lachman Prasad* v. *Sarnam Singh* (6) which determined that a mortgage of the joint family property of a Mitakshara family by its karta unless necessity or an antecedent debt is proved is void ; the transaction itself gives to the mortgagee no rights against the karta's interest in the joint family property."

Here, again, the result would have been the same if the transaction had been held to be voidable at the instance of the sons. Their Lordships characterized it as void possibly because they were considering the question as to whether it is binding on the father who had made the mortgage against whom it becomes void when the sons repudiate it. On the one hand it is perfectly clear that their Lordships held the transaction to be "void" as distinguished from "voidable" ; on the other hand it cannot be deemed that it was necessary to decide whether it should be regarded as a nullity being void ab initio and could be shown to be such by any party, whatever its own rights. In this state of the authorities we do not feel disposed to pronounce a definite opinion on the question in the view of the case we take on the assumption that the mortgage in favour of the plaintiff is only voidable.

On the authorities of this Court then it must be accepted as settled that an alienation made by a member of a joint Hindu family is voidable at the option of the other members thereof, or any one of them, that it cannot be impeached by the alienor himself or by any transferee who has not acquired by transfer or prescription the interest, in the property alienated, of the entire

(2) [1909] 31 All. 176=1 I. C. 479.
(3) A.I.R. 1924 All. 51=74 I.C. 931=45 All. 654.
(4) A.I.R. 1929 All. 243=116 I.C. 436=51 All. 575.
(5) [1913] 19 I.C. 560.
(6) A.I.R. 1917 P.C. 41=40 I.C. 284=44 I.A. 169=39 All. 500 (P.C.).
(7) A.I.R. 1919 P.C. 108=56 I.C. 766.

joint family : see *Muhammad Muzammulla Khan* v. *Mithu Lal* (1), *Bakshi Ram* v. *Lila Dhar* (8), *Tota Ram* v. *Hargobind* (9), *Durga Prasad* v. *Bhajan* (10), *Jagesar Pande* v. *Deo Dat* (3), *Sarju Prasad Raut* v. *Mangal Singh* (11) and *Madan Lal* v. *Gajendrapal Singh* (4).

In none of these cases except *Bakshi Ram* v. *Lila Dhar* (8) the Court had to deal with the case of an auction-purchaser at a sale in execution of a simple money decree against the father and in possession of the property purchased by him. It must be conceded that the facts of the case last referred to are parallel and cannot be distinguished in any material particular ; but the only ground on which the decision of the learned Judges proceeds will appear from the following remarks :

"The appellant must be regarded as the purchaser of the right of Kallu only. His purchase was made as recently as 1909 and might yet be challenged by Kallu's son. He is therefore in a different position from that occupied by the purchaser in the case of *Muhammad Muzammullah Khan* v. *Mithu Lal* (1). In that case it was held by the majority of the Court that the purchaser was entitled to challenge a mortgage made by one member, of the Hindu family, because he had acquired title to the property, by adverse possession against all the members. We must therefore hold that the appellant is not entitled to raise the question of the validity of the mortgage."

The learned Judges assumed that the position of the auction-purchaser was identical with that of a transferee under a private alienation from the father, and that he did not acquire title to the property against all the members. That, if he is invested with all the rights of the joint Hindu family, he can impeach an alienation made by the father is conceded in that case and in the Full Bench case which it follows. The position of the auction-purchaser in execution of a simple money decree, of the interests of a coparcener, specially, those of the father in a joint Hindu family consisting of himself and sons or grandsons, is materially different from that of a transferee under a private alienation by the father or any other coparcener and has not been considered in any of the cases decided by this Court. As a matter of fact the question did not arise in any of them. It could have been raised and considered and decided in *Bakshi Ram* v. *Lila Dar* (8) but was overlooked.

It is a well-established proposition that though a member of a joint Hindu family cannot, by private alienation, transfer, for his personal benefit, his own share in the joint family property, his creditor can attach and have such share sold in execution of a simple money decree against him. The auction-purchaser at such a sale acquires the right to obtain a partition of the share of the judgment-debtor who has himself at least that right : see *Deen Dayal* v. *Jagdeep Narain* (12). If the right to obtain partition is conceded to the auction-purchaser it is difficult to withhold from him the right to challenge an alienation of a particular family property made by another member of the family, since all the members must be parties to the suit for partition and the entire family property must be brought into the hotch pot.

A dictum of their Lordships of the Privy Council in *Balgobind Das* v. *Narain Lal* (13), which seems to have an important bearing runs thus :

"In the present case the interest had passed to Naunidh not by survivorship but by purchase at sales in execution of decrees. Although it is not the same interest as he would acquire by survivorship, it is sufficient to entitle him to set up the invalidity of the mortgage."

The father (Naunidh) had purchased the interest of the son in execution of a simple money decree against the son (Narain Lal). The question was whether the father, as auction-purchaser of the son's right, could impeach a mortgage made by the son. The remark quoted above is their Lordships' answer to it. They pointed out with reference to *Deen Dayal Lal* v. *Jugdeep Narain Singh* (12) that the auction-purchaser of the interests of a member of a joint Hindu family acquires the right to obtain a partition of his share. In the case before their Lordships the father had purchased at auction the interest of the son in execution of a simple money decree and was held on that account to possess sufficient interest to

(8) [1913] 35 All. 353=21 I.C. 619.
(9) [1914] 36 All. 141=21 I C. 721.
(10) [1920] 42 All. 50=58 I.C. 487.
(11) A.I.R. 1925 All. 339=87 I.C. 294=47 All. 490.
(12) [1877] 3 Cal. 198=4 I.A. 247=3 Sar. 730 (P.C.).
(13) [1893] 15 All. 339=20 I.A. 116=6 Sar. 313 (P.C.).

entitle him to impeach a private alienation made by the son. Ordinarily a member cannot impeach his own alienation and a transferee of his interest cannot be in a better position, but an auction-purchaser can do so being entitled to obtain a partition which can be effected only by including the whole of the family property. It is noticeable that in the case which their Lordships had to consider, the father could be easily held to be competent to impeach the alienation made by the son not as an auction-purchaser but in his own right as an undivided member of the family, but, for reasons which are not clear from the judgment, their Lordships preferred to base their view on the purchase by him of the son's interest in execution of a decree for money, as giving him the locus standi to challenge the alienation of family property made by the son.

We do not think that it can be seriously disputed that a transferee from the father under an alienation made for legal necessity can successfully impeach another alienation made in favour of a transferee who fails to establish legal necessity for it. This is manifest from the ratio decidendi adopted in the case of *Bakshi Ram* v. *Lila Dhar* (8) itself which concedes that right to impeach an alienation not only to members of the family, but also to those who acquire its rights even by adverse possession. If therefore on the right of the plaintiff who is himself a transferee, to impeach an alienation in favour of the defendant, being questioned it is open to him to establish his title by proving adverse possession against the whole family, it follows that the plaintiff can likewise establish his right by proof of legal necessity for the alienation in his favour. It is but a logical extension of the same proposition that a plaintiff or defendant can establish the validity of the alienation in his favour by proving that it was made by the father to satisfy an antecedent debt and that he can impeach the alienation relied on by his adversary. There is nothing in any of the decided cases to which we have been referred to negative the right of a transferee for an antecedent debt of the father to impeach an alienation not s own to be valid by proof of the existence of justifying circumstances.

The position of the auction-purchaser at a sale held in execution of a simple money decree against the father is still stronger, where the family consists of father and sons. Even if the property so purchased is not his share in the entire family property, but of several properties belonging to such family, the right of the sons to challenge the sale is extremely limited. It was laid down by their Lordships of the Privy Council in *Suraj Bansi Koer* v. *Sheo Prasad Singh* (14) that

"where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off antecedent debt or under a sale in execution of a decree to pay for the father's debt, his sons by reason of their duty to pay their father's debt cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchaser had notice that they were so contracted."

The defendant in the case before us is an auction-purchaser of the property in dispute at a sale held in execution of a simple money decree against the father who is a member of a joint Hindu family with his sons and is in possession. The plaintiff sues for sale of it for satisfaction of a mortgage which has been found to be hopelessly invalid being tainted with immorality. Possession is a good title against all except the rightful owner. It seems to us that the defendant is entitled to defend his possession which he obtained in the manner stated. His right cannot be questioned even by the sons who are the other members of the family except by showing that the debt to which the decree related had been contracted for immoral purposes, and, further, that it was known to the defendant that the debts had been so contracted. His interest in the property in dispute, if not absolutely unimpeachable, is, at any rate, such as to entitle him to resist the attempt of the plaintiff to have the property sold for satisfaction of an invalid mortgage.

On a full consideration of the position of the parties we hold, both on principle and authority that an auction-purchaser, at a sale held in execution of a simple money decree against the father, of a part of joint family property which has passed out of the family, being in his possession by virtue of the

(14) [1880] 5 Cal. 148=6 I.A. 88=4 Sar. 1 (P.C.).

auction sale, can impeach an alienation of that part of the property made by the father, where the joint family consists of father and his sons. In view of the conclusion arrived at by us this appeal fails and is dismissed with costs including counsel's fee in this Court on the higher scale.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 856

MUKERJI AND NIAMATULLAH, JJ.

Mahabir Prasad and *others*—Decree-holders—Appellants.

v.

Mahesh Prasad and *another*—Judgment-debtors—Respondents.

Execution Second Appeal Nos. 45 and 121 of 1929, Decided on 29th March 1930, against decree of the Dist. Judge, Cawnpore, D/- 26th October 1928.

(a) Bundelkhand Land Alienation Act (2 of 1903), S. 4—Power to determine agricultural tribe comprehends power to amend, vary or rescind any notification whatsoever—U. P. General Clauses Act (1904), S. 21.

Power to determine by notification in the Gazette what bodies of persons in any district were to be deemed agricultural tribes for the purposes of the act comprehends power to amend, vary or rescind any notification whatsoever. [P 857 C 2]

(b) Bundelkhand Land Alienation Act (2 of 1903) S. 16—Character of agriculturist does not exist outside notification.

The character of an agriculurist under this Act is a creation of the notification of the Local Government under S. 4, and that character does not exist outside the notification. [P 858 C 1]

(c) Bundelkhand Land Alienation Act (2 of 1903), S. 16—Two brothers deemed to be of non-agriculturist tribe with sons executing mortgage of joint family property—Subsequent to preliminary decree but before final decree brothers taken out of notification and declared agriculturists—Objection to sale on ground of this notification—Final decree held to come within purview of S. 16 and shares of sons were however saleable.

During the period when a particular tribe was deemed to be a non-agriculturist tribe two brothers with their sons constituting a joint Hindu family, executed a mortgage and subsequently a preliminary decree for sale was passed on the same. Before final decree for sale could be made, by notification the Government modified the previous notification by taking the brothers out of previous notification and declaring them as agriculturists. On the foot of this notification, when the decree was being executed the brothers preferred an objection to the executing Court claiming that their property could not be sold.

Held: that the preliminary decree did not give the decree-holders a right to sell the property till the final decree was made and the final decree made after the notification came within the purview of S. 16; and that the shares of two brothers only in the joint property could not be sold, but also the shares of their sons could be sold under the final decree. [P 857 C 2]

U. S. Bajpai and *G. S. Pathak*—for Appellants.

P. L. Banerji and *H. P. Sen*—for Respondents.

Mukerji, J.—This appeal and the connected execution second appeal No. 121 of 1929 arise out of the same execution proceedings and in this way:

The decree-holders, who are the appellants before us, namely Mahabir Prasad, Mt. Mahdei and Narain Das obtained a preliminary decree for sale on 31st March 1925 against one Badri Prasad and his two sons, and Mahesh Prasad and his son. Badri Prasad and Mahesh Prasad were uncle and nephew. The preliminary decree was passed on foot of a mortgage executed by Badri Prasad and Mahesh Prasad on 5th August 1920. The judgment-debtors belong to the district of Banda, to which the Bundelkhand Land Alienation Act applies. By Act 2 of 1903 (Local), S. 4, the Local Government was entitled to determine by notification in the Gazette what bodies of persons in any district were to be deemed to be agricultural tribes for the purpose of the Act. The act was meant to restrict the power of alienation of the inhabitants of Bundelkhand. S. 16 of that Act says:

"No land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any civil or revenue Court, made after the commencement of this Act."

Again S. 10 of the same Act runs:

"In any mortgage of land made after the commencement of this Act any condition which is intended to operate by way of conditional sale shall be null and void."

After the passing of this Act, the Government of the United Provinces issued a notification dated 22nd June 1903, by which, among others, the Chaubeys of Godh Kalan (among whom the judgment-debtors are) were declared to be agriculturists. This notification was however modified under S. 23, Bundelkhand Land Alienation Act, by issue of a fresh notification dated 2nd October 1903. By this notification, except for the purpose of S. 10, Bundelkhand Land Alienation Act, among other persons, the Chaubeys of Godha Kalan were declared to be non-agri-

culturists. It was therefore during the period when the Chaubeys of Godha were deemed to be non-agriculturists that the mortgage was made and the preliminary decree for sale was passed. Before the final decree for sale could be made, by notification dated 29th October 1925, the Local Government professed to modify the notification of 2nd October 1903 by declaring that Mahesh Prasad and Badri Prasad were to be taken out of the notification of 2nd October 1903. This means that by the notification of 29th October 1925 Mahesh Prasad and Badri Prasad were again declared to be agriculturists.

On foot of this notification of 29th October 1925, when the decree was sought to be executed, Mahesh Prasad and Badri Prasad preferred an objection to the executing Court (Subordinate Judge of Banda) claiming that their properties should not be sold. The learned Subordinate Judge dismissed the objection. On appeal by Badri Prasad and Mahesh Prasad, the learned District Judge held that by virtue of the notification of 29th October 1925 the shares of Badri Prasad and Mahesh Prasad could not be sold, but the shares of their sons could be sold.

The decree-holders accordingly have filed an appeal claiming the right to sell the shares of Badri Prasad and Mahesh Prasad, and the sons of Badri Prasad and Mahesh Prasad have filed the connected execution second appeal No. 121 of 1929, claiming that their shares should also be exempted from sale.

A good deal of controversy in the present appeal related to how far the Local Government was competent to issue the notification of 29th October 1925. Having heard the learned counsel for both the sides we are satisfied that it is not open to us to say that the notification of 29th October 1925, by which in effect Badri Prasad and Mahesh Prasad were declared for the second time to be agriculturists, was ultra vires. Briefly, our view is as follows :

Section 23, Cl. (b), Bundelkhand Land Alienation Act, gives the Local Government authority to exclude any person or class of persons from the operation of a notification made under S. 4 of the Act. By the General Clauses Act, passed a year later (1904), certain powers were given to the Local Government, and the provisions of Ss. 4 to 28, General Clauses Act, were given retrospective effect. By S. 21, General Clauses Act, where a power to issue a notification is conferred, that power is to be deemed to comprehend a power to amend, vary or rescind any notification whatsover.

The effect of this S. 21, General Clauses Act, was that the notification of 2nd October 1903 could be so amended as to declare Badri Prasad and Mahesh Prasad to be agriculturists. In this view of ours the judgment-debtors Badri Prasad and Mahesh Prasad could validly claim that their share in the mortgaged property should not be sold. The preliminary decree did not give to the decree-holders a right to sell the property till the final decree was made. The final decree was made after the notification. Therefore it comes within the purview of S. 16, Bundelkhand Land Alienation Act. The result is therefore that appeal No. 45 of 1929 must fail and we dismiss it with costs.

As regards appeal No. 121 of 1929, a preliminary objection is taken by Mr. Pathak that the appellants accepted the decision of the learned Subordinate Judge and never filed an appeal to the District Judge and therefore they are not competent to file a second appeal to the High Court. This may be a pure technicality. But we may take it that when Badri Prasad and Mahesh Prasad filed an appeal to the District Judge, they filed the appeal not only for themselves but also as guardians ad litem of their minor sons for whom they had been appointed such guardians. We therefore disallow the preliminary objection.

Coming to the merits of the case, we think that the pure technicality on which the father's judgment-debtors have relied may be met with pure technicality on the part of the decree-holders.

This is a very hard case so far as the decree-holders are concerned. When they advanced money, the borrowers Badri Prasad and Mahesh Prasad were certainly non-agriculturists. When they got their preliminary decree, the debtors were again non-agriculturists. Between the passing of the preliminary and the final decree comes in the notification by which, practically speaking, the

decree-holders were made to lose their money which they had advanced in good faith. If that is so there is no reason why the law should be stretched in favour of the judgment-debtors and against the decree-holders. It has nowhere been contended that Badri Prasad and Mahesh Prasad were the sole owners of the property. They, as members of the joint Hindu family had only 5/12ths share in the family property, the three sons of theirs owning the rest. The notification does not mention the minor sons. It has been argued that if the fathers were agriculturists the sons also must be agriculturists. But this character of an agriculturist is the creation of the notification and the character does not exist outside the notification. We have therefore no reason to suppose that the minor sons are also agriculturists within the meaning of the Bundelkhand Land Alienation Act. They are Chaubeys, and except Badri Prasad and Mahesh Prasad all the Chaubeys of Godha are non-agriculturists.

In the result we see no merits in this appeal and we dismiss it also with costs.

We find that the appellants in appeal No. 121 of 1929 made a delay in furnishing security for costs of the appeal. On account of this delay, certain orders were passed by two learned Judges of this Court and our attention has been drawn to that order. In view of the fact that the appeal fails, no severe notice need be taken of the delay in furnishing the security for costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 858

BANERJI AND NIAMATULLAH, JJ.

Mahomed Raza Ahmad and *another*—Plaintiffs—Appellants.

v.

Zahoor Ahmad and *others*—Defendants—Respondents.

Second Appeal No. 1380 of 1928, Decided on 16th May 1930, from decree of Dist. Judge, Budaun, D/- 27th April 1928.

(a) Limitation Act (9 of 1908), Art. 44—Expression "Transfer of Property" in Art. 44 implies that property has changed hands.

Cases contemplated by Art. 44 are those in which "transfer of property" has been made by a guardian. It implies that the property has changed hands and does not apply to cases where the erstwhile minor is in possession of his property in spite of deeds of transfer executed by the guardian under which either possession does not pass from transferor to transferee, e. g., deed of simple mortgage, or possession has not been parted with though it ought to have been delivered. [P 859 C 2]

A person brought a suit beyond three years of his attaining majority for partition of the house and declaration that the sale effected by his certificated guardian without permission of the District Judge was void and ineffectual as against him. He claimed to be entitled to half share of the house which was so transferred and made the other cosharer of the house as well as the vendee defendant to the suit. It was found that the plaintiff was all along in possession with the cosharer.

Held: that Art. 44 did not apply to the case, and even if it applied it only barred the remedy of the plaintiff to get the sale deed set aside but was not fatal to his title which still subsisted and consequently the main relief sought, namely partition as against the cosharer was not affected by Art. 44; *A. I. R.* 1916 *P.C.* 172, *Ref.* [P 860 C 2]

(b) Limitation Act (9 of 1908), S. 28—Scope.

The rule is now well settled that lapse of limitation, apart from S. 28, bars only the remedy and does not extinguish the title of the claimant. [P 860 C 2]

Shiva Prasad Sinha—for Appellants.

B. Malik—for Respondents.

Niamatullah, J.—This appeal arises out of a suit brought by the plaintiffs-respondents for partition of a house and for a declaration that a sale deed, dated 24th November 1911, is void and ineffectual as against the plaintiffs. They claim to be entitled to half of the house the other half being the property of one Sheikh Fazal Ahmad, who is now represented by defendants other than defendants 1 to 3. The half share which is claimed by the plaintiffs, Mohammad Raza Ahmad and Mt. Taslimunnissa, originally belonged to their grandmother, Mt. Tazimunnissa, on whose death it was inherited by them in the proportion of two-thirds and one-third, respectively, their father having predeceased Mt. Tazimunnisa. Mt. Irshad Khatun, defendant 3, the mother of the plaintiffs, was appointed guardian of their person and property by the District Judge.

By a deed, dated 24th November 1929, Mt. Irshad Khatun purported to sell half of the house to Mt. Kadirunnissa, defendant 2, wife of Hafizzahur Ahmad, defendant 1. The latter is said to be the real vendee. The permission of the District Judge was not obtained by Mt. Irshad Khatun, the guardian defen-

dant 3, for sale of the property of her minor wards.

The defence of the first two defendants, so far as it is material for the purposes of this appeal, is that the aforesaid sale effectively conveyed the rights of the plaintiffs and that the same not having been set aside within three years from the time the plaintiffs attained majority, is conclusive by lapse of limitation. Both the lower Courts have held that the sale, not being made with the permission of the District Judge, was voidable, that the claim of plaintiff 1 was barred by limitation but that of plaintiff 2 was within time. Accordingly a decree for partition of one-third of one-half of the house was passed. The plaintiffs and defendants 1 and 2 have appealed to this Court. Second Appeal No. 1380 of 1928 is the plaintiffs' appeal and Second Appeal No. 1565 is that of the codefendants.

It has been found by the lower appellate Court that the sale has not been proved to be for the benefit of the minors. It is not therefore necessary to consider whether a certificated guardian can transfer the property of the minor ward for his or her benefit in the absence of the permission of the District Judge.

It cannot be disputed that Mt. Irshad Khatun had no authority to transfer the half of the house belonging to the plaintiffs. If she had not been appointed guardian under the Guardian and Wards Act, her action in making the alienation would have been that of a Fazuli and the sale would have been void, a mother not being a guardian of the property of her minor son under the Mahomedan Law. The character of the alienation made by the mother where she is a certificated guardian is somewhat different. In that case an alienation made by her is on the same footing as one made by any other guardian appointed under the Guardians and Wards Act, S. 29 of which declares transfers made by the certificated guardian without previously obtaining the permission of the District Judge, to be voidable at the option of the minor, exercisable after he or she attains majority. The Courts below have therefore rightly held the sale deed executed by the plaintiffs' mother to be voidable. The result is that it cannot effectively convey title to the transferee.

The learned District Judge has found that Mt. Taslimunnisa, plaintiff 2, attained majority on 1st July 1923. The present suit was brought on 24th November 1923. It follows that no question of limitation can arise in respect of her claim.

It has been found by both the lower Courts that the plaintiffs have been in possession of the house in spite of the sale in favour of defendants 1 and 2. There is nothing to suggest that their possession has been in any way of a derivative character, with the leave and license of the defendants. It must be taken to be in their own right, continued and peaceful. The learned District Judge thinks that plaintiff 1's possession does not affect the question of limitation in a case like this, as he was bound to have had the voidable sale set aside within three years, as provided by Art 44, Lim. Act, and that his inaction in that respect is fatal to his title. This view is based on an erroneous reading of the article referred to and takes no account of certain weighty considerations arising from other provisions of the Act. Cases contemplated by Art. 44 are those in which "transfer of property" has been made by a guardian. It implies that the property has changed hands and does not apply to cases where the erstwhile minor is in possession of his property in spite of deeds of transfer executed by the guardian under which either possession does not pass from transferor or transferee e.g., deed of simple mortgage, or possession has not been parted with, though it ought to have been delivered. If the view of the lower Courts be correct, it should follow as a corollary that the vendees could have successfully sued the plaintiffs in ejectment. It is founded on the erroneous assumption that the failure of the rightful claimant to have a voidable deed set aside within the time limited by law has the effect of extinguishing his title, though he might have continued in possession. Ordinarily, unless a deed is fictitious, the transferee is in possession; and if he is not, he will have to sue for it. If the view taken by the lower appellate Court be correct many anomalous consequences would follow. For example if the vendee sues before the expiry of three years, he has to face the contest regard-

ing the validity of the transfer, an issue which, in many cases, may create difficulty; but if he waits for three years and sues for possession within 12 years, he can recover possession from his adversary, who ex hypothesi cannot call in question the validity of the transfer, though he has been in possession all the time that has elapsed since the date of the transfer. In other words, limitation can be successfully pleaded against a defendant whose title is to be taken as extinguished by lapse of time. This view is, however, opposed to a number of decided cases, including the decision of the Privy Council in *Sri Kishen* v. *Kashmiro* (1). The only cases in which lapse of time not only bars the remedy but extinguishes the title of a claimant are those provided for by S. 28, Lim. Act, which is confined to persons, plaintiffs or defendants, whose suit for possession, if brought, would be barred by limitation. It has been held in numerous cases that S. 28, Lim. Act, does not apply to persons who, being in actual possession which has never been disturbed, have had no occasion to sue for recovery of it, as a party in possession cannot be prejudicially affected by the law of limitation: see cases noted in support of this proposition in Rustomji's Law of Limitation, notes under S. 28.

In this case the plaintiffs who are in possession sue for partition and for avoidance of the deed. So far as the first relief is concerned, the real parties to the case are those to whom the share other than that of the plaintiffs belongs. As against them the plaintiffs' title cannot be questioned. Except the true owner no one else can dispute the title of the person in possession whose possessory title will prevail against everybody else. Therefore, if the case were one for partition only, no objection by those in possession of the other half could be made to the plaintiffs' share being separated. They have however also sued for setting aside the sale deed, a relief which is directed against defendants 1 and 2 only. No question of misjoinder of defendants and causes of action was raised in the Courts below or in this Court, and we need not pause to consider it.

The position is somewhat curious. Plaintiff 1 could have sued his cosharers for partition without impleading defendants 1 and 2, and if they had done so, their claim, in view of their possession, could not have been defeated. The result of the view taken by the Courts below is that his suit for partition against his cosharers has to be dismissed, because their claim to have the sale set aside as against defendants 1 and 2, a claim in which the cosharers are not interested, is barred by limitation, with the consequence that the plaintiff must remain in joint possession till possibly the other cosharers sue for partition or defendants 1 and 2 successfully sue the plaintiff for possession on the basis of the sale deed in their favour.

This anomaly is however only seeming, but not real, being due to the erroneous assumption made by the lower Courts that failure to institute a suit to have a voidable instrument set aside has the effect of extinguishing the title of the person at whose option it is voidable. S. 28, Lim. Act, not being applicable to case, plaintiff 1's title subsists; and the only extent to which his inaction imposes any disability on him is that he cannot sue, after the lapse of the period limited by Art. 44, Lim. Act, for having the sale set aside. The rule is now well settled that lapse of limitation, apart from S. 28, Lim. Act, bars only the remedy and does not extinguish the title of the claimant. This being so, the subsisting right of plaintiff 1 must prevail and entitle him to separate possession of what is now in joint possession of himself and other cosharers.

For these reasons we hold that Art. 44 Lim. Act, does not apply to the case; and that, if it does, the plaintiff 1's remedy of partition as against his cosharers now in joint possession with him is not affected by Art. 44, which at the most merely bars as against defendants 1 and 2 the relief of having the sale deed cancelled, a relief which is not necessary for the main purpose of the suit, viz., partition. The result is that we allow Second Appeal No. 1380 and dismiss Second Appeal No. 1565, and decree the plaintiffs' suit with costs in all Courts.

P.N./R.K. *Order accordingly.*

(1) A.I.R. 1916 P.C. 172=34 I.C. 37 (P.C.).

A. I. R. 1930 Allahabad 861

MUKERJI AND BENNET, JJ.

Sheonandan Prasad—Plaintiff—Appellant.

v.

Mt. Tahiran Bibi and *others*—Defendants—Respondents.

Letters Patent Appeal No. 116 of 1928, Decided on 25th February 1930, against judgment of King, J., D/- 19th April 1928.

Limitation Act, (1908), S. 7—Suit to impeach alienation by father, manager or guardian of joint Hindu family—Certain members minors on date of alienation—Any one of such members can bring suit within three years of his majority.

The right to impeach an alienation by father or manager of a joint Hindu family is an individual right enjoyed severally by each of the joint members of the family, and consequently a suit by one of the several members of the family is maintainable, and if certain members are minors on the date of alienation any one of such minor members can bring the suit within three years of his date of majority: 41 *Mad.* 102; 43 *Bom.* 483; 8 *A. L. J.* 733; 31 *All.* 156 and *A. I. R.* 1926 *P. C.* 16, *Ref.* 34 *All.* 549, *Dist.* [P 861 C 2, P 862 C 2]

Shiva Prasad Sinha—for Appellant.

A. Sanyal—for Respondents.

Mukerji, J. — This is an appeal against the judgment of a learned single Judge of this Court, and the question on which decision was given by that learned Judge was one of limitation alone. It appears that there was a family of which one Sital was the father. His wife was Mt. Sumari, and his three sons were Debi Prasad, Nandan and Sheonandan. After the death of Sital two transfers were executed by way of sale, one in 1908 and the other in 1909. By these documents Debi Prasad and the mother Sumari (Nandan and Sheonandan being minors) purported to transfer certain portions of the family property. This suit was instituted by Sheonandan to set aside the alienation and to recover the property, in 1923. It has been found, among other matters, that at the date of the suit Sheonandan was less than 21, but his elder brother Nandan, who was not one of the vendors, was more than 21. The suit has been dismissed on several grounds, one being that Nandan could give a valid discharge as the head of a joint Hindu family, and therefore limitation began to run against both Nandan aud Sheonandan, and it expired when Nandan was 21 years of age. Reliance was placed on S. 7, Lim. Act and certain rulings of this Court and other Courts.

In our opinion, there are two answers to the contention that the suit is time barred. Firstly, the suit fell within Art. 44, Sch. 1, Lim. Act, it being a suit by a ward, who has attained majority to set aside the transfer of property by his guardian, viz., the mother. The period of limitation is three years and begins so run from the date "when the ward attained majority." As Sheonandan was one of the wards of the mother Sumari, prima facie, he should have, in his own right, a period of three years from the date of his attaining majority for the institution of a suit like the present one.

The second ground on which the plea of limitation ought not to have been allowed to succeed is this. In a joint Hindu family every member, ordinarily, claims for himself. When a father alienates property, everyone of the sons has a right to impeach the transfer, if it is not binding on the family. It is an individual right and is enjoyed severally by each of the joint members of the family. S. 7, Lim. Act, applies where any suit has to be brought "jointly" by several persons. A suit by one of several sons of a Hindu father who has transferred the property, would be maintainable, without the other sons joining in the suit. It cannoti therefore be said that the right to sue is claimed "jointly" by the several sons of a father, who alienated the joint Hindu family property. Further the use of the words "a discharge can be given without concurrence of such person" indicate that the section is applicable to cases like a debt where the question of discharge may arise. Here there is no question of discharge. The mother, on behalf of the minors and the eldest brother, alienated the property. If the head of the family (Debi Prasad at the time) could give a discharge within the meaning of S. 7, Lim. Act, no suit whatever could lie at the instance of the younger brothers of Debi Prasad. We are of opinion that no question of giving a discharge arises in the present case.

Cases in this Court, (see e. g. *Tulsi Ram* v. *Babulal* (1) at *pp.* 735 and 736

(1) [1911] 33 All. 654=10 I.C. 903=8 A. L. J. 733.

of 8 *A. L. J.*) have established that a son can impeach his father's alienation, although other members of the family, including the elder members, have agreed to such transfer. It is true that in the Full Bench case of *Hari Lal* v. *Munman Kunwar* (2) it was laid down that, in a litigation, the head of a joint Hindu family governed by the Mitakshara represents the other members of the family. But that is altogether a different matter. It is not the case that any suit in respect of the subject-matter of the present litigation had been brought by Nandan, and it should be taken for granted, in the absence of any evidence to the contrary that Nandan represented his own and his younger brother's interest. On the other hand, this is a question of individual rights, and although Nandan may be willing not to impeach the previous transactions, Sheonandan, the present plaintiff, may be minded otherwise.

In the case of *Ganga Dayal* v. *Mani Ram* (3) the certificated guardian of two Hindu minors sold certain property of theirs without the sanction of the District Judge. The older brother attained majority but did not impeach the transfer. When the younger brother attained majority, he instituted a suit to impeach the transfer. It was held that the suit was not barred by limitation. This case was followed in an unreported case, *Udai Parkash* v. *Udai Ram* (4) by a Bench of this Court. The learned Judges repelled the contention that S. 7, Lim. Act, was a bar to the suit. The contention was noticed by the learned Judges in the following language:

"The next question is that of limitation. The Court below, relying on a certain decision of the Madras High Court, has found that because Fateh Singh, the elder brother of the present plaintiffs could have instituted a suit contesting the whole of this alienation and did not do so within three years of his attaining majority, time had begun to run as against all the plaintiffs from the date of Fateh Singh attaining majority, and the suit when brought was statute barred."

The learned Judges then considered the case of *Ganga Dayal* v. *Mani Ram* (3) and held that it laid down the correct law and the law that was applicable to the circumstances before the learned Judges. There was an appeal against the decision of this Court before their Lordships of the Privy Council, and the decision is reported. It will be found in *Jawahir Singh* v. *Udai Parkash* (5). The question of limitation was again urged before their Lordships of the Privy Council, and the plea was repelled. Their Lordships did not discuss the slea but said:

"On the question of limitation their Lordships concur with the High Court."

We take it that their Lordships entirely approved of the decision of this Court on the point of limitation, which involved a consideration of S. 7, Lim. Act of 1908.

In this state of the authority of this Court and of the Privy Council, we are not disposed to decide in accordance with the view that prevails in Bombay. The learned single Judge relied on *Bapu Tatya* v. *Bala Ravji* (6) which does not seem to have taken notice of two earlier decisions to the contrary, in the same Court, in *Kandasami Naicker* v. *Irusappa Naicken* (7) and *Gulam* v. *Sriram* (8).

We therefore hold that the suit was not barred by limitation.

This disposes of the judgment of the learned single Judge of this Court. The question then remains whether we should remand the case to the lower appellate Court. But on considering the judgment of the lower appellate Court we find that it has decided all the questions that were raised before it, in a careful judgment. Two points were urged before us, namely the right of privacy claimed by the plaintiff was not considered by the lower appellate Court, and that the decision of the lower appellate Court as to legal necessity should not be accepted.

On the first point it appears to us that the plea was not pressed before the lower appellate Court. It was negatived by the Court of first instance. The lower appellate Court has given a careful judgment, and it framed no less than six distinct and clear issues on the several points it had to decide. If the

(2) [1912] 34 All. 549=15 I. C. 126=9 A. L. J. 819 (F. B.).
(3) [1909] 31 All. 156=1 I. C. 824=6 A. L. J. 62.
(4) First Appeal No. 239 of 1920.
(5) A. I. R. 1926 P. C. 16=48 All. 152=53 I. A. 36 (P. C.).
(6) A. I. R 1921 Bom. 239=45 Bom. 446.
(7) [1918] 41 Mad. 102=40 I. C. 664.
(8) [1919] 43 Bom. 487=51 I. C. 79=21 Bom. L. R. 353.

question of right of privacy had been raised before it, we are sure that it would have been considered by it. We cannot, therefore, allow this question to be raised again.

On the question of necessity, the learned counsel for the appellant has relied on the case of *Nandan Prasad* v. *Abdul Aziz* (9). It has been urged that as in the second of these two sale deeds Mt. Sumari did not describe herself as the guardian of her minor sons, it is not open to the Courts to consider whether the minors were really benefited or not by the transaction, and whether Mr. Sumari was or was not actually dealing with the property as the guardian of her minor sons. We have had the sale deed read out to us. We do not find anywhere that Mt. Sumari purported to make the transfer as the owner of the property. Indeed she did not give herself any particular character in the document. Only a year ago she had transferred a portion of the property as the guardian of her minor sons. We are therefore not bound to take the view that Mr. Sumari, in executing the document of 1909, was taking up an attitude which was contrary to the interest of her minor sons. This view of the sale deed would distinguish the case of *Nandan Prasad* v. *Abdul Aziz* (9) The technical plea therefore taken by the learned counsel for the appellant on this point cannot succeed.

There is one other point, which ought to be noticed, and it is this. The respondent Mohammad Saddiq died more than three months ago, and his legal representatives have not been brought on the record. It was on behalf of the respondents that the whole appeal had abated. On looking at the written statement filed by Mohammad Saddiq we find that he disclaimed all title to the property. He said that the other defendant in the suit, namely Muhammad Saddiq's wife, the defendant 1, Mt. Tahira, was the sole owner of the property. In the circumstances, we do not think that the death of Mohammad Saddiq and the fact that his legal representatives, namely those (if any) other than his wife, were not brought on the record do not, in any way, affect the merits of the appeal. The preliminary objection, therefore, fails. In the result, the appeal fails and is dismissed with costs.

v.B./R.K. *Appeal dismissed.*

(9) [1899] 21 All. 372.

A. I. R. 1930 Allahabad 863

MUKERJI AND BANERJI, JJ.

Mithai and *others*—Defendants—Applicants.

v.

Hasan Ali and *others*— Plaintiffs—Opposite Parties.

First Appeal No. 70 of 1929, Decided on 13th June 1930, from order of Sub-Judge, Allahabad, D/- 1st March 1929.

(a) Practice — Misjoinder —. Preliminary point must be decided at earliest stage of suit and not along with merits of case— Defendant raising plea that suit was bad for misjoinder of parties and causes of action—Trial Court still deciding case even on merits and dismissing it—In appeal appellate Court should accede to request of plaintiff to ignore defect of misjoinder of parties and causes of action and should not allow him to withdraw suit against some defendants.

A preliminary point must be decided as a preliminary point and at the earliest stage of the suit. It is not proper that a preliminary point should be decided along with the points involved in the merits of the case.

Where the defendant raises the plea that the plaintiff has no right to maintain the suit and also that the suit is bad for misjoinder of parties and causes of action and the trial Court decides the case even on merits and dismisses the suit, in appeal from the order of dismissal the appellate Court should accede to the request of the plaintiff to ignore the defect of misjoinder of causes of action and parties because the suit had been tried on merits and should not allow the plaintiffs to withdraw the suit as against certain defendants and to maintain it as against others inasmuch as this would mean that the case under trial should be thrown away and the defendants should be exposed to the harassment of the second and subsequent suit. [P 864 C 2]

(b) Civil P. C. (1908), O. 43, R. 1—Scope.

Order allowing the plaintiffs to withdraw their suit as against certain of the defendants is not appealable. [P 864 C 2]

Mushtaq Ahmad and *S. Majid Ali*— for Applicants.

Mukhtar Ahmad — for Opposite Parties.

Mukerji, J.—This is an appeal against an order of remand passed by the learned Subordinate Judge under the following circumstances : The repondents who are faqirs sued seven defendants for several reliefs. One of the reliefs was that the defendants should be called upon to remove the materials of their buildings, the second was that they should be asked to pay damages and the third

relief was as regards perpetual injunction. The defendants raised various pleas. They denied that the plaintiffs had a right to maintain the suit. They also alleged that the suit was bad for misjoinder of parties and causes of action and they alleged that the buildings had stood on the land for many years and that the new constructions were on old foundations.

The Munsif framed eight issues and he decided all of them. He found that the plaintiffs had no right to maintain the suit. He found that the suit was bad for multifariousness and he found that most of the buildings on the site were more than 12 years old. He also found that the plaintiffs were not entitled to any damages. In the result the learned Munsif dismissed the suit. It is to be noted that in the order dismissing the suit he does not give multifariousness as one of the reasons for the order that he was passing.

On appeal by the plaintiffs the learned Subordinate Judge started by saying that the Munsif decided the case on two preliminary points. Later on he did say that the Munsif decided the case on the merits also. But the learned Judge disregarded the decision on the merits and found that the plaintiffs' title had not been properly investigated and the suit was bad for misjoinder of parties and causes of action. On behalf of the respondents the learned Judge was asked to ignore the defect of misjoinder of causes of action and parties because the suit had been tried on the merits, but this suggestion was not acceptable to the learned Subordinate Judge.

The plaintiffs having found that the learned Judge was of opinion that the suit was bad for misjoinder of parties and causes of action made an application to withdraw the suit as against six of the defendants and to be allowed to maintain it as against defendant Mathura alone. The learned Subordinate Judge passed an order acceding to this request and remanded the suit to the Court of first instance directing it to amend the plaint and to proceed with the suit according to the directions contained in the judgment as against Mathura alone.

Mathura and three of the defendants have appealed. We find that in respect of the appellants other than Mathura there is no right of appeal. The order allowing the plaintiffs to withdraw their suit as against certain of the defendants was an order which was not appealable, but, in the circumstances, we think that we should take up the appeals of Mithai, Parokwa and Bholwa in revision and pass the necessary orders. As regards the defendants Kandhai, Bhurwa and Jokhwa they have not appealed and they have accepted the order of the Court below. In the circumstances we can do nothing for them.

It appears to us that a preliminary point must be decided as a preliminary point and at the earliest stage of the suit. It is not proper that a preliminary point should be decided along with the points involved in the merits of the case. Where therefore all the points involved in the merits of the case have been decided, to call upon the plaintiffs to make their selection means that the case under trial should be thrown away and the defendants should be exposed to the harassment of a second and subsequent suit. In our opinion the learned Subordinate Judge ought to have acceded to the request of the respondents' counsel that he should ignore the plea of multifariousness raised by the defendants themselves and ought to have tried the case on the merits. It is not suggested that either of the parties have suffered on the merits by the trial.

As regards the first question, namely whether the plaintiffs had a right to maintain the suit, it was a matter to be decided on the evidence that had been placed on the record by the parties. We do not quite see what the learned Judge meant that a further enquiry ought to have been made on the point by the Munsif. The clear issue was there: "Were the plaintiffs not entitled to maintain the suit? The parties had adduced the evidence and if the learned Judge was not satisfied with the decision, he himself was there to come to some decision.

The reason therefore for remanding the case entirely disappears. We take up the cases of Mithai, Parokwa and Bhulwa in revision, and we take the case of Mathura as his appeal, and set aside the order of remand so far as the aforesaid four persons are concerned. The case will go back to the learned Subordinate Judge who will decide the

appeal on merits. The question of multifariousness need not be gone into. The costs in this Court and in the lower Courts will abide the result.

P.N./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 865

MUKERJI AND BENNET, JJ.

Kishen Lal—Plaintiff—Appellant.

v.

Pearey Lal—Defendant—Respondent.

Letters Patent Appeal No. 165 of 1928, Decided on 5th March 1930, against judgment of Dalal, J., D/- 23rd May 1928.

Civil P. C., O. 21, R. 66 — Misdescription of property not challenged by judgment-debtor who had opportunity to contest description — Description cannot be contested after sale either by way of suit or application under S. 47.

If the property has been sold under the description adopted by the Court, it cannot be open to one or more of the judgment-debtors who had had an opportunity to appear before the Court and contest the description, to come in after the sale either by way of an application under S. 47, Civil P. C., or by a suit to contest that description. In this view of the case the judgment-debtor is really estopped by an ex parte order of the executing Court from contesting the description of the property: 31 *All.* 82, *Ref.* [P 866 C 1, 2]

K. C. Mital—for Appellant.

Panna Lal—for Respondent.

Judgment.—This is a Letters Patent appeal against a judgment of a learned single Judge of this Court, who dismissed the plaintiff-appellant's suit and thereby restored the decree of the first Court.

It appears that the respondent Pearey Lal held a mortgage, made in his favour on 12th May 1904, by two persons Mahbub Ali and Shahzadi Begum. These judgment-debtors mortgaged certain specified shares as their property with Pearey Lal. In due course Pearey Lal brought his suit for sale, and to that suit he made parties not only the judgment-debtors themselves, but also their representatives, among whom were included the present plaintiff's father Ganga Sahai, who was impleaded on the ground that he had purchased a portion of the mortgaged property. At some stage of the suit Ganga Sahai died, and in his place the appellant's name was substituted as a party. The decree that was passed was in respect of

"five sihams with the exception of the property mortgaged under the deed of 6th February 1904 and sold in decree No. 157 Sultan Begam."

After obtaining a final decree for sale Pearey Lal proceeded to bring the property to sale. In doing so, he described the property ordered to be sold in specific areas. It has been found by the lower appellate Court that the area which Pearey Lal was entitled to sell was really 40 bighas and odd and by a calculation, which went entirely in favour of Pearey Lal, would not exceed 85 bighas in any case. Pearey Lal, as a matter of fact, described the property ordered to be sold by the decree as covering an area of 113 bighas. With this description, however, which it appears was unchallenged on behalf of Kishen Lal, the appellant, the property was brought to sale and was purchased by Pearey Lal himself.

After a sale certificate had been granted to Pearey Lal, Kishen Lal took two steps to contest this sale. He proceeded under S. 47, Civil P.C., by an application to the execution Court, the object being to recover what, according to him, was an excess area obtained by Pearey Lal under cover of the sale. The second proceeding which the plaintiff started was of a suit, and it is this suit which is in the shape of a Letters Patent appeal before us. The proceeding under S. 47, Civil P. C. was decided on the merits, and the decision was upheld by the High Court. The Subordinate Judge found that the objector before him, namely Kishen Lal, has failed to prove that the area sold was more than the area comprised in the share ordered to be sold. The lower appellate Court in the appeal, which arose out of the suit, held that S. 47 did not bar the suit and that actually more property had been sold than could legitimately be sold under the terms of the decree. The only question before us is whether this suit is maintainable.

A large number of cases has been cited before us. We however think that no useful purpose would be served by discussing these cases. The judgments in these cases were influenced more or less by the facts peculiar to those cases. The important case to notice is a Full Banch case of this Court, namely *Bhagwati v. Banwari Lal* (1), where a majority of the Judges constituting the Bench held that a decree-holder, who happens to purchase at the auction sale, does not continue to be a decree-holder

(1) [1909] 31 All. 82=1 I. C. 416=6 A. L. J. 71 (F. B.).

for the purpose of obtaining possession from the judgment-debtor of the property which was sold to him (the decree-holder).

In our opinion this case has to be decided having regard to the facts of the case as already described above. When Pearey Lal proceeded to describe the property to be sold as consisting of 118 bighas, that was the time when any person interested in the property to be sold should have appeared and contested this description. Let us take the following case: A decree directs certain house property to be sold and describes the same as lying within certain boundaries. To make the description clear to the intending purchasers the decree-holder says, let us take it, in his application for execution, that the boundaries cover house Nos. 3, 4 and 5 situated on Canning Road in Allahabad. If this description is allowed to stand, and if no objection is taken to this description and the property is sold under that description, no judgment-debtor will be allowed to come forward after the sale and say that one of the houses was not really covered by the boundaries. It matters little whether the judgment-debtor appears and contests the description and fails to substantiate his plea, or whether he keeps silent and does not come before the Court at all. When the Court, by its order of sale, directs the property to be sold under the new description given by the decree-holder, it must be taken that the Court accepts that description as a correct description and makes an order for sale of the property as thus described. This is exactly what has happened in this case. Pearey Lal said that the 5 sihams ordered to be sold, and as described in the decree, corresponded to 118 bighas of area on the spot. If this was not so, it was for the appellant before us to appear in Court to say that the area was really in excess of the area which Pearey Lal was authorised by the decree to sell. It was a case of description and nothing else. If the property has been sold under the description adopted by the Court, it cannot be open to one of the judgment-debtors, who had an opportunity to appear before the Court and contest the description, to come in after the sale either by way of an application under S. 47, Civil P. C., or by a suit to contest that description. In this view of the case the appellant is really estopped by an ex parte order of the executing Court from contesting the description of the property. In our view the decree of the Court of first instance, as upheld by the learned Judge of this Court, is a correct decree, and we dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Allahabad 866

SEN AND NIAMATULLAH, JJ.

Abdul Alim and *another*—Plaintiffs—Appellants.

v.

Abdul Hamid—Defendant — Respondent.

Second Appeal No. 2213 of 1927, Decided on 21st May 1930, from decree of Sub-Judge, Benares, D/- 23rd August 1927.

***(a) Limitation Act (1908), S. 28—Suit for possession of office of mutawalli is personal action—In such action law of limitation merely bars remedy and not right.**

A suit for possession of the office of mutawalli is an action of a personal character and is not "a suit for possession of any property." In personal actions, the law of limitation bars the remedy but not the right. Where the action for possession of the office is statute barred, right to a particular wakf property is not necessarily extinguished under S. 28, which is limited to suits for "possession of property." But a person in adverse possession of property claiming to hold it as mutawalli does not prescribe for more than a mutawalli's right in such property and may acquire to that extent, the status of a mutawalli. The right to office and the right to possession of property are distinct jural concepts, though in the generality of cases the claim to the office of mutawalli and to the property appurtenant thereto are inseparable. This would principally depend upon the terms of the foundation or settlement : 26 *Mad.* 410, *Rel. on.* [P 868 C 1, 2]

(b) Limitation Act (1908), Art. 120—Scope.

A suit for a declaration that the plaintiffs are the Mutawallis of the trust property or a suit for possession of the office of the muttawalli are both governed by Art. 120. [P 867 C 2]

K. N. Katju and *Mahmoodullah*—for Appellants.

A. M. Khwaja—for Respondent.

Sen, J.—This is an appeal by the plaintiffs and arises out of a suit for recovery of Rs. 1,692 being the rents of certain endowed property which were alleged to have been wrongfully appropriated by the defendant during a period of three years before the institution of the suit.

The parties to the suit are own brothers, being the sons of one Sheikh Qadir Bakhsh. Plaintiffs alleged that their father had founded two mosques in mohalla Andha ka Pul in Talia Bagh of the city of Benares and that under a registered instrument, dated 28th April 1910, he had endowed certain property for the upkeep of these mosques and had constituted himself the first mutawalli of the endowment and directed that after his death two of his sons, Sheikh Abdul Alim and Sheikh Abdurrauf would succeed to the mutwallishiip. Haji Qadir Bakhsh died on 6th December 1912. The endowed property consisted of a number of shops which are admittedly in the possession of tenants. In 1917 the names of the plaintiffs were mutated in the municipal records as mutawallis of the endowed property. The suit was instituted on 10th September 1926 against Sheikh Abdul Alim, the eldest brother on the allegation that he had without any right appropriated the rents of the endowed property.

The defendant alleged that the mosques were not founded by Haji Qadir Bakhsh, that the properties in suit were not endowed by him and that the plaintiffs were not the mutawallis thereof. He admitted that Haji Qadir Bakhsh was the mutawalli of the said mosques but that during his lifetime the defendant had relieved him of the management of the mosques and since then had remained in possession of the wakf property for a period of more than twelve years. The defendant admitted that he had been realising the rents of the disputed property but contended that he had applied the income "on the objects of the wakf."

The defendant did not deny that the property in suit barring three houses was endowed property nor did he set up a claim adverse to the trust. It was immaterial for the purpose of the suit whether the two mosques were founded by Haji Qadir Bakhsh. The vital issues in the case were :

1. Did Qadir Bakhsh create a wakf in favour of these mosques ?
2. Did he constitute himself a mutwalli during his lifetime and direct the appointment of the plaintiffs as his successors to that office ?
3. Are the plaintiffs entitled to recover the amount claimed or is the claim statute barred?

The trial Court came to the conclusion that Haji Qadir Bakhsh had created an endowment in favour of the mosques by an instrument dated 28th April 1910, that the plaintiffs were mutawallis of the said wakf and that they were entitled to the rents which had been wrongfully collected by the defendant. Upon these grounds the plaintiffs' suit was decreed. The defendant appealed. The lower appellate Court did not try the issues of fact involved in the case and did not disagree with the findings of the trial Court. Apparently it assumed that a wakf had been created by Qadir Bakhsh and that the plaintiffs were the mutawallis de jure under the terms of the settlement.

The lower appellate Court reversed the decision of the trial Court and dismissed the suit with the following finding :

"The defendant has been in adverse possession of his office of mutawalliship (sic) for about 14 years and the suit was long time barred,"

The plaintiffs impugn the correctness of this decision for a variety of reasons and it appears to us that their criticism is well founded. The plaintiffs did not sue for a declaration that they were the mutawallis of the trust property. Likewise they did not sue for possession of the office of the mutawalli. Art. 120, Limitation Act, applies to suits of either description. Had the plaintiffs sought for one or the other or both of the aforesaid reliefs, it would have been open to the defendant to plead the bar of Art. 120. The defendant did not plead in the written statement either the bar of Art. 120 or the fact that he had been in adverse possession of the office of mutwalli for the statutory period of limitation.

Reference has been made to para. 7 of the written statement and to the grounds of appeal and it is alleged that the defendant

"had specifically stated that ever since the death of Qadir Bakhsh, the defendant had held the office adversely to that of the plaintiffs."

Paragraph 7 of the written statement is not free from vagueness and obscurity but it cannot, without straining the language, be construed to mean that the defendant had been in adverse possession of the office of the mutawalli. The only relevant paragraphs in the grounds of appeal are paras. 4, 5 and 7. These do not raise the plea of adverse posses-

sion to the office. The same remark would apply to the defendant's application dated 25th July 1927. Particular stress has been laid upon Abdul Alim's deposition and upon his petition dated 6th August 1926 in which it has been admitted that the defendant has remained in possession of the wakf property ever since the death of Qadir Bakhsh. This does not amount to an admission that the defendant has been in adverse possession of the office of mutawalli. The defendant is after all the own brother of the plaintiffs. No private or pecuniary interest was involved in the administration of the property. There may have been negligence in not asserting their rights ; but the plaintiffs were not completely remiss about their responsibilities. They got their names mutated in the municipal records in 1917 and they had been uniformly paying the rates and taxes relating to the wakf property. We are clearly of opinion that the lower appellate Court was not justified in finding

" that the defendant had been in adverse possession of the office of mutawallishiip from 1912 up till now."

The finding is at variance with the pleadings which have been completely misunderstood and rests upon a misreading of the evidence.

A suit for possession of the office of mutawalli is an action of a personal character and is not " a suit for possession of any property." In personal actions, the law of limitation bars the remedy but not the right. Where the action for possession of the office is statute barred, right to a particular wakf property is not necessarily extinguished under S. 28, Limitation Act, which is limited to suits for "possession of property." But a person in adverse possession of property claiming to hold it as mutawalli does not prescribe for more then a mutawalli's right in such property and may acquire to that extent, the status of a mutawalli. The right to office and the right to possession of property are distinct jural.concepts. The distinction has been kept in view in the explanation to S. 9, Civil P. C. The scheme of the Limitation Act tends to show that the framers of the Act were not oblivious of this distinction. In *Rajah of Venkatagiri* v. *Isakapatti Subiah* (1) it was held that where a suit was barred in so far as it was for a declaration of rights to the lands, that bar affected only the remedy or relief by way of declaration and did not extinguish the right and title of the true owner of the property (416 and 417)

In the generality of cases, the claim to the office of mutawalli and to the property appurtenant thereto go together and are inseparable. This would principally depend upon the terms of the foundation or settlement. It is possible that the claim to the office and to the property appurtenant thereto may be barred by limitation. It is equally possible that the claim to the office of mutawalli may not be time barred but limitation may have run against the mutawalli as regards his right to the administration and possession of the property. In so far as the mutawalli's suit to recover possession of the wakf property is barred, his right to it will be extinguished.

If the plaintiffs are the mutawallis, they have a right to hold the properties relating to the wakf and this right naturally extends to the appropriation of rents due from the tenants. If the plaintiffs are not the mutawalis, their suit must fail. There is some authority for the proposition that the defendant may, by lapse of time, by denial of title and by ouster, acquire a title to the mutawallishiip : *Debendranath* v. *Sefatulla* (2). The point does not arise in this case and we make no pronouncement on it. The defendant intended to plead in para. 7 of the written statement that his title to the wakf property had matured against the plaintiffs by lapse of time and continuous possession. He does not assert a title against the endowment inasmuch as he admits that the property is held in wakf and that he has been spending the income on "the objects of the wakf." But he sets up his title to the possession of the property in opposition to the plaintiffs. The written statement has not been artistically drawn up and it is possible that the vagueness and obscurity of the language of para. 7 misled the lower appellate Court in its appreciation of the pleadings.

(1) [1903] 26 Mad. 410.
(2) A. I. R. 1927 Cal. 130=99 I. C. 205.

We are clearly of opinion that the lower appellate Court erred in reversing the trial Court decree upon a point which was not available to the defendant on the pleadings. The finding moreover rests upon a misappreciation of the evidence. The grounds upon which the appeal was filed have not been tried. We therefore allow the appeal, reverse the decree of the lower appellate Court and remand the case under O. 41, R. 23, Civil P. C. with direction to readmit the appeal under its original number and to dispose of it according to law. Costs here and heretofore shall abide the event. Costs in this Court will include fees on the higher scale.

P.N./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 869

BANERJI AND NIAMATULLAH, JJ.

Raghunandan Prasad and *another*—Plaintiffs—Appellants.

v.

Ajodhya Singh and *others*—Defendants—Respondents.

Second Appeal No. 1270 of 1927, Decided on 18th March 1930, against decree of Sub-Judge, Jaunpur, D/- 8th April 1927.

(a) Transfer of Property Act, S. 74—Subsequent mortgagee paying off prior mortgage but redeeming more than what is mortgaged with him—He has right to subrogation.

A subsequent mortgagee when he sues for redemption of a prior mortgage acts on his own behalf as a mortgagee and not as agent of the mortgagee and if he redeems more property than given to him by the terms of his own mortgage deed he is entitled to retain possession of it in subrogation to the rights of the mortgagee redeemed by him till a proportionate amount is paid to him by those interested in the property other than that to which he is entitled under his own mortgage deed. [P 871 C 1,2]

(b) Specific Relief Act, S. 42—Liability to pay rents admitted but whether cultivators are so liable to one party or other sole question in suit—Declaratory relief only as to party's exclusive right to collect rent is proper.

Where the liability of cultivators to pay rent is admitted but the question is whether they are so liable to one party or other or both jointly a declaratory relief regarding the party's exclusive right to collect rent is proper one and may be claimed without infringing the provisions of S. 42. [P 873 C 1]

(c) Suits Valuation Act, S. 11(1) (b)—Over-valuation alone not sufficient to justify dismissal of suit by appellate Court unless over-valuation has prejudicially affected disposal of suit.

Over-valuation alone is not sufficient for the suit being dismissed by an appellate Court unless it is satisfied for reasons to be recorded by it in writing that over-valuation has prejudicially affected the disposal of the suit on its merits. It is only on this finding that it is justified in dismissing the suit or more correctly speaking in directing the plaint to be returned for presentation to the proper Court; 36 *All.* 58, *Ref.* [P 873 C 1]

Haribans Sahai and *Gadadhar Prasad*—for Appellants.

Shiva Prasad Sinha—for Respondents.

Judgment.—This and the connected Second Appeal No. 1071 of 1927 arises out of the same suit brought by the plaintiff appellants for a declaration of their exclusive right to recover rent of 15·53 acres of land detailed in list (b) at foot of the plaint as land appertaining to the share of 8 annas held by them in mortgagee-possession. The Court of first instance decreed the suit in its entirety. The lower appellate Court has dismissed it. The appeals were preferred in the lower appellate Court one by all the five defendants to the action and the other only by Sheobadan Singh, defendant 2 and Baijnath Singh, defendant 3. Both the appeals having been allowed by the lower appellate Court, the plaintiff had to file two appeals. The connected appeal No. 1271 is from the decree of the lower appellate Court passed in the appeal preferred by Sheobadan Singh and Baijnath Singh. It relates only to five plots to which the decree in Suit No. 230 of 1921, passed by the Munsif of Kirakat relates. The plaintiffs-appellants also seek a declaration that the aforesaid decree does not affect their interest in those plots. It is convenient to deal with the plaintiffs' suit as a whole passing separate orders on the connected appeal No. 1271 so far as the five plots in dispute in that appeal are concerned.

The pedigree given at p. 20 of the paper-book in the judgment of the Court of first instance will explain the position of the parties. The village Parhwa, District Jaunpur is divided into two pattis; (1) Patti Balbhaddar Singh of 10 annas 8 pies and (2) Patti Muneshar Singh of 5 annas 4 pies. This litigation is not concerned with the latter patti. In the former patti the share of Balbhaddar Singh was 8 annas. The remaining 2 annas 8 pies belonged to Baijnath Singh and Sheonath Singh

defendants 3 and 4, to the extent of 1 anna 4 pies, to Sheobadan Singh, defendant 2, to the extent of anna 1 and to Gayadin Singh, defendant 5 to the extent of 4 pies. The specific plots amounting in area to 15·55 acres, mentioned in list (b) already referred to were sir plots in Patti Balbhaddar Singh. The principal question in dispute in the appeal is whether they should be regarded as the sir exclusively of Balbhaddar Singh the cosharer of 8 annas, or as appertaining to the entire patti of 10 annas 8 pies so that the other cosharers of Balbhaddar Singh had a proportionate share in them as their sir. The shares of defendants 2 to 5 are held by defendant 1 as mortgagee with possession under several mortgage deeds. Balbhaddar Singh's 8 annas share was mortgaged with possession to one Kishen Dat by a deed dated 18th November 1902: Ex. 4. It purports to transfer not only the share but the entire sir now in dispute. The mortgagee's possession over the "sir" plots was the subject of a contest in the revenue Court at the instance of Sheobadan Singh defendant 2, and father of Gayadin Singh defendant 5. The entire sir land was recorded in the name of Balbhaddar Singh at that time and the revenue Court treated it as his sir exclusively directing the same to be recorded as the exproprietary tenancy of Balbhaddar accruing on the execution of the usufructuary mortgage deed dated 18th November 1902. Accordingly exproprietary rent of Rs. 65-8-3 was fixed by an order of the revenue Court dated 31st May 1905: Ex. 3.

Balbhaddar Singh having died in the meantime his son Jagat Bahadur Singh executed a deed of usufructuary mortgage on 21st June 1919 in favour of Lal Bahadur Singh plaintiff 2 in respect of the 8 anna share belonging to him. The deed expressly exempts the "sir" lands from the operation of the mortgage. A few months later on 22nd September 1912 Jagat Bahadur Singh sold his rights in the 8 annas share to Kishan Dat the mortgagee under the first deed executed by him on 18th November 1902 relinquishing the exproprietary rights in his favour.

Sheobadan Singh defendant 2, instituted a suit for pre-emption of the sale in favour of Kishen Dat last mentioned and obtained a decree on 22nd April 1921. Subsequently he transferred the share pre-empted by him to Ajudhia Singh defendant 1 by a deed of usufructuary mortgage dated 6th February 1922.

Lal Bahadur Singh plaintiff 2, obtained a decree for redemption in suit No. 184 of 1922 against Kishan Dut, to whom he paid off the mortgage money due to him under the prior mortgage of 18th November 1902. It should be mentioned that plaintiff 2 sued for redemption as puisne mortgagee under his deed dated 21st June 1919 and obtained delivery of possession of the property redeemed by him on 4th July 1923. The lands now in dispute were specifically sued for and all the defendants to the present suit were parties to that suit. He sold half of his rights to Raghunandan Prasad plaintiff 2.

The two plaintiffs brought a suit for arrears of rent against certain tenants who cultivated some of the plots now in dispute. On the defendants intervening in those suits, the Collector eventually dismissed them on 26th March 1925 holding that the sir lands in question did not exclusively belong to the plaintiffs or to their predecessor-in-title Balbhaddar Singh and that they could not sue for recovery of arrears of rent without joining the other cosharers, viz. defendants 2 to 5, and their mortgagee defendant 1. The plaintiffs seek a declaration to the effect that they are exclusively entitled to collect rent in respect of the sir plots in dispute challenging the correctness of the Collector's order aforesaid.

Baijnath Singh and Sheo Nath Singh defendants 3 and 4 had obtained a decree against Sheobadan Singh in respect of the five of the plots now in dispute recognizing their exclusive title to those plots as their sir land. The plaintiffs also seek a declaration of their rights to these plots which it should be noted are included in the property to which the general relief claimed by them relates. Second Appeal No. 1271 of 1927 specially deals with these five plots.

Both the Courts held that the 15·53 acres of sir land now in dispute originally appertained to the entire 10 annas 8 pies share that only Balbhaddar's

name was recorded because he was the lambardar and represented the entire family but that since the time of the usufructuary mortgage dated 18th November 1902 the same was treated as *sir* of Balbhaddar alone and that he was treated as exproprietary tenant from whom his mortgagee Kishen Dat was in receipt of rent for a period of more than 12 years. Accordingly they held that the defendants could not claim any share in that *sir* in view of the facts that have happened. The Court of first instance decreed the plaintiffs' claim on the finding that they obtained all the rights of Kishen Dat who was entitled to recovery of rent payable in respect of the *sir* land by the exproprietary tenants or the actual cultivators by virtue of redemption by them of the mortgage in favour of Kishen Dat. The lower appellate Court's view may better be expressed in its own words. It says:

"A subsequent mortgagee when he sues for the redemption of the prior mortgage, stands in the position of an agent of the original mortgagor. He cannot by redeeming a prior mortgage acquire more rights in the property than are given to him by the terms of his own mortgage deeds. The balance must revert to the original mortgagor. Whatever money the subsequent mortgagee paid to the prior mortgagee came really from the pocket of the original mortgagor, and the payment by him must be considered to be a payment by and on behalf of the latter."

The substance of the lower appellate Court's finding is that the mortgage-deed, dated 21st June 1919, in favour of the plaintiffs, clearly exempts the *sir* land and is limited to the 8 annas share while Kishen Dat's mortgage of 18th November 1902, redeemed by the plaintiffs, related to the *sir* as well. It is of opinion that redemption by the plaintiff will entitle them to possession of what was mortgaged to them under their own deed and anything over and above that share which could be obtained from the prior mortgagee by redemption cannot be retained by the subsequent mortgagee, but the latter must hand it over to the mortgagor or his representative-in-interest. We entirely disagree with the proposition of law which the lower appellate Court has given effect to. It is in direct conflict with the provisions of S. 74, T. P. Act, which expressly provides that:

"any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee and such mortgagee is bound to accept such tender and to give receipt for such amount and .... the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender."

Under S. 91 of the same Act any person who is interested in the mortgaged property or in the equity of redemption, however small his interest may be, is entitled to redeem a prior mortgage and retain possession of the mortgaged property in subrogation to the rights of the mortgagee redeemed by him till a proportionate amount is paid to him by those interested in the property other than that to which he is entitled under his own mortgage deed. The theory of agency which underlies the view of the lower appellate Court quoted above cannot be supported by anything on this record. The plaintiffs did not profess to act on behalf of their mortgagors but on their own behalf as subsequent mortgagees. To guard against possible misunderstanding we desire to make it clear that, as we read the mortgage deed in favour of the plaintiffs the deed dated 21st November 1919, they are entitled to recover thereunder the rent payable by the mortgagors for the exproprietary holding then in their possession. The deed clearly authorizes them to take possession of everything appertaining to the share mortgaged, except the *sir* plots, and to appropriate all profits of the share left after payment of the Government revenue. The rent payable by the expropietary tenant, the mortgagee, is unquestionably part of the profits. Strictly speaking, there was no *sir* then in existence. The lands which had been formerly *sir* became exproprietary tenure of the mortgagor. Exproprietary lands are sometimes loosely called as *sir* because of their character as such previous to the transfer which gives rise to the exproprietary tenure. What is, therefore, exempted by the mortgage deed is the exproprietary tenancy. The lands held by the mortgagor as exproprietary tenant are not to be taken possession of by the mortgagee but the deed does not entitle the mortgagor to hold the land rent free. In other words, the mortgage operates on the entire proprietary right in the 8

annas share, including the right to receive rent from the exproprietary tenant the mortgagor, whose possession, however, cannot be interfered with. Reservation in respect of the so-called *sir* land was made in the deed lest the mortgagee should attempt to take actual possession of it.

It has been mentioned that Jagat Bahadur subsequently sold his share and relinquished his exproprietary rights in favour of the vendee. If the relinquishment holds good absolutely and in favour of the mortgagee, a point which we do not decide, the plaintiffs are entitled to recover rent from the cultivators liable to pay it; but if the exproprietary rights subsist, the plaintiffs are entitled to recover the rent payable by the exproprietary tenant.

Having regard to the correct legal position and the rights of the plaintiffs under the mortgage deed, we are clearly of opinion that the view taken by the lower appellate Court is unsustainable and that of the Court of first instance must prevail. The result is that the plaintiffs-appellants are entitled to step into the shoes of Kishen Dat mortgagee. The latter was unquestionably entitled to receive rent in respect of the *sir* land which had been declared to be the exproprietary tenancy of Balbhaddar Singh and who was made liable to pay rent in respect of it by the revenue Court. We must accept the finding of both the Courts below that for more than 12 years it was treated as the exclusive *sir* of Balbhaddar Singh to the exclusion of defendants 2 to 5, whose attempt to obtain recognition of their rights in the revenue Court failed as far back as 1905. They could not have successfully resisted Kishen Dat's claim to rent in respect of these lands. The plaintiffs-appellants must be deemed to be entitled to what could have been recovered by Kishen Dat, to whose right they have been subrogated.

The above remarks may or may not apply to the five plots to which the connected S. A. No. 1271 of 1927 relates. The lower appellate Court has not arrived at any certain and definite finding with regard to the question whether defendants 2 to 5 were in possession of these plots to the exclusion of Balbhaddar Singh and his mortgagee, Kishen Dat. The lower appellate Court says:

> "As to the exclusive possession of the appellants Sheonath Singh and Baijnath Singh, over a number of plots, it is not easy to arrive at a decision. They have mortgaged these plots on several occasions and in 1921 obtained a declaration from the civil Court in respect of them, and Sheobadan Singh had admitted their claim in that suit. There is also the statement of the "patwari" (who happens to be the father of respondent 2) in certain previous proceedings to the effect that they were in possession. The "patwari," however, has tried to explain that he made those statements as a partisan of Baijnath and Sheonath and that the statements are not true. It is difficult to accept this explanation and it is not easy to hold that Baijnath Singh and Sheonath Singh have really not been in exclusive possession of plots which they claim. But in view of my finding that the plaintiffs are not entitled to the exclusive collection of rents from the tenants of the property in dispute, it would be unnecessary to decide this question."

Though the lower appellate Court is inclined to find in favour of defendants 2 to 5 as regards the five plots in question in Appeal No. 1271 of 1927, we cannot treat the observation quoted by us above as a finding of fact which may be conclusive in second appeal. It is a halting expression of opinion by a Court which refrains from making it a part of its decision. Before disposing of Appeal No. 1271, it is necessary that a definite issue should be remitted to the lower appellate Court for a finding as to whether defendants 2 to 5 were at any time in exclusive possession of the five plots to which it relates and, if so, how long and during what time.

Another point on which the lower appellate Court based its decree has reference to the proviso to S. 42, Specific Relief Act. It held that the plaintiffs' failure to obtain a decree for arrears of rent makes it necessary for them to sue for possession and a mere declaratory relief is barred by the proviso to S. 42, Specific Relief Act. We are unable to endorse that view. All that the Collector held by his order, dated 26th March 1925, is that the plaintiffs are not entitled to recover rent from the tenants liable to pay them, as other cosharers had not been joined as plaintiffs. It is true the Collector held incidentally at any rate, that the plaintiffs were not exclusively entitled to possession of the *sir* land now in dispute. If the defendants, who were held to be cosharers with the plaintiffs were to bring a suit for recovery of rent from those tenants, it would

meet the same fate. The plaintiffs cannot claim any consequential relief as against the defendants, who can, in no sense, be considered to have ousted the plaintiffs. It is conceded on all hands that the actual cultivators are liable to pay rent. The question is whether they are so liable to the plaintiffs alone or jointly to the plaintiffs and the defendants. A declaratory relief, under these circumstances, is a proper one and may be claimed by them without infringing the provisions of S. 42, Specific Relief Act. Accordingly we hold that the plaintiffs' suit for the declaration claimed by them is maintainable.

Another ground on which the lower appellate Court's decision was adverse to the plaintiffs was one of jurisdiction. It found, on a question raised before the Court of first instance by the defendants, that the value of the properties in dispute in the suit exceeded Rs. 2,000. It was accordingly held by the lower appellate Court that the trial Court, the Munsif, had no jurisdiction to entertain the suit. It found on evidence that the value was well over Rs. 2,000. (It should be mentioned that the Court of first instance found the value of the property in dispute to be no more than Rs. 1,100, which was within the pecuniary limits of its jurisdiction.) The lower appellate Court held that "the appeal ought therefore to be allowed for this reason alone." It has apparently overlooked the provisions of S. 11 (1) (b), Suits Valuation Act. Overvaluation alone is not sufficient for the suit being dismissed by an appellate Court, unless it is satisfied, for reasons to be recorded by it in writing, that the over-valuation has prejudicially affected the disposal of the suit on its merits. It is only on this finding that it is justified in dismissing the suit, or, more correctly speaking, in directing the plaint to be returned for presentation to the proper Court. If any authority were needed to support the proposition clearly borne out by the section itself, we may refer to *Dalip Singh* v. *Kundan Singh* (1). There is nothing to suggest that the defendants have been prejudiced by the trial of the suit in the Court of the Munsif whose judgment is thorough and well considered.

In the view of the case that we have taken Second Appeal No. 1270 of 1927 is allowed subject to the result of Second Appeal No. 1271 of 1927 as regards the five plots to which it relates. The plaintiff's suit is decreed; it is declared that they are entitled to recover from the tenants liable to pay rent in respect of the land in dispute other than the five plots aforesaid. The defendants-respondents must pay the costs of this appeal incurred by the plaintiffs here and in the lower appellate Court, including in this Court fees on the higher scale. As regards the costs of the original suit, the defendants must pay 9/10ths of the costs incurred by the plaintiffs in the Court of first instance, the remaining 1/10th being assumed by us to be costs apportionable towards the five plots to which Second Appeal No. 1271 relates and as to which orders shall be passed in that appeal.

V.B./R.K. *Order accordingly.*

(1) [1914] 36 All. 58=22 I. C. 614=12 A. L.J. 21.

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SULAIMAN, J.

Dwarka Das—Applicant.

v.

Pyare Lal—Opposite Party.

Civil Revn. No. 4 of 1930, Decided on 6th May 1930, from order of Small Cause Court Judge, Bulandshahr, D/- 18th May 1929.

(a) Appeal—Right of appeal being substantive applicant for revision can object to jurisdiction of Court, so as not to be deprived of right of appeal—Civil P.C., S. 115.

A right of appeal is a substantive right and an applicant in an application for revision is to urge entitled that a Court which has no jurisdiction should not take up a matter and dispose of it itself, depriving the applicant of his right of appeal. [P 874 C 2]

(b) Civil P. C. (1908), S. 21—Objection to jurisdiction taken in lower Court at later stage—It ought to be entertained in revision—Civil P. C., S. 115.

Although objection as to jurisdiction is taken in lower Court at a late stage in the proceedings, it ought to be entertained in revision, as question involved is one of jurisdiction as to which there can be no estoppel by conduct of parties. But the delay can be taken into account in awarding costs. [P 875 C 1]

(c) Civil P. C. (1908), S. 21—Principle of S. 21 is applicable to ex parte decree.

The principle underlying S. 21 applies also to an application for setting aside an exparte decree, by virtue of the provisions of S. 141. [P 874 C 2]

(d) Civil P. C. (1908), S. 115—Court below intervening with case without jurisdiction to hear it—It is fit case for revision.

Where the lower Court has no jurisdiction to hear a case and yet interferes in so far as to set aside an ex parte decree and returns the plaint for presentation to a proper Court for trial de novo, it is a fit case for interference in revision by the High Court for removing such anomaly. [P 874 C 2]

S. B. L. Gaur—for Applicant.

Panna Lal—for Opposite Party.

Judgment.—This is an application in revision from an order dated 18th May 1929, passed by the Judge of the Court of Small Causes at Bulandshahr setting aside an exparte decree. This order was followed by another order of the Court below dated 22nd June 1929, returning the plaint for presentation to the Court of the Munsif at Khurja. It appears that at the time when the decree was passed the Subordinate Judge of Bulandshahr had Small Cause Court powers and passed the decree as the Judge of the Small Cause Court of Bulandshahr on 20th December 1926. At that time Khurja was within the jurisdiction of that Court. By the time that the application for setting aside the ex parte decree was filed on 5th December 1928, the Judge of the Small Cause Court of Bulandshahr ceased to have jurisdiction within the area of Khurja Munsif. He therefore no longer had jurisdiction to try Small Cause Court, cases arising in that area. It follows that under S. 35, Provl. Small Cause Courts Act when the Court ceased to have jurisdiction in relation to the case, all proecedings in relation to it even after the decree had to be taken in the Court which, if the suit out of which the proceeding had arisen was about to be instituted, would have jurisdiction to try the suit. Such a Court in the present case would be the Munsif's Court at Khurja. It is therefore clear that the Judge of the Small Cause Court at Bulandshahr had no longer any jurisdiction to dispose of this litigation. This point has been conceded by the learned Judge in his subsequent order dated 22nd June 1929, and he has accordingly returned the plaint for presentation to the proper Court. The position therefore is anomalous. The learned Judge has held that he had no jurisdiction to hear the case and yet he has interfered in so far as he has set aside the ex parte decree and returned the plaint for presentation to the proper Court for trial de novo. If therefore there were no bar to my interference in revision, this would be a fit case for interference and removing this anomaly. S. 35, Provl. Small Cause Court Act, applies but by virtue of the provisions contained in sub-Cl. (2) of the section it is subject to the provisions of the Civil Procedure Code. Under S. 21, Civil P. C., no objection as to the place of suing can be entertained by the revisional Court unless such objection were taken in the Court of first instance at the earliest possible opportunity and there has been a consequent failure of justice. The principle underlying that section would undoubtedly apply to an application for setting aside an ex parte decree, by virtue of the provisions of S. 141, Civil P. C. It is an admitted fact that no objection as to jurisdiction was raised by the applicant in his objection dated 23rd February 1929, which he filed against the application for restoration and such objection was only raised on 22nd June 1929, in argument before the order returning the plaint was passed. If therefore the objection is substantially one as to the place of suing I have no power of interference in the case. On the other hand, if the objection as to jurisdiction is of a different character then S. 21 would not be applicable.

The Munsif of Khurja had Small Cause Court powers only up to Rs. 250, but the valuation of the present suit was in excess of that figure. Thus, if the present suit were now to be instituted, it would have to be instituted in the Court of the Munsif at Khurja and not in the Court of Small Causes at Khurja. There would be a right of appeal to the District Judge. On the other hand, the application has been disposed of by the Court of Small Causes at Bulandshahr which gives no power of appeal from the order. It therefore seems to me that the objection as to the jurisdictiou of the Court is not one merely of the place of suing but as to the nature of the Court itself. A right of appeal is a substantive right and the applicant is entitled to urge that a Court which has no jurisdiction should not take up the matter and dispose of it itself, depriving the applicant of his right of appeal. I am therefore of opi-

nion that although this objection was taken in the Court below at a late stage in the proceedings, it ought to be entertained in revision as the question involved is one of jurisdiction as to which there can be no estoppel by conduct of parties. But the delay in taking the objection can be taken into account in awarding costs. I accordingly allow this revision, and setting aside the order of the Court below, dated 18th May 1929, direct that the application for restoration be returned to the judgment-debtor for presentation to the proper Court. The effect of this order will of course be to set aside the order of 22nd June 1929 automatically. The Munsif at Khurja will dispose of the application for restoration on its merits. I direct that parties will bear their own costs of these proceedings in this Court and in the Court below. Rs. 6 paid to the decree-holder as a condition precedent for the restoration of the case will be refunded by him to the judgment-debtor.

B.V./R.K. *Revision allowed.*

A. I. R. 1930 Allahabad 875

SULAIMAN AND KENDALL, JJ.

Ram Das—Defendant—Appellant.

v.

Dwarka Das—Plaintiff—Respondent.

First Appeal No. 59 of 1927, Decided on 27th March 1930, from decision of Addl. Sub-Judge, Benares, D/- 3rd December 1926.

(a) Principal and Agent—Principal, minor—Suit filed by general attorney of minor's guardian without knowledge and permission of guardian—Minor not being fully represented, judgment cannot be conclusive as against him.

A suit was instituted by the general attorney of a minor principal's guardian, without the guardian's knowledge and permission, both on his own behalf and for the minor's guardian, professedly as the guardian's authorized agent.

Held: that the minor not being fully represented, the judgment cannot be conclusive as against him. [P 876 C 1]

(b) Transfer of Property Act (1882), S. 130—Transfer of debts by way of sale—Vendor realizing one debt in spite of sale—Vendee should be allowed credit for such amount out of consideration — Vendor and purchaser.

When debts are transferred by way of sale and the vendor, in spite of the sale, realizes one of such debts, it is only just and equitable that the vendee should be allowed credit for the amount so realized out of the consideration. [P 876 C 1,2]

(c) Civil P. C. (1908), O. 8, R. 6 — Equitable set-off.

An equitable set off can be claimed independently of the specific provisions of the Civil Procedure Code. It is not necessary to demand court-fees on this account; 27 *All.* 145, *Foll.* [P 876 C 2]

Sulaiman, J.—This is a defendant's appeal arising out of a suit for recovery of Rs. 7,000 odd comprised of several items. The claim was disputed, but has been decreed in part. The defendant has accordingly appealed, but the plaintiff has submitted to the decree so far as it dismissed a part of his claim. It will be convenient to take up each of the items separately. The first item claimed was the balance of Rs. 1,575 out of Rs. 5,100 which had been fixed as the value of the share of the plaintiff's deceased father in a certain partnership business. After the dissolution of the partnership, written agreements were executed by the deceased and the defendant and they are to be found at pp. 58 and 59 of the paper book. There cannot be the least doubt that the deceased transferred his entire interest in this partnership in lieu of Rs. 5,100 and ceased to have any further concern with this business. The defendant has taken the plea that there was some sort of an oral understanding that the defendant would be liable to pay this amount only if the valuation of the assets had been correctly made. No such contemporaneous oral agreement can be pleaded when the agreement between the parties was reduced to writing. We are satisfied that the defendant was bound to pay Rs. 5,100, it being wholly immaterial what the real value of the assets of the partnership turned out to be.

The second item was of Rs. 4,000 which represented debts due to the deceased personally from his debtors which were transferred by him to the defendant for a sum of Rs. 4,000, the face value of the debts being over Rs. 6,000. The agreements referred to above leave no doubt that the defendant agreed to pay a consolidated sum of Rs. 4,000, irrespective of the amount which he was actually able to recover from the various debtors. The pleas taken with regard to this item on behalf of the defendant were (1) that the debt of Rs. 600 had really become

barred by time, (2) that Rs. 3,000 had been realized by the deceased after the transfer and (3) that the debts included a simple mortgage debt which had not been formally sold to him with the result that he could not sue upon it.

In support of his contention the defendant produced a certified copy of the judgment in a previous suit, brought by him both for himself and on behalf of the present plaintiff's guardian against the said debtor, which was ultimately dismissed. The learned Subordinate Judge in the present case has held that that judgment is not relevant in this case, because although the suit had been brought nominally in the name of the present plaintiff as well, he was a minor, and his mother had no knowledge of the suit, and the defendant who was her general attorney had taken advantage of that circumstance and included the minor's name in the plaint. It does appear that after the disposal of the suit, when the present defendant appealed to the District Judge the present plaintiff's mother applied to him stating that the suit as well as the appeal had been filed without her knowledge and permission, and that she had not authorized Ram Das to file them. There is no evidence on the present record to show that the minor's mother had any real knowledge of this litigation. The plaint shows that it was signed by Ram Das himself both on his own behalf and for the minor's guardian, professedly as her authorized agent. We are satisfied that the present plaintiff was not fully represented in that case and the judgment therefore cannot be conclusive as against him.

It has been contended on behalf of the respondent that it is not open to the defendant in the suit to take the plea that there should be deduction on account of the supposed realization of a debt by Gokul Das. The contention is that his remedy would be by way of a separate suit for damages for breach of contract. We do not find any force in this contention. The deduction claimed is on account of the same transaction. If it be true that Gokul Das had transferred certain debts to the defendant and then, in spite of the sale realized one of such debts, it seems to us only just and equitable that the defendant should be allowed credit for the amount so realized out of the consideration as it has been held in this Court in several cases that an equitable set-off can be claimed even independently of the specific provisions of the Code of Civil Procedure (S. 111 now corresponding to O. 8, R. 6: *Nand Ram* v. *Ram Prasad* (1) and the earlier cases referred to therein. It is not necessary to demand court-fees on this account.

Both the suits were, unfortunately for the defendant-appellant, going on almost simultaneously. In the present suit Ram Das was examined on 8th July 1926 and his evidence was formally closed on 2nd August 1926. The appeal in the previous suit against the debtor however was not disposed of till 10th November 1926. Ram Das was in this awkward position. In his previous suit against the debtor the position taken up by him was that no payment had been made by the debtor to the deceased Gokul Das. Ram Das was actually leading evidence to disprove any such payment. In the present case the plea taken up by him was that such amount was paid but this version was based on the payment of the defendant's debtor as alleged in the other case and the judgment of the first Court which had not become final. The main evidence which Ram Das could have produced in the present case would have been the production of the debtor as his own witness as well as his account books, the genuineness of which he was not challenging in the other litigation. No doubt if he had been properly advised he might have adopted a course of action which would not have placed him in this difficulty, but the fact remains that his position has been awkward and has resulted in sufficient evidence not having been adduced in the present case. The learned Subordinate Judge has not recorded any clear finding that no payment had actually been made to Gokul Das. He has perhaps implied it in his finding that the defendant is liable to pay the whole of Rs. 4,000.

We think that it would be only fair that there should be a clear finding on this question of fact, viz. : (1) whether

(1) [1905] 27 All. 145=(1904) A. W. N. 193.

Madho Prasad, and Kishori Lal did pay Rs. 3,000 odd to Gokul Das deceased on or about 24th August 1923 and (2) whether if Gokul Das did receive such an amount he paid it to Ram Das. We further think that in view of the circumstances enumerated above the parties should be at liberty to produce further evidence on these issues.

The plea that one of the debts amounting to Rs. 600 had become barred by time cannot be sustained. Under the written agreements the loss must be suffered by the defendant. There is also no force in the contention that there was no sale deed of a simple mortgage which was included in the sum of Rs. 4,000. In the first place there is no satisfactory evidence to prove that there was any such simple mortgage, and in the next place the recitals in the two written agreements make it quite clear that a sale deed had been duly executed and handed over to the defendant. We accept the findings of the Court below on this point.

The third item was a trivial one and was abandoned at the trial.

The claim as regards the fourth item has been dismissed and is not in dispute before us.

The last item is a sum of Rs. 175 claimed as interest on Rs. 10,000 which was subsequently paid off. It appears that Rs. 10,000 were borrowed by Ram Das from Gokul Das under a mortgage deed which sum was subsequently paid off by executing another mortgage deed in favour of a third part. The interest however was actually not paid under the document. The defence is that this amount was paid in cash privately. As against the defendant's statement we have the statement of the plaintiff's guardian that when the mortgage account was squared the sum of Rs. 175 which was the amount of interest was by agreement transferred to another account and debited to the defendant. The account books of Gokul Das fully corroborate her statement p. 76. There seems to be no reason why the amount should have been given up. The defendant has not produced any entry in his account books to show that he made this payment to Gokul Das. The finding therefore must be accepted. We would accordingly accept the findings of the Court below on all the items except the sum of Rs. 3,000 odd which is alleged by the defendant to have been realized by Gokul Das deceased after the transfer of the debts to him. On this one point the issues referred to above are sent to the Court below for findings. Two months are allowed for return of the findings on receipt of which the usual ten days will be allowed for objections.

B.V./R.K. *Case remanded.*

A. I. R. 1930 Allahabad 877

SEN AND NIAMATULLAH, JJ.

Dwarka—Defendant—Appellant.

v.

Ram Jatan and *another* — Plaintiff and Defendant—Respondents.

Second Appeal No. 23 of 1928, Decided on 12th June 1930, from decree of Dist. Judge, Benares, D/- 8th December 1927.

(a) Specific Relief Act (1 of 1877), S. 21—Agreement of reference acted upon and terminating in award—Suit for its cancellation for fraud and collusion is not barred.

Where an agreement of reference has been acted upon and terminated in an award, a suit for cancellation is not against the tenor of S. 21. That section has no application except where a person, having made a contract to refer a controversy to arbitration, has refused to perform it and institutes a suit in respect of the subject matter in defiance of the contract. [P 879 C 1]

(b) Practice — Inconsistent pleas — Alternative reliefs claimed upon ownership and upon right of easement in respect of same property—Suit should not be dismissed.

No plaintiff can be allowed to take the impossible position of being the owner of and of having a simultaneous right of easement over the same land. But where the reliefs claimed upon ownership and upon the right of easement in respect of the same property are not claimed simultaneously, but in the alternative, the action of the plaintiff must be condemned, but the plaintiff should not be penalized by a total dismissal of his suit: 18 *All.* 125; *A.I.R.* 1924 *All.* 97; 34 *Cal.* 51 (*F.B.*) and *A.I.R.* 1926 *Mad.* 728 (*F.B.*), *Rel. on.* [P 879 C 1, 2]

A. P. Bagchi—for Appellant.

Gadadhar Prasad—for Respondents.

Sen, J. — This and the connected appeal arise from the same suit in respect of a plot of land lying between the homesteads of the parties. On 15th March 1927, the defendant-appellants enclosed the plot by putting up boundary walls. The plaintiff sued for possession of the land by removal of the boundary walls in the right of ownership. In the alternative, he claimed a decree for his right of easement of way

through his southern door and the right to discharge water from his drain across the land in dispute and for an injunction restraining the defendants from interfering with the said rights.

The parties are neighbours. The plaintiff purchased his house under a sale deed dated 31st May 1912. The defendants acquired their house under an earlier sale deed dated 21st April 1893. A portion of the defendant's house fell into ruins more than 20 years before suit and the land remained vacant for this long period till the defendants constructed the boundary walls.

On 12th January 1927, the parties had referred their disputes to the arbitration of five persons including the umpire. An award was given on 15th March 1927. The award was against the plaintiff who impugned its validity on the ground of fraud and collusion.

The defendants contested the suit on the ground that they and not the plaintiff, were the owners of the land in dispute, that the suit was barred by S. 21, Specific Relief Act, that the plaintiff's claim having been founded upon rights of ownership and of easement with reference to the same property, was bad in law and liable to dismissal and that the plaintiff had acquired no easement of way through his southern door which had been opened only a few months before suit nor any right in respect of his drain which was constructed by the plaintiff with the permission of the defendants about 14 years before the suit.

The Court of first instance held that the plot in dispute belonged to the defendants and not to the plaintiff. The award dated 15th March 1927, was set aside. The Court declared that the plaintiff had established a right of easement of way and his right to a flow of water through his drain across the land in dispute. Accordingly it ordered as follows:

"Let an injunction be issued directing the defendants to allow passage to the plaintiff from his back door up to the bamboo clump leaving a way two feet wide and not to interfere with the plaintiff's rights of easement in future. Amin's map to form part of the decree."

Both the parties appealed. The lower appellate Court affirmed the finding of the trial Court, that the plot in dispute belonged to the defendants and not to the plaintiff, It accordingly dismissed the plaintiff's appeal except by a variation as to the width of the passage:

"An objection has been raised that the two feet passage allowed by the Munsif is very small. As I have ordered the plaintiff to cover over his drain, I think it only fair to increase his passage to three feet instead of two feet in width as ordered by the Munsif."

The defendant's appeal was also dismissed in substance, on the finding that the plaintiff had established his right of easement in respect of the way and the drain as claimed by him. As to the drain the decree of the trial Court was varied in so far that the plaintiff was directed either to cover the drain with stone slabs or to insert drain pipes across the length of the drain "through the present construction of the defendant's house."

Both the parties are dissatisfied with the decrees by the Courts below. The defendants have filed two appeals. The plaintiff has filed cross-objections. The cross-objections are directed against the finding, negativing the plaintiff's title to the land in suit. This finding rests upon evidence. The learned advocate for the respondents has failed to satisfy this Court that this finding is vitiated by either improper reception or rejection of evidence or by any misapplication of law or procedure. The cross-objections therefore are without any force.

The defendants do not appear to have pressed for an issue as to whether the suit offended against S. 21, Specific Relief Act. The defendants conceded in the trial Court that the award dated 15th March 1927, was invalid. There was a definite issue before the trial Court as regards the validity of the award. This issue was decided in plaintiff's favour with the following observation:

"The defendant's vakil conceded the invalidity of the award on the ground that by the deed of reference the presence of all the arbitrators (Ajudhya, one of them, admittedly being absent) was essential. The issue consequently goes against the defendants in the plaintiff's favour."

This concludes the point and the defendants-appellants cannot be allowed to resuscitate the plea that the suit is obnoxious to S. 21, Specific Relief Act. A reference had been duly made and an award duly passed. This award was challenged on the ground of fraud and collusion. The defendants themselves admitted the invalidity of the award

though not on the ground set forth by the plaintiff. Where an agreement of reference has been acted upon and terminated in an award, a suit for cancellation of the award on the ground of fraud and collusion is not against the tenor of S. 21, Specific Relief Act. This section has no application except where a person having made a contract to refer a controversy to arbitration has refused to perform it and institutes a suit in respect of the subject matter in defiance as of the contract. We are clearly of opinion that the contention of the defendants-appellants proceeds upon a misconception of law and ought to be disallowed.

Considerable stress has been placed upon the form of the the suit and the nature of the reliefs claimed and it has been contended that no suit is maintainable for a declaration of a plaintiff's title to and his right of easement over the same property. It is manifestly clear that the two concepts are incompatible. "An easement" has been defined in S. 4, Easement Act (Act 5 of 1882), as

"a right" which the owner or occupier of certain land possesses as such for the beneficial enjoyment of that land to do and continue to do something, or to prevent and continue to prevent something being done in or upon or in respect of certain other land not his own."

This definition is founded upon the maxim *nulli res sua servit*. In *Ladyman* v. *Grave* (1) at p. 767, Lord Hatherley is reported to have said:

"You cannot have the land itself and also an easement over it."

It is essential for the creation of an easement that there should be two distinct heritages, that the two heritages must not belong to the same individual and that there must be some advantage derived by one tenement from or upon a neighbouring tenement greater than what would naturally and ordinarily belong to the former (The Law of Limitation and Prescription, Tagore Lectures, 1882, p. 357). No plaintiff can be allowed to take the impossible position of being the owner of and of having a simultaneous right of easement over the same land. Where the averments in the pleadings and the reliefs claimed are of a conflicting character the Court must insist upon an election on the part of the plaintiff to choose one or other of the reliefs and upon an amendment of his plaint accordingly. Not to do so would necessarily lead to waste of time and embarrassment of trial. Unfortunately the plaintiff was not put upon his election and the trial proceeded upon conflicting pleadings. Cases are conceivable where a plaintiff may, from obscurity or from complexity of facts, be in honest doubt as to the nature of the relief available to him. Inconsistent claims may therefore under the peculiar circumstances be explained and accounted for. In the present case there could be no reasonable excuse for the inconsistent reliefs claimed by the plaintiff. The land in dispute was outside the plaintiffs' purchased property and within the boundary of the property purchased by the defendants. The parties were close neighbours. It was impossible for the plaintiff not to have known that he was not the owner of the property in dispute. His claim therefore to ownership was not only unwise but was deliberately dishonest.

The reliefs based upon ownership and upon the right of easement were not claimed simultaneously but in the alternative While we condemn the action of the plaintiff for having asked for inconsistent reliefs we are of opinion that the plaintiff should not be penalized by a total dismissal of his suit where the reliefs claimed by him are in the alternative. The defendants-appellants strongly rely upon certain dicta of the Privy Council in *Mohammad Bakhsh Khan* v. *Husaini Bibi* (2). This case was considered by a Bench of this Court in *Jino* v. *Manon* (3), and it was held that the Privy Council decision was not authority for such a broad proposition as is now enunciated by the defendants-appellants. It was accordingly held that where a plaintiff claimed in his plaint two alternative reliefs which were inconsistent with each other, that fact was no ground in itself for the dismissal of the suit. In *Sri Ram* v. *Mani Ram* (4) it was held that a suit was not liable to dismissal because the plaintiff claimed in the alternative over the same plot of land both by rights of ownership and of easement. A similar view was

(1) [1871] 6 Ch. 763=19 W.R. 863=25 L.T. 52.

(2) [1888] 15 Cal. 684=15 I. A. 81=5 Sar. 175 (P.C.).
(3) [1896] 18 All. 125=(1396) A. W. N. 1.
(4) A. I. R. 1924 All. 97=74 I. C. 922.

taken in *Narendra Nath Barari* v. *Abhoy Charan Chattobadhya* (5), and it was remarked that

"the inconsistency of the two allegations may be, and probably would be, a ground for viewing them both with the greatest suspicion, but does not, as a matter of pleading, render the suit not maintainable."

This view is supported in principle by a Full Bench decision of the Madras High Court in *Subha Rao* v. *Lakshmana Rao* (6), in which, though the facts were somewhat different, the Court remarked:

"It is clear that a man is not finally precluded from claiming the benefit of an easement merely because in the course of legal proceedings he made an unfounded claim to be the owner however strongly the making of such a claim might weigh against him."

We are therefore of opinion that the action was not liable to dismissal merely on the ground that the plaintiff had asked for inconsistent but alternative reliefs.

Mr. Bagchi for the defendants-appellants, who argued the case with considerable skill, contended that the plaintiff's claim for an easement was not maintainable on the ground that the mere user on the part of the plaintiff during the statutory period could not mature into an easement by prescription under S. 15, Easements Act, where the user was not accompanied by an animus of enjoying the easement as such. He strongly relies upon the decision of the Madras High Court in *Subha Rao's* case (6), which has already been adverted to. It was held in this case that acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. Reference was made to *Lyall* v. *Hothfield* (7) in support of the view. S. 15, Easements Act, provides that

"where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption and for twenty years, the right to such . . . . . use of . . . . . easement shall be absolute."

It is clear therefore that for the creation and maturity of the right of easement it is essential that the right should be openly and peaceably enjoyed by the holder of the dominant tenement for the prescriptive period "as an easement and as of right." In order that the user should be as an easement and as of right it is absolutely essential that the said right should be claimed over the property of another and for the beneficial enjoyment of a property which belongs to the owner. From the very nature of the conception easement is rather a fringe to property than property itself. We are however of opinion that the proposition of law enunciated by Mr. Bagchi does not call for a definite finding having regard to the facts and pleadings involved in the case.

It does not appear to have been argued in either of the Courts below that the plaintiff did not possess the requisite animus because he was claiming to be the owner of the property itself. We are clear that the plaintiff was not the owner of the servient tenement and was labouring under no delusion as to his rights in respect of the same. During the twenty years and more that he exercised a right of user over the property of the defendants he did so with a clear consciousness that the said property belonged to another. He does not appear to have put forward a right of ownership before the present suit was launched. The question of animus is in each case a question of fact. Where the owner of one property exercises certain rights of enjoyments over the property of another for the beneficial enjoyment of the former, he must be presumed to possess an animus which is manifestly to his advantage. The lower appellate Court, in holding that the plaintiff had established the rights of easement claimed by him, must be taken to have found by implication that the animus indicative of a right of user over the property of another was either to be presumed from the facts of the case or was established by evidence. We do not think therefore that it is necessary to send down an express issue on a point which was neither specifically raised in the written statement nor argued in any of the Courts below. We dismiss these appeals and the cross-objections with costs, including in this Court fees on the higher scale.

P.N./R.K *Appeal dismissed.*

(5) [1907] 34 Cal. 51=4 C. L. J. 437=11 C. W. N. 20 (F.B.).
(6) A. I. R. 1926 Mad. 729=96 I. C. 968=49 Mad. 820 (F.B.).
(7) [1914] 3 K. B. 911=84 L. J. K. B. 251=30 T. L. R. 630.

* A. I. R. 1930 Allahabad 881

SEN AND NIAMATULLAH, JJ.

Mt. Imtiaz Begam—Defendant — Appellant.

v.

Abdul Karim Khan and *others*—Plaintiffs—Respondents.

Second Appeal No. 85 of 1928, Decided on 13th June 1930, from decision of Sub-Judge, Budaun, D/- 26th August 1927.

***Mahomedan Law—Dower—Widow taking possession lawfully and peaceably of her husband's estate without any force or fraud, dower debt remaining unpaid — She can retain possession against other heirs of husband till the debt has not been paid or has been satisfied out of usufruct of property—In order to entitle her to retain possession it is not necessary that her possession should have originated with the consent, express or implied, of her husband or of her husband's heir.**

Under certain circumstances a Mahomedan widow has a right to retain possession of the property left by her husband. This right of retention is not a lien in the true sense of the term. Her right to retain and continue in possession of the husband's estate in lieu of her dower is a creation of Mahomedan law and does not in the generality of cases originate from a contract with the husband or with his heirs. The widow is not a secured creditor and as regards the dower which is due to her, she ranks equally and rateably with other creditors of her husband. Her dower is not a charge upon the assets left by her husband. Upon the death of the husband, succession opens out immediately to the heirs. This succession is not postponed till the debts to the creditor have been paid. The heirs of the husband however are not entitled to recover possession of the property so long as the debts have not been paid. Their right to the distributive share in the assets of the husband comes into existence after the debts have been satisfied. Where a Mahomedan widow lawfully and peaceably takes possession of her husband's estate without any force or fraud, where her dower debt remains unpaid in whole or in part, she is entitled to retain possession against the other heirs of the husband so long as the debt has not been paid by them or has been satisfied out of the usufruct of the property, and in order to entitle her right to retain possession of the property it is not necessary that her possession should have originated with the consent, express or implied, of her husband or of her husband's heirs: 16 *All.* 225; 32 *All.* 551; 32 *All.* 563; *A. I. R.* 1927 *All.* 850; 43 *Mad.* 214 and 38 *Cal.* 475, *Foll.*; 17 *All.* 77 and 17 *All.* 93, *not Foll.*; 14 *M. I. A.* 377 (*P. C.*), *Expl.*; *A. I. R.* 1916 *P. C.* 46, *Disc.*; *A. I. R.* 1925 *P. C.* 63, *Ref.* [P 882 C 1; P 884 C 1]

Harnandan Prasad—for Appellant.

Akhtar Husain Khan — for Respondents.

Sen, J.—The property in dispute is a zamindari share in mauza Naithuwa which originally belonged to Mt. Imtiaz Begam, defendant. She gifted the property to her husband Muhammad Khan and his name was mutated in the revenue record in due course. Muhammad Khan died on 15th May 1925. The name of Mt. Imtiaz Begam, the widow, was mutated by order of the revenue Court dated 7th June 1926.

Plaintiffs, as residuary heirs of Muhammad Khan, brought the suit which has given rise to the present appeal for a declaration that they were the owners in possession of 12 out of 16 sihams in the zamindari share left by Muhammad Khan. They prayed for possession in the alternative.

The defendant denied that the plaintiffs were the residuary heirs of her husband and contended that after the death of Muhammad Khan she had lawfully and peaceably, without any force or, fraud taken possession of the property in lieu of her dower debt and that the plaintiffs were not entitled to recover possession of it so long as her claim to dower was not satisfied.

The Court of first instance held that the plaintiffs were the residuary heirs of Muhammad Khan. The claim however was dismissed upon the ground that the defendant had obtained possession of the property lawfully in lieu of her dower debt and that she was entitled to retain possession of the said property so long as the dower was not satisfied.

There was some controversy as to the amount of dower due to defendant. She claimed that her dower was Rs. 10,000. The plaintiffs alleged that her dower was only Rs. 500. The Court of first instance was inclined to the view that her dower was Rs. 10,000, but no definite finding was arrived at as regards the amount.

The lower appellate Court has not gone into the question of the amount of dower due to the defendant. It affirmed the finding of the trial Court that the plaintiffs were the residuary heirs of Muhammad Khan. It reversed the decision of the trial Court upon the ground that although the defendant had obtained possession of the property in dispute lawfully and peaceably, without any force or fraud, she was not entitled to retain possession so as to defeat the

claim for recovery of the share of the plaintiffs, because her possession did not originate from consent on the part of the husband or his heirs.

The defendant contests this finding. The matter is not entirely free from doubt or difficulty. Under certain circumstances a Mahomedan widow has a right to retain possession of the property left by her husband. This right of retention is not a lien in the true sense of the term. Her right to retain and continue in possession of the husband's estate in lieu of her dower is a creature of Mahomedan law and does not in the generality of cases originate from a contract with the husband or with his heirs. It must be remembered that the widow is not a secured creditor, and as regards the dower which is due to her she ranks equally and rateably with the other creditors of her husband. Her dower is not a charge upon the assets left by her husband.

Upon the death of the husband succession opens out immediately to the heirs. This succession is not postponed till the debts to the creditor have been paid. The heirs of the husband however are not entitled to recover possession of the property so long as the debts have not been paid. Their right to the distributive shares in the assets of the husband comes into existence after the debts have been satisfied.

It is settled law that where a Mahomedan widow lawfully and peaceably takes possession of her husband's estate without recourse either to force or to fraud, and her dower in whole or in part remains unpaid, she is entitled to retain her possession against the other heirs of her husband so long as the dower has not been paid by them or remains unsatisfied out of the usufruct of the property.

There is considerable conflict of judicial opinion on the question whether the widow's right to retain possession of the property is dependent upon her possession originating with the consent, express or implied, of the husband or the husband's heirs.

There is a preponderance of judicial opinion in view of the proposition that no such consent is necessary.

We shall refer only to some of the important cases. In *Mt. Bebee Bechun* v. *Hamid Hossein* (1), their Lordships observed at p. 384:

"It is not necessary to say, whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in the judgment of the High Court in the case of *Ahmed Hoosein* v. *Mt. Khoreja* (2). Whatever the right may be called, it appears to be founded on the power of the widow as a creditor for her dower, to hold the property of her husband, of which she has lawfully and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claims for the profits received. This seems to have been the ground on which the claim of the widow to retain possession was put in *Ameerunnissa* v. *Muradunnissa* (3)."

Their Lordships endorsed the same view in *Maina Bibi* v. *Vakil Ahmad* (4).

In *Amani Begam* v. *Muhammad Karim Ulla'h Khan* (5), Burkitt, J., held that where a Mahomedan widow was in possession of the property of her deceased husband, having obtained such possession lawfully and without force or fraud and her dower or any part of it was due and unpaid, she was entitled as against the other co-heirs of her husband to retain possession of such property until her dower debt was paid and that it was immaterial to such widow's right to retain possession, that such possession was obtained originally without the consent of the other co-heirs. At p. 227 of the Report the learned Judge observes as follows:

"Their possession appears to be perfectly lawful as heiresses of their deceased husband according to the Mahomedan law, and as creditors for their dower. I can find no authority for the proposition that the widow's possession is unlawful unless she has got such possession with the consent of the other coheirs."

The same view was emphasized by a Division Bench of this Court in *Ali Bakhsh* v. *Allahdad Khan* (6). Richards, J., observed:

"I think that a perusal of the report of the case *Mt. Bebee Bechun* v. *Hamid Hossein* (1) negatives the assumption that a Mahomedan widow cannot be "lawfully in possession" unless by contract with her husband or with the consent of the heirs. I do not understand how such a widow can be said to obtain a "lien" by contract. If the widow's right is only by virtue of a contract with her husband or with the other heirs, her right must be

(1) [1870-72] 14 M. I. A. 377=17 W. R. 113=10 B. L. R. 45 (P.C.).
(2) 10 W. R. C. R. 363=3 B. L. R. 23.
(3) [1854-57] 6 M. I. A. 211.
(4) A. I. R. 1925 P. C. 63=86 I. C. 579=52 I. A. 145=47 All. 250 (P.C.).
(5) [1894] 16 All. 225=(1894) A. W. N. 52.
(6) [1910] 32 All. 551=6 I. C. 376.

limited entirely by the terms of the contract. It is not a lien. In my opinion where a Mahomedan widow entitled to dower gets quietly and peacefully into possession without fraud, she is entitled to retain possession until her dower debt is paid, subject to (as their Lordships have laid down) her liability to account for the profits received."

In *Ramzan Ali Khan* v. *Asghari Begam* (7) another Division Bench of this Court took the same view:

"It seems to me that the force of authority is in favour of the view that the widow, who from the nature of things on the death of her husband in many instances finds herself in possession of some, if not of the whole, of her husband's estate is entitled to hold the estate against the other heirs until her claim to dower is satisfied without being asked to show either consent on their part or on that of the deceased husband."

The latest pronouncement on the same lines was made in *Muhammad Shoaib Khan* v. *Zaib Jahan Begam* (8). In this case the rule of law laid down in the last mentioned case was cited with approval.

A Full Bench of the Madras High Court has taken the same view in *Beeju Bee* v. *Murthuja Saheb* (9) and it has been held that the widow is entitled to retain possession as against the other heirs until her dower is satisfied even though such possession was not obtained with the consent (express or implied) or under an agreement with her husband or his other heirs and that such property would not be divided among the heirs until the dower debt is satisfied. In *Sahebjan Bewa* v. *Ansaruddin* (10), Mukerji and Teunon, JJ., after a careful review of all the authorities came to the conclusion that under the Mahomedan law when a widow was in possession of the undistributed property of her husband lawfully and without force or fraud and her dower or any part of it was still due and unpaid she was entitled as against the heirs of her husband to retain such possession until her dower debt was satisfied and that her possession need not necessarily be possession obtained by an agreement with her husband or his heirs.

There are certain cases on the other side of the line. In *Amanatunnissa* v. *Bashirunnissa* (11) and *Muhammad Karim Ullah Khan* v. *Amani Begam* (12), Edge, C. J. and Banerji, J., had taken the view that the widow was not entitled to retain possession against the other heirs of her husband unless she obtained possession in lieu of dower debt after her husband's death with the consent or by the acquiescence of the heirs. The latter of the two decisions follows the earlier. In the former decision reference has been made to a number of cases. We have examined these cases for ourselves and we do not find that they support the view which commended itself to their Lordships. No original texts have been cited and we do not agree with their construction of *Mt. Bebee Bechun's* case (1). In *Sahur Bibi* v. *Ismail Sheikh* (13) Rankin and Ghose, JJ., have ruled that under the Mahomedan law the widow has for her dower all the rights of an ordinary creditor, and may be given by the consent of her husband or his heirs, a right to the possession of the estate until by the rents and profits the debt has been liquidated. This view has been founded upon the decision of the Privy Council in *Mt. Bebee Bechun* v. *Hamid Hossein* (1) which has already been adverted to and upon the observations of the Judicial Committee in *Hamira Bibi* v. *Zubaida Bibi* (14). It may be observed with respect that the view taken by the learned Judges does not find support in the decision of the Privy Council in *Mt. Bebee Bechun's* case (1). The Privy Council did not lay down the proposition that in order to entitle the Mahomedan widow to retain possession of the property against the other heirs of the husband, the consent of the husband or of his heirs was necessary. In *Hamira Bibi's* case (14) their Lordships of the Privy Council do make certain observations which support the view of the Calcutta High Court;

"But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right however is no greater than that of any other unsecured creditor, except that if she lawfully with the express or implied consent of the husband or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she

(7) [1910] 32 All. 563=6 I. C. 405.
(8) A. I. R. 1927 All. 850=107 I. C. 591=50 All. 423.
(9) [1919] 43 Mad. 214=53 I. C. 505 (F.B.).
(10) [1911] 38 Cal. 475=9 I. C. 1031.
(11) [1895] 17 All. 77=(1895) A. W. N. 7.
(12) [1895] 17 All. 93=(1895) A. W. N. 16.
(13) A. I. R. 1924 Cal. 508=80 I. C. 294=51 Cal. 124.
(14) A. I. R. 1916 P. C. 46=36 I. C. 87=43 I.A. 294=38 All. 581 (P.C.).

is entitled to retain possession until it is satisfied."

In this appeal to quote the words of the Privy Council:

"the sole question for determination is whether the defendant Zubaida is entitled to an interest or compensation in respect of her dower unpaid at the time of Inayatulla's death."

The point as to whether the right of the widow to retain and continue in possession of the husband's estate was dependent upon the consent of the husband or his other heirs was not the question in issue in the case. It did not arise from the pleadings and was not a point in issue in the original or the appellate Courts. Indeed the point was not argued at the Bar before their Lordships. We are of opinion therefore that the observation of the Judicial Committee referred to above although entitled to the very greatest weight ought not to be construed literally. The decision of this Court in *Ramzan Ali Khan* v. *Asghari Begam* (7) was before their Lordships. It was referred to in another connexion which need not be detailed. Their Lordships do not dissent from the view taken in the cases which were cited to them. We are clearly of opinion that the long string of authorities of this Court for the contrary proposition are not affected by the observation of the Judicial Committee and we are bound to follow the decisions of this Court notably in *Ramzan Ali Khan* v. *Asghari Begam* (7). We are therefore of opinion that where a Mahomedan widow lawfully and peaceably takes possession of her husband's estate without any force or fraud where her dower debt remains unpaid in whole or in part she is entitled to retain possession against the other heirs of the husband so long as the debt has not been paid by them or has been satisfied out of the usufruct of the property, and in order to entitle her right to retain possession of the property it is not necessary that her possession should have originated with the consent express or implied of her husband or of her husband's heirs.

The result is that we allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs including in this Court fees on the higher scale.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Allahabad 884

YOUNG, J.

In the matter of the Dehra Dun Mussoorie Electric Tramway Co. Ltd.

Civil Revn. No. 96 of 1926, Decided on 27th June 1930.

(a) Companies Act (7 of 1913), S. 230—"Revenue" means "income."

Since the word "revenue" in S. 230 comes first, the meaning of "revenue" must not necessarily be taken to be ejusdem generis with the words that come after it and it consequently means "income." [P 885 C 1]

(b) Companies Act (7 of 1913), S. 230—Rent of Government telephone and charge for trunk calls is revenue.

Rent of the Government telephone lines and also the charge for trunk calls is the income of the Government and hence revenue within the meaning of S. 230. [P 885 C 1]

U. S. Bajpai—for Telegraph Department.

Bhagwati Shankar—for the Company.

Judgment.—In this liquidation the official liquidators filed a list of creditors for the approval of the Court. Item 11 was a claim by the Telegraph Department of the Government for Rs. 1,527-9-10 for the costs of moving telephone lines, rent of telephone lines, telephone bill, etc. The Telegraph Department claimed that this amount should be paid in priority to the other debts of the company in liquidation. Notices were issued to the Telegraph Department and to the Government Advocate to show cause why this claim or any part of it should be paid in priority. The learned Government Advocate has appeared for the Telegraph Department and Mr. Bhagwati Shankar for the company in liquidation. This matter is governed by S. 230, Companies Act, which reads as follows:

"In a winding up there shall be paid in priority to all other debts: (a) all revenue, taxes, cesses and rates, whether payable to the Crown or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the 12 months next before that date."

"The date hereinafter mentioned" is the date of the winding up order. It is admitted by the Government Advocate that a portion of the claim amounting to Rs. 192 is clearly outside the scope of S. 230 as it became due and payable over 12 months next before the date of the compulsory order. As regards the portion of the claim which is for moving telephone lines, I am of opi-

nion that this either cannot come within the section. The amount claimed for this is for work and labour done and cannot come within thewords' 'revenue" taxes, ceses and rates.' There is an item for rent of telephone lines and cost of a trunk call amounting in all to Rupees 481-5-0 which became payable with the 12 months next before the date of the campulsory order. The question is whether this amount comes within the meaning of the words in S. 230. It clearly does not come within the meaning of the words "taxes cesses and rates." These have all a specialized meaning and could not be held to include rent of telephone lines. In my opinion this amount would become under the heading of the word "revenue." In Warton's Liw Lexicon, Edn. 13, the definition of "revenue" is stated to be

"income annual profit received from land or other funds; also the profits or fiscal prerogatives of the Crown."

In Murray's Dictionary "revenue" is said to be

"return, yield or profit of any lands property or other important source of income."

If S. 230 had read "all taxes, cesses rates and other revenue" it is clear that the word "revenue" would have had to be read ejusdem generis with the preceding words. But in this section "revenue" comes first and therefore the meaning of "revenue" must not necessarily be taken to the ejusdem generis with the words that come after it. It is to be noted that in the equivalant section of the Companies Act of 1929 in England the word "revenue" is not used at all. S. 264, English Act, is confined to all cesses taxes land-tax property or income-tax. I am satisfied that "revenue" in this case means income. It is perfectly clear that the rent of the Government telephone lines and also the charge for trunk calls is the income of the Government and therefore must be taken to be "revenue" wlthin the meaning of S. 230 (A), Companies Act. I order therefore that priority be given to the amount of Rs. 481-5-0 in the winding up of this company. It is to be noted that as far as the Dohra Dun Electric Tramway Company is concerned the point raised today is merely an academic one. There are I am informod sufficient funds to meet all the debts of the company whether they have to be paid in priority or not, and therefore the whole of this claim by the Telegraph Department will eventually be met.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Allahabad 885

BOYS AND SEN, JJ.

Maheshrey Tewari—Defendant — Appellant.

v.

Jarbandhan Misir and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1441 of 1927, Decided on 7th March 1930, against decree of 2nd Addl. Sub-Judge, Gorakhpur, D/- 23rd March 1927.

Practice—New plea—Points not taken in first appeal cannot be allowed in second appeal unless good cause is shown for their omission.

Points which have not been raised in the first appeal cannot be allowed to be raised in the second appeal merely because they are points of law unless good ground is shown for failure to take them before the lower appellate Court. [P 886 C 1]

Harnandan Prasad—for Appellant.

U. S. Bajpai and *N. Upadiya* — for Respondents.

Boys, J.—Mr. Harnandan Prasad on behalf of the appellant has given us the fact of this case in detail and has proposed to raise four points before us; one based on S. 115, Evidence Act; another on S. 43, T. P. Act; a third in reference to the alleged assumption of both the lower Courts that a 20 pies share must be taken to be owned in equal halves by two ladies; and finally a question of the burden of proof. It has to be admitted however that no point was made in the grounds of appeal taken to the lower appellate Court in regard to either of first three matters. In regard to the fourth, it is possible to more than suggest that the point was taken; but admittedly it cannot carry the appellant any further if he cannot succeed on either of the first three points. It having to be admitted that neither of the first three points was taken before the lower appellate Court, and we may here mention that we are informed that both Courts have agreed in their findings on all points, the burden lay upon the appellant to show us adequate reason why we should allow the points to be taken here. No such reason can be offered.

The only explanation which counsel can suggest is that the points were not noticed in the lower Courts. That is not an adequate reason for allowing them to be argued here. This Court manifestly is not here to do the work of the trial or the lower appellate Courts. Further it would be unfair to the respondent, generally speaking, to allow matters to be raised here of which he has had no warning, and which had not been raised, in the Courts below; and finally it is not fair to the Court below to allow points to be taken and have its judgment upset on those points when the points were not raised before it. These are the manifest reasons for refusing to allow points to be urged in this Court merely because they are points of law, unless good ground is shown for failure to take them before. This being the admitted situation, the appeal must fail and it is dismissed with costs. The plaintiff and the defendant second party, who are both of them represented here, will have their separate costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Allahabad 886

SEN AND NIAMATULLAH, JJ.

Pearey Lal Krishen Prasad—Plaintiff—Appellant.

v.

Dev Karan Das Ram Saran Das and *others*—Defendants—Respondents.

Second Appeal No. 1410 of 1927, Decided on 13th January 1930, from decision of Sub-Judge, Meerut.

Contract Act (1872), S. 107—Purchaser not paying balance of purchase money cannot claim delivery of goods though property in goods passed to him—Vendor's selling goods to third party—After deducting their due amount, remainder deposited to credit of rightful owner—Purchaser is entitled to this amount.

A purchaser had not paid the balance of purchase money to the vendors and hence was not entitled to claim delivery of goods sold, though the property in the goods had passed to him. The vendors sold the same goods to a third party and after deducting the amount due to them held the balance to the credit of rightful claimant.

Held: that under the circumstances the purchaser was the person who was entitled to this amount. Though the suit was not brought for this sum of money, the claim was comprehensive enough to justify a decree in purchser's favour for this amount. [P 886 C 2]

Judgment.—This case is in many respects analagous to *Pearey Lal Kishen Prasad* v. *Diwan Singh* (1). Most of the points raised in the two appeals are identical and do not call for any separate treatment. Defendant 1 had contracted to sell 1,00 maunds of wheat to the plaintiff. Four hundred maunds of wheat were either delivered or the claim relating to the same was duly settled. Defendant 1 held certain contracts from defendants 2 and 3 as regards 800 maunds of wheat. Defendant 1 assigned these contracts to the plaintiff.

The contract was contained in a langot in the printed form prescribed by the Meerut Veoparak Sabha. The Veoparak Sabha was registered on 16th June 1925. The contract in suit was entered into on 12th June 1925. According to a peculiar usage which obtains in Mandavi Qaisar Ganj in the city of Meerut the langot is a document of title and authorizes the purchaser under the langot to deal with the grain purchased by transfers in favour of new purchasers. Even when the property remains in the actual and physical possession of the bank as a mortgagee the right of the purchaser is capable of assignment by devolution from hand to hand.

It has been found by the Courts below that the property in the goods had passed to the plaintiff, the purchaser, that the plaintiff was not entitled to claim delivery so long as he did not pay the balance of the purchase-money, that the plaintiff had failed to carry out his part of the contract and that therefore it was he and not the defendant who was guilty of breach.

Upon these findings the plaintiff's claim was dismissed. We agree with the finding of the lower appellate Court.

The defendants appear to have sold the grain to a third party. After deducting the amount which was due to them they held in their hands Rs. 143-7-6 to the credit of the person who was in law entitled to this amount. There is no doubt that it is the plaintiff who is entitled to this amount. Although the suit was not brought for recovery of this sum of money we are of opinion that the claim was comprehensive enough to justify a decree in plaintiff's favour for this amount. We think that the Courts below, by a pure oversight, have failed to decree the plaintiff's claim as to this amount.

(1) A.I.R. 1930 All. 661=125 I.C. 453.

We modify the decrees of the Courts below and grant the plaintiff a decree for Rs. 143-7-6, against defendant 2, Daulat Ram-Nathu Mall. We dismiss the appeal with costs except as to the sum indicated above against defendant 2. Plaintiff will be entitled to proportionate costs form defendant 2. All defendants, including defendant 2, are entitled to get one set of costs from the plaintiffs.

B.V./R.K. *Decree modified.*

A. I. R. 1930 Allahabad 887

BOYS AND KISCH, JJ.

In the matter of A Vakil of Beawar.

Misc. Case No. 168 of 1930, Decided on 29th April 1930.

(a) High Court— Courts at Ajmere are not subordinate to Allahabad High Court except in two comparatively rarer matters.

Broadly speaking the Courts at Ajmere are not subordinate to the High Court of Allahabad except in two comparatively rare matters. [P 838 C 2]

(b) Legal Practitioner— Allahabad High Court can take action against vakil or advocate on its roll but practising at Ajmere even though Ajmere Court does not choose to deal with him—Regulation 9 of 1926— (*Obiter.*)

The mere fact that the Ajmere Court might have power to deal with a legal practitioner practising there and did not choose to exercise that power would in no way whatever prevent Allahabad High Court, if it thought fit taking action against that legal practitioner if he was on the rolls of Allahabad High Court as a vakil or an advocate. [P 883 C 2]

(c) Bar Councils Act (38 of 1926), S. 9, R. 1, Proviso (a)—Scope.

The clause " practised in one or more of the Courts of the Court subordinate to the Allahabad High Court " as used in the rules framed under S. 9 means " practised in one of the Courts in this province." [P 883 C 2]

Peary Lal Banerji—for Bar Council.

Shabd Saran and *Binod Behari Lal*—for Applicant.

Judgment.—This is a case in which the Bench has been constituted to hear an objection by the Bar Council to enrolling a gentleman as an advocate of this Court who is already enrolled as a vakil of the Court. The applicant for enrolment, Mr. Raj Narain, took his degree of Bachelor of Laws at Lucknow University in 1928. On 24th July 1928, he was enrolled as a vakil of this Court. He subsequently went to Ajmere. His counsel, Mr. Shabd Saran, cannot inform us in virtue of what authority Mr. Raj Narain began to practise in Ajmere, but we have little doubt that we are right in assuming that he applied to be enrolled as a pleader entitled to practise in Ajmere under Regn. 9 of 1926. He now has applied for the entry of his name as an advocate on the rolls of this Court by virtue of the rules made under S. 9, Bar Councils Act (38 of 1926), and in particular, of R. 1, Proviso (a) which reads as follows :

" Provided, firstly, that a person who is a graduate in law of any such scheduled University ..... and has been ..... enrolled as a vakil ..... prior to 31st March 1929, may be admitted to the roll of advocates on presenting a certificate that he has bona fide practised in one or more of the Courts subordinate to the Allahabad High Court for a period of not less than one year."

The only contention that has arisen in this matter is as to whether the Courts at Ajmere can be regarded for the purposes of enrolment as an advocate here as Courts subordinate to the Allahabad High Court. It is clear that generally speaking the Ajmere Courts are not subordinate to this Court in the matter of civil jurisdiction: see S. 3 (2), Regn. 9 of 1926 (published in the Government of India Gazette on 2nd October 1926 and which came into ferce on 23rd December 1926). For the applicant it has been urged that in certain special matters the Ajmere Courts are subordinate to this Court. In respect of two of these matters we do not think that the contention is well-founded. We have been referred to the fact that in certain cases of disputes as to income-tax, the income-tax officer can or must refer the matter under S. 66 (a) to this Court. But the fact that an income-tax officer must refer a matter to this Court can have no bearing on the question whether the Courts of Ajmere are subordinate to this Court or not. Similarly reference has been made to the fact that the repealed Press Act, 1 of 1910 (which it is suggested has been embodied in a recent Ordinance) provided in certain cases for this Court considering the propriety of an order of Government ferfeiting a press in Ajmere. This again can manifestly have no bearing on the relations between the Courts in Ajmere and this Court. There is, however, greater force in the argument for the applicant in reference to two other cases where this Court does exercise jurisdiction in matters

arising in or dealt with by the Courts in Ajmere.

Regulation 9 of 1926, S. 27, expressly saves jurisdiction over European British subjects from the provision which declares the Judicial Commissioner to be the High Court in matters on the criminal side, and another notification declares this Court to be the High Court in such matters. Similarly in certain matters this Court is the High Court for purposes of matrimonial jurisdiction. Further on behalf of the applicant we have been referred to three cases in which a man practising in Ajmere has been admitted to the rolls of this Court as an advocate on the strength of his having practised in Ajmere. But those three cases are irrelevant to the one before us for in all three of them the one year's practice which was relied upon was prior in date to the coming in force of Regn. 9 of 1926, and therefore such practice was at the time of the practice capable of constituting a good qualification, the Courts in Ajmere being at that time subordinate to this Court.

There is only one of the contentions before us on behalf of the Bar Council with which we think it necessary to deal. It has been urged that the present rules framed under Regn. 9 of 1926 make full provisions for dealing with offences of the nature of professional misconduct committed by a vakil practising in the Ajmere Courts; and it is suggested that it would be undesirable to admit anybody to the rolls of the advocate here if he could not be dealt with by this Court. If there were any force in that argument it would be a good reason for striking anybody off the rolls of vakil of this Court on the ground that the Court had no jurisdiction to deal with him. But in fact we think it is desirable to put plainly on record our opinion that the mere fact that the Ajmere Court might have power to deal with a legal practitioner and did not choose to exercise that power, would in no way whatever prevent this Court, if it thought fit, taking action against that legal practitioner if he was on the rolls of this Court as a vakil or as an advocate.

The only consideration, then, which are really material to the decision of this application are, in our opinion, firstly, that broadly speaking the Courts at Ajmere are not subordinate to this Court: and, secondly, that in two comparatively rare matters those Courts are subordinate. It remains for us to interpret the word "subordinate" as used in the rules framed under S. 9 in the spirit in which we think there can be no doubt that it was used. There is no reason whatever for supposing that in using the word "subordinate" the framers of the rules had in mind the very exceptional cases in which the Ajmere Courts are subordinate to this Court. We think therefore that the right way of interpretation of the proviso with which we are dealing is that "practised in one or more of the Courts subordinate to the Allahabad High Court" means "practised in one of the Courts in this province." We think, therefore, that the application for enrolment as an advocate was rightly refused. The applicant will be informed that his application is refused.

R.M./R.K. *Application refused.*

J. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

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